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Managing GST legislation

Melanie Baker[1]

1. INTRODUCTION

It has taken just over ten years since the introduction of the goods and services tax (GST), but we are finally beginning to see a critical mass of GST cases work their way through the legal system. To date, many discussions around managing GST litigation have centred on the merits of declaratory relief versus taxation review and appeal proceedings brought under Part IVC of the Taxation Administration Act 1953 (Cth) (TAA). However, just as we have become familiar with that aspect of GST litigation, the Government is threatening to change the landscape yet again with the introduction of self assessment.

At the same time, Federal Court litigation more broadly is changing. Not only has the Civil Dispute Resolution Act 2011 (Cth) commenced, but the Federal Court Rules have recently been rewritten.[2]

In the context of the changing landscape for litigation, this article seeks to examine both what is unique in GST when it comes to managing GST litigation, as well as considering some issues that are common to all tax litigation (and, indeed, commercial litigation more generally). The paper begins by examining why GST practitioners have embraced declaratory relief and considers whether the introduction of self assessment will mean that more GST litigation is likely to be brought under Part IVC of the TAA. The paper then moves on to describe some of the matters that GST practitioners should be aware of when managing taxation review and appeal proceedings brought under Part IVC of the TAA. The matters range from simple questions such as choosing the right applicant and selecting whether to pursue the proceedings in the Administrative Appeals Tribunal (AAT) or Federal Court, to considering how the processes established by the AAT and the Federal Court should influence how proceedings are run.

Although there are a number of cases involving private parties that raise interesting issues, such as rectification of documents to deal with defective GST clauses, they are beyond the scope of this article. Rather, this article focuses on GST litigation to which the Commissioner of Taxation (Commissioner) is a party.

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[1] Victorian Bar

[2] Both the *Federal Court Rules 2011* and the former Federal Court Rules are referred to in this paper, where relevant.

2. DECLARATORY RELIEF

2.1 Discretionary power to grant declaratory relief

Superior Courts, including the Federal Court, have an inherent power to grant declaratory relief. The power to grant declaratory relief is a discretionary power, in respect of which it has been said that it is 'neither possible nor desirable to fetter… by laying down rules as to the manner of its exercise'.[3] However, it is clear that declaratory relief: 'must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions', in that:[4]

> *'The person seeking relief must have "a real interest" and relief will not be granted if the question "is purely hypothetical", if relief is "claimed in relation to circumstances that [have] not occurred and might never happen" or if "the Court's declaration will produce no foreseeable consequences for the parties".'*

The fact that declaratory proceedings are not an appropriate method of testing the law where the question is hypothetical or advisory was at the heart of the Commissioner of Taxation's response to judicial criticism of the ATO in FCT v Indooroopilly Children Services (Qld) Pty Ltd [2007] FCAFC 16. In his speech, 'The Rule of Law: A Corporate Value', given to the Law Council of Australia Rule of Law conference in Brisbane on 1 September 2007, Michael D'Ascenzo stated:

> *'The Solicitor-General and counsel have advised that it would not usually be appropriate for the Commissioner to seek to use declaratory proceedings to resolve taxation disputes. In many cases, a declaration from the court would not be available to test an interpretation of the law because the question would be hypothetical or advisory. The advice confirms that the usual objection and appeal processes involving assessments and private rulings should be used to resolve issues between a taxpayer and the ATO.'*

2.2 Declaratory proceedings v Part IVC of the Taxation Administration Act 1953 (Cth)

The conclusion that Part IVC proceedings should be preferred over declaratory proceedings is, of course, consistent with the views expressed by the High Court in FCT v Futuris Corporation Limited (2008) 237 CLR 146, by Gummow, Hayne, Heydon and Crennan JJ at 153 [10] where their Honours stated: '...as matter of discretion, relief under ss 75(v) and 39B [the original jurisdictions of the High Court and Federal Court, respectively] may be (and often will be) withheld where there is another remedy provided by Pt IVC'. Their Honours went further at 162 [48] where they stated that: 'it should be emphasised that the pendency of a proceeding by Futuris under Pt IVC should have led the Full Court to refuse declaratory relief in any event.'[5]

As the existence of an assessment, and correspondingly, access to the objection, review and appeal procedures under Part IVC of the TAA, are matters that 'should'

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[3] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-582.

[4] Ibid at 582. See also *Oil Basins Ltd v Commonwealth of Australia* (1993) 178 CLR 643, 649, in which the Commissioner was found to be a 'contradictor' notwithstanding professing his neutrality as to the outcome.

[5] See also *DFCT v PM Developments Pty Ltd* (2008) 173 FCR 247, 252. *Platypus Leasing Inc v FCT (No 3)* (2005) 59 ATR 84, 96 [76]-[78] is also often identified as a GST case that illustrates the way in which the issue of an assessment could preclude the grant of declaratory relief.

lead the Court to refuse to grant declaratory relief, the introduction of self assessment for indirect taxes is likely to impact on the use of declaratory relief in GST (see further the discussion below under heading 2.4).

2.3 GST and declaratory proceedings: pre-self assessment

Of course, at present, a taxpayer's liability to pay GST does not depend on the making of an assessment,[6] with the result that assessments are not an automatic part of the GST system.[7] In the absence of an assessment, the taxpayer does not have recourse to Part IVC of the TAA to challenge the Commissioner's interpretation, which has clearly made the Courts more likely to exercise their discretionary power to make declarations. For that reason, GST practitioners seem to have embraced declaratory relief as a way of resolving disputes, with the vast majority of significant GST cases involving requests for declaratory relief.[8]

Even in the pre-self assessment world, GST practitioners have acknowledged that there is a risk that declaratory proceedings may be precluded if an assessment subsequently issues. Platypus Leasing Inc v FCT (No 3) (2005) 59 ATR 84, 96 [76]-[78] is often referred to as illustrating the point that the issue of assessments could be used to frustrate declaratory relief.[9]

The popularity of declaratory proceedings in GST disputes might be thought to suggest that many practitioners are confident that the Court will necessarily exercise its discretion to make a declaration if the taxpayer's interpretation of the law is preferred. This confidence may well be misplaced. Even in the absence of an assessment, there has never been any guarantee that the Court would exercise its discretion to make a declaration. Indeed, the types of circumstances that would militate in favour of the exercise of the discretion were outlined in DFCT v PM Developments Pty Ltd (2008) 173 FCR 247, 253 [24]:

> *'24. In this case, exceptionally, it seems to me appropriate, as a matter of discretion, not to withhold the granting of declaratory relief. I do so for these reasons. The declaratory relief has been sought in this Court, which unlike these days a State or Territory Supreme Court, is the usual forum for the resolution of Commonwealth revenue law liability controversies. The point raised is novel, controversial not only between the parties but evidently also in academic literature (see "Anderson and Morrison, GST and Insolvency Practitioner Liability: Who are you? (2001) 11 Revenue LJ 23") and one of pervasive significance to corporate insolvency administration. The latter factor was recognised by the Deputy Commissioner in submissions and evidenced by*

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[6] Section 105-15 of Schedule 1 to the TAA.

[7] At present, assessments will ordinarily only be made if requested by the taxpayer under section 105-10 of Schedule 1 to the TAA or as a result of audit action: see paragraph 45 of Annexure D to PS LA 2009/9.

[8] See, for instance, *Travelex Ltd v FCT* [2010] HCA 33 (29 September 2010, French CJ, Hayne, Heydon, Crennan and Bell JJ); *DFCT v PM Developments Pty Ltd* (2008) 173 FCR 247; *Marana Holdings Pty Ltd v FCT* (2004) 141 FCR 299; *TAB Ltd v FCT* (2005) 223 ALR 309; *FCT v Gloxinia Investments Ltd* (2010) 183 FCR 420; *TT-Line Company Pty Ltd v FCT* (2009) 181 FCR 400; *South Steyne Hotel Pty Ltd v FCT* (2009) 180 FCR 409; *Saga Holidays Pty Ltd v FCT* (2006) 156 FCR 256.

[9] However, note that the plaintiffs in that case gave an undertaking not to take the point that the Commissioner would act in contempt of Court if he issued the assessment in the first place: *Platypus Leasing v FCT* [2004] NSWSC 376 (19 November 2004, Gzell J) at [10].

> *his disposition, exceptionally, to pay the liquidator's taxed party and party costs of and incidental to the application in any event and, equally exceptionally, by his obviously considered decision not to make and tender an assessment, which would be the usual course for the Commissioner to adopt in a proceeding such as this in either this Court or, a fortiori, in a State or Territory Supreme Court: see, eg Platypus Leasing Inc v Federal Commissioner of Taxation (2005) 61 ATR 239 (NSW Court of Appeal). There is no evidentiary controversy. Further, and as was also conceded on behalf of the Deputy Commissioner in submissions, the point is one always destined for this Court even in the event of assessment with the raising of the same and determination of an objection and attendant delays and related expenses only serving, in the circumstances, further to diminish such funds as may be available for distribution to creditors (principally, the Commissioner on behalf of the Commonwealth).' [Emphasis added.]*

Of course, the absence of an assessment as an automatic part of the GST system is not the only reason why declaratory proceedings are so popular in GST disputes. If it was, one would have expected more taxpayers to avoid the risk that the Courts would refuse to exercise their discretion to grant declarations by simply requesting an assessment under section 105-10 of Schedule 1 to the TAA to invoke the Part IVC review and appeal processes in GST matters.

The reality is that declaratory proceedings are easier to frame in terms of narrow issues and can be simple to run where the facts are not in dispute. Take for example the approach taken in TT-Line Company Pty Ltd v FCT (2009) 181 FCR 400, where the broader question of whether the liability to pay GST on transport services provided by TT-Line was determined by reference to the amount paid by its fare-paying customers, or whether it was to be determined by reference to that amount plus the amount paid by the Commonwealth under the Bass Strait Passenger Vehicle Equalisation Scheme, was dealt with in the context of a simple fact pattern involving services provided to 'Mr J Egan of Hoopers Crossing' and his companion on 6 May 2008. Other examples include the provision of accommodation to 'Ms Young' as a guest in the Sebel Hotel, which was formed the basis for one of the issues considered in South Steyne Hotel Pty Ltd v FCT (2009) 180 FCR 409, and the sale of Fijian currency on the departures side of the Customs barrier to Mr Urquhart in Travelex Ltd v FCT (2010) 76 ATR 329.

2.4 GST and declaratory proceedings: post-self assessment

If PM Developments suggests that the standard for satisfying the Court to exercise its discretionary power to grant declaratory relief is quite high, then the proposed introduction of self assessment may make it significantly harder to obtain declaratory relief.[10]

Under the original Exposure Draft legislation dealing with self assessment of indirect taxes,[11] the Commissioner was to be treated as having made an assessment of a taxpayer's net amount (including a nil amount) for a tax period when the taxpayer

[10] Since this paper was presented, the Government has announced that the proposed 1 July 2011 starting date for self assessment of indirect taxes has been deferred.

[11] A revised Exposure Draft was published on 22 August 2011.

lodged their GST return for the relevant tax period.[12] Taxpayers were to be entitled to object, in the manner set out in Part IVC of the TAA, against the deemed assessment (or any subsequent amended assessment) if they were dissatisfied with it.

Based on the High Court's comments in Futuris, and Gzell J's approach in Platypus Leasing, it seems reasonably clear that the existence of an assessment in respect of a particular tax period will be a factor that will strongly militate against granting declaratory relief.[13] However, there may still be some residual scope for taxpayers to seek declaratory relief in respect of other tax periods, including past tax periods in respect of which no assessment has been made and future tax periods before an assessment has been made. Certainly, Gzell J seemed to emphasise the fact that the assessments in Platypus Leasing had been made in respect of the same tax periods to which the declaratory proceedings related (Platypus Leasing Inc v FCT (No 3) (2005) 59 ATR 84, 95 [74]):

> *'74 In this case, on the other hand, the notices of assessment and declaration relate to the tax periods in question. They preclude this court calling in question the amount or particulars with respect to those tax periods.'*

Although it might still be possible to seek declaratory relief in respect of past, pre-self assessment, tax periods, there is a risk in doing so as the declaration will not bind the Commissioner in respect of other tax periods. The circumstances in which estoppel operates against the Commissioner are rare, with the result that a declaration in respect of an earlier tax period may have very limited utility in respect of later tax periods.[14]

The Commissioner appears to have endorsed the use of declaratory proceedings in respect of future tax periods and transactions before an assessment has issued. Footnote 83 of the Statement on Tax Technical Litigation in the Federal Court at Annexure D of Law Administration Practice Statement PS LA 2009/9 states that declaratory proceedings need not always be used 'in substitution for' taxation appeal proceedings brought under Part IVC of the TAA:

> *'… Taxpayers may sometimes want a declaration from the Federal Court that an ongoing supply is GST-free. Due to the restrictions in section 105-65 of Schedule 1 to the TAA in getting refunds on overpaid GST on past sales, taxpayers are more concerned with using the declaration for future sales, whereas Part IVC of the TAA relates to past tax periods (although appeal decisions can have implications for the future).'*

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[12] See clause 155-17 of Schedule 1 to the original Exposure Draft setting out the inserts for Assessment of Indirect Taxes.

[13] Given the statement in *Futuris* about the fact that the discretion to make declarations should not be exercised where Part IVC proceedings are pending, it seems unlikely that the Commissioner will follow his previous policy on declaratory proceedings in Sales Tax matters which was set out in Sales Tax Ruling ST 2454 (now withdrawn) at 12-13. That ruling, which also considered issues of jurisdiction and cross-vesting, suggested that the Commissioner might ordinarily have difficulty seeking a stay or dismissal, and that the preferred course might be to have declaratory proceedings and Part IVC proceedings heard together in the same Court.

[14] Indeed, in the context of Part IVC proceedings dealing with income tax, the authorities suggest that revenue proceedings in respect of one year of income will not be determinative of any other year of income where there are findings of fact that may differ from year to year that are indispensible to the determination of the appeal; that is, issue estoppel does not arise in the later year (*Spassked v FCT (No 2)* (2007) 165 FCR 484, 500-507).

However, if the comments made by Dowsett J in FCT v Gloxinia Investments Ltd (2010) 183 FCR 420, 424 [13] are anything to go by, there might be some risk in pursuing declaratory relief in respect of future transactions where some aspect of the analysis requires an assessment of the facts and circumstances at the time of the transaction. His Honour's comments certainly suggest that declaratory relief may have been refused if the Commissioner had taken issue with the taxpayer seeking declaratory relief based on hypothetical facts (at 424 [13]):

> *'13. Subparagraph (a) [of the definition of 'long-term lease'] speaks of a reasonable expectation as to the duration of the lease, hire or licence, such expectation to be "at the time of the lease, hire or licence", presumably the date of grant. It seems that at least at the time of commencement of these proceedings, the Strata Lot Leases had not been granted. See the application and the primary Judge's reasons at [13] and [14]. If that is correct, then it is difficult to understand how it is possible to determine what, at the time of grant, "was" reasonably to be expected as to the likely duration of the lease. This suggests that, at least in theory, Gloxinia's application for declaratory relief is, or was, premature. The respondent (the "Commissioner") has not taken the point, either at first instance or on appeal. I propose to deal with the matter on the basis adopted by the parties. Nonetheless I observe that this, and some other aspects of the case, hint at the possibility that they are seeking little more than an advisory opinion.' [Emphasis added.]*

Although there will likely still be some residual scope for taxpayers to seek declaratory relief once self assessment has been introduced for indirect taxes, the use and usefulness of declaratory proceedings in GST cases in the future will probably depend on the Commissioner's attitude to them. After all, it seems that the Commissioner will be able to make technical arguments to oppose the grant of declaratory relief in respect of future tax periods, or to ignore the results of declaratory relief in respect of past tax periods. As such, it might be necessary to gauge the Commissioner's view on whether declaratory proceedings are an appropriate way of resolving a particular dispute where Part IVC proceedings might otherwise be available, albeit in respect of a different tax period.

3. REVIEW AND APPEALS UNDER PART IVC OF THE TAA

The review and appeal processes set out in Part IVC of the TAA are doubtless familiar to most GST practitioners, so there is no need to outline them again here.[15] It is sufficient to say that once an objection decision has been made disallowing the taxpayer's objection, wholly or in part, the taxpayer may wish to challenge the

[15] Although it is worth noting that there are still plenty of examples where taxpayers have sought to invoke Part IVC where it clearly does not apply: see generally *Re Garrett v FCT* (2008) 73 ATR 564; [2008] AATA 749; *Re Kancroft Pty Ltd (Acting as Trustee for Robertson Family Trust) v FCT* (2004) 56 ATR 1086, 1088; [2004] AATA 591, at [16]-[17]; *Re Ivan Sop v FCT* [2007] AATA 1746; *Re Nyack Investments Pty Ltd v FCT* (2005) 59 ATR 1116; [2005] AATA 468; *Flack v FCT* 2005 ATC 2016. Therefore, it is necessary to note that Part IVC of the TAA only applies where a statutory provision confers a right to object. At present, the power to object against reviewable indirect tax decisions is found in section 105-40 of Schedule 1 to the TAA. As mentioned above, the Exposure Draft for self assessment contains a specific objection right in respect of indirect tax assessments at clause 155-75. Objections against assessments of penalties, the Commissioner's refusal to remit further any amount of penalty that exceeds 2 penalty units and objections against private rulings, amongst other things, are all subject to their own rights to object.

objection decision. This is the time to make decisions about whether it is worth the expense of 'fighting on', which may depend on the appetite your client has for risk and whether or not they can find the necessary evidence to discharge their onus of proof.

3.1 Who can seek review or appeal?

In order to apply for review of or appeal against an objection decision, the taxpayer must be a person 'dissatisfied with the Commissioner's objection decision'.[16]

The question of when a taxpayer is dissatisfied with an objection in the relevant sense has a few aspects. Beyond the question of what constitutes 'dissatisfaction', and how it interacts with the onus cast on taxpayers by sections 14ZZK and 14ZZO of the TAA in proceedings before the AAT and Federal Court respectively, there is also the question of who must be dissatisfied.

It is trite, but only the taxpayer (or the applicant for a ruling, in the case of objections against rulings[17]) can be dissatisfied in the relevant sense. Where the taxpayer is an individual or a body corporate, the question of who may bring review or appeal proceedings under Part IVC of the TAA will be obvious. Subject to the early error made by HP Mercantile Pty Ltd as trustee of the Recoveries Trust, it is also now apparent in whose name proceedings must be instituted where the taxpaying entity is a trust.[18]

Where the taxpayer is an entity for GST purposes which is exposed to joint and several liability, the issue is more difficult as Russell v FCT [2008] FCA 343 (14 March 2008, Logan J)[19] demonstrates. In Russell, the question was whether the applicant, Mr Russell, could bring the Part IVC proceedings in his name alone despite the fact that the assessments being challenged related to a partnership in which he had been a partner with his former wife. In the case, the Commissioner contended that the proceedings should have been brought in the name of the partnership that lodged the relevant business activity statements, or alternatively that Mr Russell's former wife, who was the other partner in the partnership, should also be a party to the proceedings.

Justice Logan conceded that if the partner's liability for GST was only joint, rather than joint and several, 'the Commissioner's submission might have some attraction' (at [31]). However, Logan J emphasised the joint and several liability of partners in a partnership to conclude:

> *'41. ... The "person dissatisfied" with the Commissioner's objection decision in respect of a GST assessment might well, for just the reasons identified by the Court of Appeal in Sutherland v Gustar, be but one of a number of partners.*

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[16] Section 14ZZ of the TAA.

[17] *Corporate Business Centres International Ltd v FCT* [2004] FCA 458 at [51].

[18] See *HP Mercantile Pty Ltd v FCT* (2005) 143 FCR 553, per Hill J at 555 [2] commenting on the substitution of the trustee's name as the relevant party to the appeal against the *Recoveries Trust v FCT* (2004) 57 ATR 1038.

[19] This issue was not revisited in the related proceedings *Russell v FCT* [2009] FCA 1224 (30 October 2009, Logan J) and its appeal proceedings *Russell v FCT* [2011] FCAFC 10 (4 February 2011, Dowsett, Edmonds and Gordon JJ).

> *44. The word "person" in s 14ZZ of the TAA bears its ordinary meaning of referring to natural persons as well as bodies corporate and bodies politic: s 22 Acts Interpretation Act 1901 (Cth) and includes the singular as well as the plural: s 23 Acts Interpretation Act 1901 (Cth). As earlier noted, under the general law a partnership is not a separate legal entity. A partnership is not a "person". The liability in respect of GST being joint as well as several s 14ZZ of the TAA would certainly permit the members of a partnership jointly to institute an appeal against an objection decision in respect of a GST assessment if so disposed but the effect of that section is that it is not mandatory that each partner be a party to the institution of an appeal for that appeal to be competent.'*

Given that the GST law also affixes joint and several liability to GST joint ventures and GST groups, among other arrangements used for the purposes of GST, it will be interesting to see how broadly Russell may be applied in the future. Certainly, it seems possible that one entity might be dissatisfied in the relevant sense, without that entity's dissatisfaction representing the interests of the GST group as a whole.

Once a relevant person who is capable of being 'dissatisfied' has been identified, the next issue is whether they are dissatisfied in the relevant sense for the purposes of section 14ZZ of the TAA. What constitutes relevant 'dissatisfaction' was considered by Gummow J in CTC Resources NL v FCT (1994) 48 FCR 397 in the context of an objection against a private ruling (at 408):[20]

> *'In my view, if regard is had to the context in which s 14ZZ appears, in its operation upon the jurisdiction of this Court, then the 'dissatisfaction' of the person initiating the proceeding is of the following nature. It is a dissatisfaction with the absence of a favourable decision upon the objection which would, if now rectified by the Court, place the party in the position for the administration of the taxation laws which should have applied if the ruling had been made by the Commissioner in the terms sought. A mere curiosity or interest in having a formal ruling by the Commissioner for some collateral commercial purpose of the applicant is not sufficient to amount to "dissatisfaction" in the relevant sense. That being the case, s 14ZZ clearly is valid. There is thus no occasion to consider what might have been the position if the provision were more widely construed.'*

It appears that one may be dissatisfied when an taxation decision, such as an assessment, is too low.[21] However, in those circumstances, their dissatisfaction will be based on the fact that the decision should have been made differently.[22]

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[20] In *CTC Resources*, the applicant could not be dissatisfied in the relevant sense because the income year to which the private ruling related had passed without the arrangement that was the subject of the ruling being implemented. As GST is now within the uniform rulings system, there is likely to be some scope for some of the same issues concerning whether the taxpayer is 'dissatisfied' in the relevant sense to arise in that context too. See also *Re Kenneth Hickey v FCT* [2009] AATA 347.

[21] *Isaacs v FCT* (2006) 151 FCR 427 and TR 2010/D10 at 86-87. Subject, of course, to the restriction on objections against nil income tax assessments under subsection 175A of the ITAA 1936.

[22] See, for instance, *Waverley Council v FCT* 2009 ATC 10-095, in relation to the burden of proof faced by the taxpayer under section 14ZZK of the TAA when they were alleging certain GST assessments were too low.

3.2 When must the application be made?

The taxpayer has 60 days from when they are served with the objection decision to seek review by the AAT[23] or to appeal to the Federal Court.[24] However, the AAT may extend the time period in which review can be sought.[25]

3.3 Can one application be made in respect of multiple objection decisions?

In respect of appeals to the Federal Court, it has been accepted that a single appeal can be made in respect of multiple objection decisions. Further, it does not matter that those objection decisions deal with different subject matters, such as income tax and GST. As Logan J observed in Russell v FCT [2008] FCA 343 (14 March 2008, Logan J)

> *'9. In Krampel Newman Partners Pty Ltd v FCT [2001] FCA 976; (2001) 113 FCR 306 at 312, [15], Ryan J concluded that s 14ZZN of the TAA does not evince an intention contrary to the effect of s 23 of the Acts Interpretation Act 1901 (Cth), which is that the singular includes the plural. I respectfully agree. Thus, there is nothing in s 14ZZN of the TAA which forbids the inclusion in the form of initiating application which is lodged with this Court of appeals against more than one objection decision.*
>
> *10. Krampel Newman concerned objection decisions each of which related to objections against income tax assessments. Does it make any difference here that one of the primary tax liabilities is in respect of income tax and the other is in respect of a net amount for the purposes of the GST Act? In my opinion it does not...'*

Presumably the same reasoning would apply in respect of applications for review made to the AAT under section 29 of the Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act), as modified by section 14ZZC of the TAA.[26]

3.4 Subject matter of the review or appeal

3.4.1 Limited to grounds on objection

If a taxpayer seeks to challenge a decision made by the Commissioner on objection before the AAT or the Federal Court, then they will be limited to raising the grounds stated in the objection unless they seek leave to raise additional grounds.[27] The AAT and the Federal Court have a broad discretion to grant leave, but there is no automatic right to such an order.[28]

The matters that will be considered by the AAT and the Federal Court when considering applications for leave to raise additional grounds are set out in Lighthouse

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[23] In accordance with the AAT Act as modified by section 14ZZC of the TAA.
[24] Section 14ZZN of the TAA.
[25] Subsection 29(7) of the AAT Act confers on the AAT a discretion to extend the time for making an application. The Federal Court has no such jurisdiction: *Bayeh v FCT* (1999) 100 FCR 138.
[26] Certainly the AAT is prepared to hear applications for review against objection decisions dealing with different taxes together. See *Peerless Marine Pty Ltd v FCT* [2006] AATA 765; (2006) 63 ATR 1303.
[27] Paragraph 14ZZK(a) and 14ZZO(a) of the TAA.
[28] See generally *FCT v American Express Wholesale Currency Services Pty Ltd* (2010) 187 FCR 398, 447 per Kenny and Middleton JJ.

Philatelics Pty Ltd v FCT (1991) 32 FCR 148. These include matters such as expediency and whether permitting the additional grounds is in the interests of justice, or whether it would cause prejudice.

3.4.2 Court is seized with the entire objection decision

If you represent a taxpayer that is only dissatisfied with one aspect of the objection decision, it is worth keeping in mind that on appeal to the Federal Court (and possibly in seeking review to the AAT), the Court is seized with the entirety of the objection decision. In FCT v Australia and New Zealand Savings Bank Limited (1994) 181 CLR 466, the High Court stated (at 476):[29]

> *'… An appeal relates to the objection decision made by the Commissioner albeit a taxpayer is dissatisfied only with part of that decision. A power to make such order as the Court thinks fit is clearly not unconstrained but there is nothing in s199 [the predecessor to section 14ZZP of the TAA] to suggest that the Federal Court may not make such order in relation to the objection decision as is appropriate in all the circumstances once the subject matter of the taxpayer's dissatisfaction has been resolved.'*

3.4.3 Recovery and restriction on refund provisions as part of Part IVC proceedings?

One matter that is yet to be determined by a Court[30] that is unique to GST is the question of whether the Commissioner is correct in his view expressed in Miscellaneous Tax Ruling MT 2010/1 that provisions such as sections 105-55 and 105-65 of Schedule 1 to the TAA are relevant to the determination of a taxpayer's net amount and are, therefore, included in the ambit of Part IVC taxation review and appeal proceedings.

The Commissioner's view is set out in paragraphs [158] and [159] of MT 2010/1:[31]

> *'158. Determining the correct net amount is a two step process. The first step is to determine whether the entity is entitled to a refund because they overpaid GST as a result of incorrectly treating a supply as a taxable supply to some extent. If an overpayment did occur, then generally the net amount is reduced by the amount of the overpayment. However, before determining the correct net amount (that is the actual entitlement to a refund or obligation to pay) a second step is required. That step is to consider all the provisions that go to or may affect the entitlement to pay that refund. Section 105-65 operates to restrict that entitlement and if it operates to deny the refund then the entity has no*

[29] Cited with approval by Logan J in *Russell v FCT* [2009] FCA 1224 (Federal Court of Australia, Logan J, 30 October 2009) at [165]. However, in that case, Logan J concluded that the powers exercisable by the Court did not include setting aside the decision on objection, making an order setting aside the assessment and making an order that Mr Russell's taxable income should have increased. Notably, Logan J left open the possibility that an increased assessment might be ordered where it is a consequential adjustment (at [177]-[178]).

[30] Certainly, the AAT has already considered provisions of this type in its review of Part IVC proceedings: *Re Australian Leisure Marine Pty Ltd and FCT* [2010] AATA 620 at [16] and [17]. This approach is also arguably implicit in other AAT decisions: see Miscellaneous Tax Ruling MT 2010/1 at [155].

[31] See also the excerpt from the advice of J Daryl Davies QC, which can be found at Annexure 3 of the Draft GST minutes for September 2010 (although apparently in connection with the NTLG GST Sub-Committee meeting of 24 June 2010).

> *entitlement to the refund and the net amount must reflect this application of the law.*
>
> *159. The view that the relevant TAA provisions impact upon the net amount, and hence also on assessments, means that taxpayers are provided with the ability to challenge decisions under Part IVC of the TAA and also may be able to obtain merits review in the Tribunal. In particular, on this view, taxpayers are able to obtain, as part of the review of an objection decision relating to an assessment of the taxpayer's net amount for a tax period, merits review of a decision made by the Commissioner not to exercise the section 105-65 discretion to pay a refund where its provisions otherwise apply.'*

The view adopted by the Commissioner is undoubtedly favourable to taxpayers in that it will reduce the compliance costs associated with running separate proceedings. However, it may be susceptible to challenge (and may well be challenged by a taxpayer if there is any advantage in doing so in a particular case).

Even more unsatisfactorily, it is presently unclear how section 105-65 of Schedule 1 to the TAA, in particular, will interact with self assessment when it is introduced. The Exposure Draft legislation dealing with self assessment of indirect taxes did not deal with the issue at all. Hopefully this issue will be resolved through the consultative process that is currently ongoing in relation to self-assessment, as taxpayers will need to address the operation of section 105-65 of Schedule 1 to the TAA in drafting grounds of objection and preparing matters to litigate in the future.

3.5 The choice between the AAT and the Federal Court

In GST proceedings brought under Part IVC of the TAA, which deal with 'reviewable objection decisions'[32], there is choice to be made between seeking review by the AAT and appealing to the Federal Court.

3.5.1 Difference in the roles and powers of the AAT and Federal Court

Where there is a choice between the AAT and Federal Court, it is necessary to be aware of the essential differences between the role and powers of the AAT and the Federal Court.

The AAT is an administrative body which undertakes reviews on the merits. That is, it makes administrative decisions afresh by effectively 'standing in the shoes of the Commissioner', which is particularly useful for the taxpayer where the matter involves the exercise of a discretion or power (take, for instance, remission of penalties). That is, section 43 of the AAT Act as modified by section 14ZZJ of the TAA applies in respect of the AAT's decision on review. Subsection 43(1) of the AAT Act relevantly states:

> *'(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:*

[32] 'Reviewable objection decision' is defined in section 14ZQ of the TAA to mean 'an objection decision that is not an ineligible income tax remission decision'. An 'ineligible income tax remission decision' is defined in section 14ZS of the TAA and broadly relates to certain penalties imposed under the former Part VII of the *Income Tax Assessment Act 1936* (Cth).

> *(a) affirming the decision under review;*
>
> *(b) varying the decision under review; or*
>
> *(c) setting aside the decision under review and:*
>
> *(i) making a decision in substitution for the decision so set aside; or*
>
> *(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.'*

Compare this to the power to make orders conferred on the Federal Court by section 14ZZP of the TAA, which is clearly confined to confirming or varying the decision, or setting it aside where it is wrong in law.

> '*Where the Federal Court hears an appeal against an objection decision under section 14ZZ, the Court may make such order in relation to the decision as it thinks fit, including an order confirming or varying the decision.'*

The Federal Court therefore does not make new decisions. Rather, it undertakes judicial review of the Commissioner's decision. The Federal Court can only order the Commissioner to vary an assessment or set it aside where it is wrong in law. (Importantly, though taxation appeal proceedings under Part IVC are designated as 'appeals', they are actually brought in the original jurisdiction of the Court and are not 'appeals' in the strict sense.[33])

The distinction between the role and powers of the AAT and Federal Court is particularly important when it comes to cases where the Commissioner has exercised a discretion (for instance, remission of penalties). In those cases the AAT member may substitute his or her discretion if he or she reaches a different conclusion based on the evidence.

However, in other cases, it may nonetheless be preferable to appeal to the Federal Court where the issues in the taxation objection are extremely complex or technical.[34]

3.5.2 Other differences between the AAT and Federal Court

Although the difference in the roles and powers of the AAT and Federal Court will lie at the heart of any choice between the two forums, there are a range of other matters that may also influence a taxpayer's choice. These may include likely cost (and the ability to recover costs if successful[35]) and the mechanisms by which it is possible to preserve taxpayer anonymity in the AAT.[36]

However, one of the most critical distinctions that may be relevant in factually intensive cases is the fact that the AAT is not bound by the rules of evidence, and it is

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[33] Although an appeal to the Federal Court against the decision of the AAT on a tax matter is clearly an appeal in the strict sense.

[34] It is also arguable that the findings of the AAT cannot create an issue estoppel see *Blackman v FCT* (1993) 43 FCR 449, at 457 per Gray J, such that proceedings in the Federal Court may have other advantages (notwithstanding the difficulties in establishing that estoppel can operate against the Commissioner).

[35] In general, parties before the AAT bear their own costs.

[36] Sections 14ZZE and 14ZZJ of the TAA, and section 43(2)(c) of the AAT Act.

intended to operate with as little formality and technicality as possible.[37] Arguably, this feature of the AAT may explain why the AAT was chosen as the preferred venue for a number of income tax anti-avoidance cases, where establishing the objective facts was essential.[38]

The fact that the AAT is not bound by the rules of evidence does not mean that 'anything goes' when it comes to adducing evidence. Rather, the AAT will often have regard to the rules of evidence in 'informing itself' as to the probative force of evidence and the weight to attach to it. This power to inform itself is set out in paragraph 33(1)(c) of the AAT Act, which states:

'(1) In a proceeding before the Tribunal –

…

(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.'

There are many AAT decisions which clearly illustrate that the AAT will often have regard to the rules of evidence as part of 'informing itself'. For instance, Re Ileris and Comcare [1999] AATA 647 (Senior Member P Bayne) at [37] to [39] contains a lengthy analysis of the principles governing the acceptance of hearsay evidence by the AAT. Similarly, Re Proctor and FCT [2005] AATA 389, at [66]–[68] provides an illustration of when opinion evidence will be excluded by the AAT if it is directed to the ultimate issue that must be decided by the AAT.[39]

In addition to the fact that the AAT may have regard to the rules of evidence in giving weight to evidence (or in refusing to accept it), it should also be noted that in practice the AAT's use of its inquisitorial powers is often fairly limited.[40] Typically the AAT will generally rely on material produced by the parties.

Provided that the evidence produced in proceedings before the AAT is sufficiently probative, there are definite advantages associated with the AAT not being bound by the rules of evidence. For instance, in appropriate cases, it is arguable that the AAT may draw an inference in respect of one period when satisfied in respect of an earlier period. This obviously would assist where the taxation review proceedings deal with multiple tax periods. However, the AAT will only draw this inference if the evidence of the taxpayer is considered to be completely truthful or reliable.[41]

Despite the AAT not being bound by the rules of evidence, it is apparent that care must still be exercised in preparing evidence to discharge the onus of proof borne by taxpayers under section 14ZZK of the TAA before the AAT.

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[37] Section 33 of the AAT Act.

[38] See, by way of example, *Re News Australia Holdings Pty Ltd and FCT* (2009) 75 ATR 971; [2009] AATA 750, which was appealed directly to the Full Court of the Federal Court of Australia in accordance with section 44(3) of the AAT Act (*FCT v News Australia Holdings Pty Ltd* [2010] FCAFC 78 (Stone, Jessup and Jagot JJ, 30 June 2010).

[39] As to irrelevant material, see *Mt Gibson Manager Pty Ltd v DFCT* (1997) 81 FCR 335, 343 per French J, as his Honour then was.

[40] *Re Hobart Central Child Care Pty Ltd and FCT* (Cth) [2004] AATA 1222 at [18].

[41] See *Re Goldfort Corporation, Brendan Smith and Julie Smith* [2010] AATA 883 at [55], referring to *Krew v FCT* (1971) 2 ATR 230 per Walsh J and *McCauley v FCT* (1988) 19 ATR 1443 per Lockhart J.

3.5.3 Discharging the onus of proof in the AAT

The onus of proof in GST cases, as in income tax, is on the taxpayer to demonstrate any facts necessary to show that the assessment is excessive and to show how the amount by which the assessments are incorrect. As Edmonds J stated in Hua-Aus Pty Ltd v FCT (2010) 184 FCR 430, 436-437 [23]:[42]

> *'23. I agree with the Commissioner's submissions. It follows that if no evidence is adduced by Hua-Aus; if such evidence as is adduced is not a reasonable explanation of why the assessment is excessive and, in consequence, is not accepted as discharging the onus; or if such evidence is otherwise rejected, the Notice of Assessment of GST net amount issued to Hua-Aus must prevail: Gauci 135 CLR at 89 (Mason J).'*

There are numerous examples of AAT decisions involving taxpayers who have failed to discharge their onus in GST cases.[43] One recent example, Re Goldfort Corporation Pty Ltd, Brendan Smith and Julie Smith and FCT [2010] AATA 883, illustrates that the fact that the AAT is not bound by the rules of evidence does not mean that the taxpayer is released from having to prove its case.

In Re Goldfort, the AAT began its decision by observing (ominously for the taxpayer) that 'in circumstances where the applicants seek to rely on memory and a lack of records, the Tribunal will rightly be reluctant to find that the applicants' onus has been discharged' (at [11]). Further, to the extent that the taxpayer was relying on the memory of individuals rather than business records, the AAT found its witnesses unimpressive.[44] Of one witness, Mr Mann, the AAT stated:

> *'30. In the opinion of the Tribunal his disclaimers as to knowledge of what was happening at the Vibe (see for instance his claim that he never went upstairs) are disingenuous, particularly given the parts of his evidence the applicants seek to rely on in their submissions. The truth about what he actually knew of the day to day operations of Vibe is obscured rather than illuminated by the inconsistencies between his asserted lack of knowledge on the one hand, his detailed knowledge on the other and the reliance on some of his evidence by the applicants.'*

The AAT was similarly unimpressed by Mr Blake:

> *'33. Overall the Tribunal attaches little weight to Mr Blake's evidence, which is substantially adversely affected by his stated disinterest in the administrative aspects of the business [TS182.14–45], his poor memory [TS136.30 & 35; 139.22-25; 143.35-45; 150.3; 182.23; 192.5; 208.13], and his admitted heavy alcohol use [TS158.15-40].'*

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[42] Although note that his Honour held that a taxpayer's evidence should not be discounted unless there is a positive reason the taxpayer should be disbelieved (citing at [46] *Ma v FCT* (1992) 37 FCR 225, 230).

[43] See, for example, *Re Martinazzo and FCT* [2009] AATA 62 and *Re QFP Professional Tomato Project 98 and FCT* [2010] AATA 864.

[44] Although the AAT declined to make any finding as to whether their conduct in giving away free drinks was in breach of liquor licensing guidelines (*Re Goldfort* at [64]).

The failure by one of the applicants (Ms Julie Smith) to give evidence also caused the AAT to draw the inference that her evidence would not have assisted the applicants (at [50]-[53]).

One of the matters that is unique to GST that should be considered when preparing evidence for GST litigation, is the impact of the multi-party nature of GST. It might be that calling third party witnesses will be necessary for corroboration of some matters, or to avoid any adverse inferences being drawn about their absence. It may also be prudent to investigate whether the other parties to the transaction took an inconsistent position, which may be exposed in the Commissioner's cross examination.

3.5.4 Legal professional privilege in the AAT

Common law legal professional privilege applies to confidential communications between a client and the client's legal adviser for the dominant purpose of giving or receiving legal advice ('legal advice privilege') or for use in existing or anticipated litigation ('litigation privilege').[45] The Evidence Act 1995 (Cth) applies to proceedings in a federal court, with sections 118 and 119 of that Act creating a statutory version of legal professional privilege.

A corollary of the fact that the AAT is not bound by the rules of evidence is that the Evidence Act 1995 (Cth), including sections 118 and 119 of that Act, has been held not to apply in matters before the AAT.[46] Although it has also been suggested that 'litigation privilege' (as distinct from 'legal advice privilege') does not apply to proceedings in the AAT[47], the AAT disagreed with that proposition in Re Farnaby and Military Rehabilitation and Compensation Commission [2007] AATA 1792 at [19]-[31] and held that common law privilege still applies in the AAT unless there is a clearly expressed abrogation of the privilege in the legislation governing the application.

However, just to complicate matters further, the AAT has also held that it may inform itself having regard to the provisions of the Evidence Act 1995 (Cth) in deciding matters of privilege (see Re Seinor and Comcare [2009] AATA 201).

What this means is that those involved in any tax litigation, whether before the AAT or Federal Court, will need to have a working knowledge of both common law principles that govern legal professional privilege and the Evidence Act 1995 (Cth). It is essential to be aware that there may be differences between how the two regimes for privilege apply to issues such as waiver of privilege and the operation of privilege with respect to in-house lawyers. Therefore, slightly different principles may apply depending on whether legal professional privilege is being claimed in proceedings before the AAT as compared to the Federal Court.[48]

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[45] *Esso Australia Resources Ltd v FCT* (1999) 168 ALR 123.

[46] *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 67 NSWLR 91; [2006] NSWSC 530.

[47] *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2006) 67 NSWLR 91; [2006] NSWSC 530.

[48] Note that common law privilege also applies when making legal professional privilege claims when responding to requests for information made by the Commissioner, and also appears to apply in Freedom of Information proceedings when challenging the Commissioner's privilege claims.

3.6 Process for applying for review by the AAT

An application to the AAT for review of a decision must be made in writing and may be made in the approved form provided by the AAT,[49] which requires the taxpayer to provide reasons for their request for review. There is a fee that is fully refundable if the review is decided the taxpayer's favour. The fee may also be waived in some circumstances.

Twenty eight days after receiving notice of the application, the ATO will file material with the AAT pursuant to section 37 of the AAT Act. That material includes:

- a statement giving reasons for the decision;
- the notice of the taxation decision concerned;
- the taxation objection concerned; and
- every other document that is in the Commissioner's possession or under the Commissioner's control and is considered by the Commissioner to be necessary to the review of the objection decision concerned.

These documents are often referred to as the 'T-documents'.

Generally a conference by telephone will be arranged with a Registrar from the AAT. A pre-hearing timetable, including dates for the parties to file and serve Statements of Facts, Issues and Contentions, signed witness statements and any further relevant material will usually be set down. Often, alternative dispute resolution processes, such as a conciliation conference, will be included in the pre-hearing timetable.[50]

3.7 Appeals to the Federal Court – The 'Tax List'

Appeals to the Federal Court require a written application which sets out brief details of the objection decision appealed against.[51] It must be filed with the relevant Federal Court Registry. The application must also be accompanied by the prescribed filing fee. The application must be both filed with the Court and served on the Commissioner, as Respondent, at the Office of the Australian Government Solicitor in the state or territory in which the application was filed.

Within 28 days of serving a sealed copy of the application on the Commissioner, the ATO will provide the Court and taxpayer with:[52]

- a copy of the notice of the objection decision concerned; and
- a copy of the taxation objection concerned; and

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[49] Section 14ZZC of the TAA, which modifies section 29 of the AAT Act.

[50] See generally Practice Statement Law Administration PS LA 2007/23 generally concerning the ATO's approach to alternative dispute resolution, and in particular at [25]-[30] within the AAT.

[51] See Order 52B rule 4 of the former Federal Court Rules, which prescribed that Form 55D must be used and Rule 33.02 of the *Federal Court Rules 2011*, which prescribes Form 73.

[52] Order 52B rule 5 of the former Federal Court Rules and Rule 33.03 of the *Federal Court Rules 2011*. Note that the documents that the Commissioner must lodge are modified where the appeal relates to a private ruling: Order 52B rule 5A of the former Federal Court Rules and Rule 33.04 of the *Federal Court Rules 2011*.

- any return or other document in the Commissioner's possession or under the Commissioner's control to which the taxation objection relates that is relevant to the hearing of the matter; and
- an appeal statement or an appeal affidavit (which is an affidavit setting out the grounds for seeking an order to dispense with the appeal statement[53]).

3.7.1 Appeal statements

The taxpayer's appeal statement must be filed and served upon the Commissioner within 40 days of the date on which the application was served on the Commissioner. Both parties must also complete, file and serve a copy of the pro forma questionnaire attached to the Practice Note reissued by the Chief Justice of the Federal Court on 1 August 2011, 'Tax 1 – Tax List' within 40 days of the date on which the application was served on the Commissioner.

Relevantly, the appeal statement is a statement that outlines succinctly the relevant party's contentions and the facts and issues in the appeal as that party perceives them. The Practice Note issued by the Chief Justice of the Federal Court on 25 September 2009, 'Tax 1 – Tax List', also requires that appeal statements must state in summary form:

- the basic elements of the party's case or defence;
- where applicable, the relief sought;
- the issues the party believes are likely to arise;
- the principal matters of fact upon which the party intends to rely; and
- the party's contentions (including the legal grounds for any relief claimed) and the leading authorities supporting those contentions.

The function of the appeal statement was considered by Stone J in BAE Systems Australia (NSW) Pty Ltd v FCT [2008] FCA 48 (Federal Court of Australia, 5 February 2008). Her Honour concluded that the appeal statement is not to be treated in the same way as pleadings even though it takes the place of pleadings, but rather:[54]

> *'[18] The difference between pleadings and a statement of facts, issues and contentions or an appeal statement was recognised by Lindgren J in W R Carpenter Holdings Pty Ltd v FCT [2006] FCA 1252; W R Carpenter Holdings Pty Ltd v FCT [2007] ALMD 379; [2007] ALMD 572; [2007] ALMD 573; [2007] ALMD 592; [2007] ALMD 590; W R Carpenter Holdings Pty Ltd v FCT (2006) 2006 ATC 4652; 63 ATR 577; 234 ALR 451 where his Honour stated unequivocally (at ATR 585 [35]; ATC 4659 [35]; ALR 459 [35]), that a statement of facts, issues and contentions is not a pleading even within the extended definition of "pleading" in O 1, r 4 of the Federal Court Rules 1979 (Cth).*

[53] See Order 52B sub-rules 5(2)(iv) and (3) of the former Federal Court Rules and Rule 33.03(a)(iv) of the *Federal Court Rules 2011*.

[54] See also *Pacific Exchange Corporation Pty Ltd v FCT* (2009) 180 FCR 300, 311 [53] per Logan J.

> *[19] Ultimately, however, what is clear from all of the authorities is that the issue is one of substance; the taxpayer, and the court, must be given a clear and succinct statement of the Commissioner's position without imposing any element of a burden of proof on the Commissioner. In substituting such a statement for pleadings the legislature has provided for a very practical approach to the unusual situation where the taxpayer bears the burden of proving that the Commissioner's assessment is excessive. In my view, such a statement should not be overly scrutinised in an attempt to find errors or inadequacies. The question is: does the statement give the taxpayer a practical understanding of the Commissioner's position?' [Emphasis added.]*

Arguably, the 'practical understanding' threshold applied by her Honour to the Commissioner's appeal statement is a lower standard than that which previously applied to Statements of Facts, Issues and Contentions filed by the Commissioner.[55]

3.7.2 Scheduling conference

After the parties have exchanged appeal statements, an initial directions hearing, called the 'Scheduling Conference', will be set down not less than 45 days from the date of the filing of the application.

The lawyers acting for each party are expected to attend the Scheduling Conference and they will be expected to address the following matters at the Scheduling Conference:

- In 'clear outline', narrow the issues and facts in dispute;
- Provide an initial witness list to form the basis of the 'Preliminary Witness List';
- Establish a pre-trial schedule;
- Deal with matters raised by the Pro Forma Questionnaire; and
- Fix a trial date.

In addition to dealing with the prescribed matters listed above, it appears that the parties must also have considered the following:

- The need for discovery, and whether discovery should be expanded beyond the limited categories outlined in paragraph 6.1 of the Practice Note, or whether discovery should be further limited; and
- Whether there are any exceptional circumstances that would justify a request for interrogatories (paragraph 7.1 of the Practice Note) or particulars (paragraph 7.2 of the Practice Note), having regard to the fact that it is expected that questions that would otherwise justify particulars should be discussed at the Scheduling Conference.

[55] See generally *Rio Tinto Ltd v FCT* (2004) 55 ATR 321 per Sundberg J at 342, where his Honour stated: that a 'statement of contentions "must propound all the necessary ingredients of the claim for which, as a matter of legal substance, that party contends"'.

Another issue that is increasingly addressed by the Tax List coordinating judge at the Scheduling Conference is the use of expert evidence. Commonly parties are now asked to exchange copies of curriculum vitae of proposed independent experts and to draft questions, which may need to be agreed.

One advantage of the parties being asked to consider their use of experts at an early stage is that it may prevent the inappropriate use of expert evidence, thereby avoiding some of the criticism levelled by Sundberg J at the parties in the 'Mini Ciabatte' case, Lansell House Pty Ltd v FCT [2010] FCA 329 (Federal Court of Australia, Sundberg J, 9 April 2010), when they sought to use expert evidence in GST characterisation cases dealing with 'ordinary words':

> *'[60] It is not in my view the function of an expert to give evidence about the meaning of ordinary words such as bread, biscuit and cracker…*
>
> *[64] On the other hand I do not need an expert to educate me about the appearance (size, shape, weight, thickness) of biscuits, crackers or bread. Nor do I need to be told how those food products are used – their mode of consumption. That is something I know from my own experience…'*

3.7.3 Purpose of the Federal Court's Tax List

The Tax List process is intended to narrow the factual and legal issues in dispute and to enable proceedings to proceed as expeditiously as possible, thereby reducing costs and unnecessary delay. The Tax List has almost unquestionably 'front-ended' the evidence gathering processes undertaken by both taxpayers[56] and the Commissioner[57] before proceedings are instituted. However, the Tax List is also intended to steer litigants away from unnecessary recourse to Court processes, such as interrogatories, particulars and discovery, once proceedings have commenced.

Justice Edmonds described some of the matters that the Tax List process was intended to address as follows:[58]

> *'(1) The failure of the parties to identify the real issues in dispute (both factual and legal), at the earliest possible time and to hold the parties to those issues. Of course, there will be cases where the evidence will raise a new factual issue and that may need to be addressed by further evidence. But if all the known issues are identified at an early date, it should be possible, in the vast majority of cases, to make, at the outset, an informed and definitive assessment of the evidence that will be required to address those issues. …*
>
> *(2) Far too often the parties, but in particular the taxpayer, seek particulars of matters which are not the subject of a proper request; particulars of fact are one thing, particulars of argument are another.*

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[56] For instance by using Freedom of Information requests made pursuant to the *Freedom of Information Act 1982* (Cth).

[57] For instance, through use of his information gathering and access powers in sections 353-10 and 353-15 of Schedule 1 to the TAA.

[58] Justice Edmonds, 'Recent tax litigation: A view from the Bench' (2008) 37 *Australian Taxation Review* 79, at 94.

> *(3) A failure to properly rely on the curial processes of the court whether it amounts to a failure to utilise them or unnecessary recourse to them. Notices to admit facts fall into the first category; discovery into the second.'*

One of the key points made by Justice Edmonds is that the introduction of the Tax List was intended to encourage litigants to utilise the curial processes of the Court. A 'Notice to Admit Facts', which his Honour referred to in the extract reproduced above, may be given pursuant to Part 22 of the Federal Court Rules 2011 (Order 18, rule 2 of the former Federal Court Rules). Where the notice is served by a party on another party in the required form, that other party is required to admit, for the purpose of the proceeding only, the facts or documents specified in the notice.

The Notice to Admit Facts is a method of proving facts in taxation proceedings. Another alternative to the use of affidavit evidence is the use of Statements of Agreed Fact. Although opinion is sometimes split on whether they are worth the effort given the difficulties that one can encounter in reaching agreement with the Commissioner, a recent GST going concern case (albeit a test case) provides an example of how a Statement of Agreed Facts can be used together with affidavit evidence to narrow factual disputes.[59]

3.8 Methods of confining issues in tax proceedings

Although the quote from Justice Edmonds, which was reproduced above, focused on curial processes directed at establishing facts in Court proceedings, there are other processes that may assist litigants in GST disputes. For instance, a recent case that dealt with the Petroleum Resource Rent Tax Assessment Act 1987 (Cth) illustrated the way in which the Court may make orders to deal with the legal substance of a dispute before matters concerning quantification are determined.[60] The relevant power, which may also be useful in the context of GST litigation if declaratory relief is not available, is found in Rule 30.01(1) of the Federal Court Rules 2011 (Order 29 rule 2 of the former Federal Court Rules):

> *'(1) A party may apply to the Court for an order that a question arising in the proceeding be heard separately from any other questions.'*

The power to make this order is discretionary and, in many instances, might well be opposed by the Commissioner given it presents the obvious difficulty that separating issues of quantum of GST for later determination may present with respect to taxpayers discharging the onus cast on them. (That is, taxpayers in taxation review and appeal proceedings are generally required to show, where the relevant taxation decision is an assessment, that the assessment is excessive or, where the taxation decision is not an assessment, that the decision should not have been made or should have been made differently.[61]) Nonetheless, it does demonstrate that there may be

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[59] See *Aurora Developments Pty Ltd v FCT* [2011] FCA 232 (Federal Court of Australia, Greenwood J, 18 March 2011) at [5].

[60] *Esso Australia Resources Pty Ltd v FCT* [2011] FCA 360 (Federal Court of Australia, 13 April 2011, Middleton J).

[61] Paragraphs 14ZZK(b) and 14ZZO(b) of the TAA in respect of the AAT and Federal Court, respectively.

some further scope for narrowing issues in dispute in Part IVC proceedings before the Federal Court,[62] particularly where the parties agree to do so.

3.9 Offers made for the purposes of former Order 23 and indemnity costs orders

That some of the provisions of the Federal Court Rules are applicable to taxation appeal proceedings and can be utilised by taxpayer litigants in appropriate circumstances was recently highlighted in Clark v FCT [2010] FCA 415 (30 April 2010, Greenwood J).[63] Clark dealt with the question of whether an offer, in which the taxpayer applicant offered to settle the proceedings with the parties bearing their own costs if the Commissioner effectively 'walked away' (ie, allowed the objection decision and withdrew the notice of amended assessment), was covered by former Order 23 of the Federal Court Rules (the equivalent of which is now found in Rule 25.14 of the Federal Court Rules 2011).

Order 23 rule 2 of the former Federal Court Rules broadly provided that 'in any proceeding' a party may make an offer to compromise the proceeding on the terms set out in the notice of offer. Where the offer is made by the applicant in the required form, but is not accepted by the respondent, the offer may have cost consequences. The cost consequences were set out in Order 23 sub-rule 11(4) of the former Federal Court Rules as follows:

> *(4) If:*
>
> *(a) an offer is made by an applicant and not accepted by the respondent; and*
>
> *(b) the applicant obtains judgment on the claim to which the offer relates not less favourable than the terms of the offer;*
>
> *then, unless the Court otherwise orders, the applicant is entitled to an order against the respondent for costs incurred in respect of the claim:*
>
> *(c) up to and including the day the offer was made -- taxed on a party and party basis; and*
>
> *(d) after that day -- taxed on an indemnity basis.*

In Clark, Greenwood J held that Order 23 of the former Federal Court Rules may apply to taxation appeal proceedings. His Honour concluded that the offer made by the applicant was a genuine offer, as the applicant absorbing its own costs, which were

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[62] In respect of the AAT, see generally *WAKN v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 138 FCR 579, 589 [41] per French J as his Honour then was. His Honour stated that although there is no specific power for the AAT to hear and determine preliminary questions, the AAT is empowered to give directions "as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal". Although his Honour considered that these powers would be sufficient to support the hearing of particular issues separately from the main body of the hearing, it was a power to be 'exercised with caution because, as the experience of the courts has shown, it can lead to fragmentation of what should be a relatively informal and expeditious process…'.

[63] *Clark* was listed as being subject to an appeal to the Full Court of the Federal Court. However, the matter is now recorded as having no future listing. In the meantime, the principles in *Clark* have again been applied in *International All Sports Ltd v FCT (No 2)* [2011] FCA 1027 (1 September 2011, Jessup J).

in the order of $123,000 to $184,000, had real value (at [92]) and were 'significant' (at [90]).

The applicant's offer was also found to be for a sum which was less than the applicant eventually achieved at trial. As such, a presumptive entitlement to indemnity costs arose under Order 23, sub-rule 11(4) of the former Federal Court Rules. The Commissioner failed to point to any 'compelling and exceptional circumstances' that would have justified Greenwood J making an order 'otherwise' than on the basis of indemnity costs (at [94]). In particular, the Commissioner's view that he had a real prospect of success was not sufficient, nor was the fact that the issue raised important matters of legal principle and was in the public interest (see generally [95-105]).

4. THE CIVIL DISPUTE RESOLUTION ACT 2011 (CTH)

Although this article has not sought to examine alternative dispute resolution processes in any detail, it is important to recall that alternative dispute resolution can play an important role in not just settling tax disputes, but also in narrowing issues in dispute. The trick is to engage in alternative dispute resolution processes at the right time, so there is a real prospect that facts and legal matters can be agreed, without simply adding another process that delays the resolution of the proceedings and increases costs.[64] Unfortunately, it is impossible to lay down any hard and fast rules about when to engage in alternative dispute resolution as each case is different.

Despite the fact that there are no hard and fast rules about when to engage in alternative dispute resolution, most potential litigants in the Federal Court and the Federal Magistrates' Court will soon be required to undertake at least some steps toward attempting to resolve their dispute before litigation commences.

4.1 Overview of the Civil Dispute Resolution Act 2011 (Cth)

The Civil Dispute Resolution Act 2011 (Cth) received Royal Assent on 12 April 2011. The operative provisions of the Act commenced on 1 August 2011, being the date fixed by proclamation. The object of the Civil Dispute Resolution Act 2011 (Cth) is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted.[65] Importantly, lawyers are under a duty to advise their clients of their obligations under the Civil Dispute Resolution Act 2011 (Cth) and must assist them to comply.[66]

The Civil Dispute Resolution Act 2011 (Cth) applies to most civil proceedings instituted in the Federal Court and Federal Magistrates Court of Australia. Certain types of proceedings are excluded proceedings, including civil penalty and criminal proceedings, appeals (for instance, an appeal against a decision of the AAT), and a range of judicial review proceedings.[67] Proceedings under particular statutes are also

[64] See also Practice Statement PS LA 2007/23 at [15]-[19].

[65] Section 3 of the *Civil Dispute Resolution Act 2011* (Cth).

[66] Section 9 of the *Civil Dispute Resolution Act 2011* (Cth). Failure to comply with the duty in section 9 may result in cost consequences for the lawyer, just as a party's failure to comply with the requirement to file a genuine steps statement may be taken into account in awarding costs: section 12 of the *Civil Dispute Resolution Act 2011* (Cth).

[67] Section 15 of Part 4 of the *Civil Dispute Resolution Act 2011* (Cth).

excluded[68] and there is scope for regulations to expand the categories of excluded proceedings.[69]

Section 6 of the Civil Dispute Resolution Act 2011 (Cth) imposes an obligation on applicants who institute civil proceedings to file a 'genuine steps statement' at the time of filing the application instituting the proceedings. In the context of taxation appeal proceedings, presumably this will require the applicant to file the statement at the same time as filing its notice of appeal in accordance with Rule 33.02 of the Federal Court Rules 2011 (formerly an application under Order 52B rule 4 of the former Federal Court Rules).

The genuine steps statement filed by the applicant must specify:[70]

(a) the steps that have been taken to try to resolve the issues in dispute between the applicant and the respondent in the proceedings; or

(b) the reasons why no such steps were taken, which may relate to, but are not limited to the following:

(i) the urgency of the proceedings;

(ii) whether, and the extent to which, the safety or security of any person or property would have been compromised by taking such steps.

Correspondingly, the respondent is required to file a genuine steps statement before the hearing date specified in the application.[71] The respondent's statement must set out whether the respondent agrees with the applicant's statement, and any areas of disagreement.

Section 4 of the Civil Dispute Resolution Act 2011 (Cth) sets out what constitutes 'genuine steps' as follows:

4 Genuine steps to resolve a dispute

(1A) For the purposes of this Act, a person takes genuine steps to resolve a dispute if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.

(1) Examples of steps that could be taken by a person as part of taking genuine steps to resolve a dispute with another person, include the following:

(a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;

(b) responding appropriately to any such notification;

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[68] Section 16 of Part 4 of the *Civil Dispute Resolution Act 2011* (Cth).
[69] Section 17 of Part 4 of the *Civil Dispute Resolution Act 2011* (Cth).
[70] Subsection 6(2) of the *Civil Dispute Resolution Act 2011* (Cth).
[71] Section 7 of the *Civil Dispute Resolution Act 2011* (Cth).

> *(c) providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved;*
>
> *(d) considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;*
>
> *(e) if such a process is agreed to:*
>
> *(i) agreeing on a particular person to facilitate the process; and*
>
> *(ii) attending the process;*
>
> *(f) if such a process is conducted but does not result in resolution of the dispute—considering a different process;*
>
> *(g) attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.*
>
> *(2) Subsection (1) does not limit the steps that may constitute taking genuine steps to resolve a dispute.*

Although the parties are required to outline the genuine steps taken to resolve their dispute, section 17A of the Civil Dispute Resolution Act 2011 (Cth) expressly preserves the law in relation to the use and disclosure of information, the production of documents and the admissibility of evidence. This should permit the parties to continue to use 'without prejudice' communications as part of their settlement negotiations.

The Federal Court and Federal Magistrates' Court may, in performing functions or exercising powers in matters before it, take into account whether the parties complied with their obligations under the Civil Dispute Resolution Act 2011 (Cth). In addition to influencing the award of costs, the explanatory memorandum suggests the Court may be empowered to refer the dispute to alternative dispute resolution and dismiss the proceedings in whole or in part, among other things.[72] However, failure to file a genuine steps statement does not invalidate the proceedings.[73]

4.2 Application of the Civil Dispute Resolution Act 2011 (Cth) to taxation appeal proceedings

At this stage, none of the categories of excluded proceedings would appear to exempt taxation appeal proceedings filed in the Federal Court under Part IVC of the TAA. This means that the Civil Dispute Resolution Act 2011 (Cth) is likely to apply in taxation disputes.

It is unclear at this stage precisely how the Civil Dispute Resolution Act 2011 (Cth) will apply to taxation appeal proceedings and quite what it will add to the established objection process that occurs before proceedings may be instituted. Arguably, one could argue that there are no 'issues in dispute between the applicant and the

[72] Paragraph 45 of the explanatory memorandum to the Civil Dispute Resolution Bill 2010 (Cth).
[73] Subsection 10(2) of the *Civil Dispute Resolution Act 2011* (Cth) and paragraph 39 of the explanatory memorandum to the Civil Dispute Resolution Bill 2010 (Cth).

respondent in the proceedings' until such time as the objection decision has been made by the Commissioner, at which time the applicant has only 60 days to file its appeal in the Federal Court and therefore may be prevented from taking further steps due to the limited time available. However, it is more likely that taxpayers will simply document all steps taken throughout the audit and subsequent objection stage, and provide that information in the genuine steps statement. After all, meetings and correspondence with the ATO, the provision of information in response to information requests, the exchange of position papers and appearances before the General Anti-Avoidance Panel, if applicable, would all seem to qualify as genuine steps. The question is, whether something more than documenting the status quo might be necessary to satisfy the Court that the parties have sought to comply with the Civil Dispute Resolution Act 2011 (Cth) in tax proceedings.

5. CONCLUSION

It is simply not possible to provide a definitive guide to managing GST litigation. Not only is the landscape of GST litigation undergoing some fundamental changes, particularly with the likely introduction of self-assessment, but managing litigation always involves matters of judgement. What is best in one proceeding will not necessarily work in the next.

To the extent it is possible to lay down any high level guidelines, they should be limited to these:

1. Do not forget that there are some considerations that are GST specific. These include identifying the relevant applicant, considering how provisions such as sections 105-50, 105-55 and 105-65 of Schedule 1 to the TAA should be approached, and considering the evidentiary implications of GST being a multi-party tax.

2. However, do not make the mistake of treating GST litigation as entirely unique. Advisers and parties to GST disputes should be aware of both civil procedure and taxation administration law more generally. The benefit of having a broader awareness of civil procedure is not just limited to complying with any applicable obligations. Rather, advisers and parties to GST disputes should be willing to make use of the Court's curial processes to their full advantage. Indeed, by doing so, they might well be able to reproduce some of the features of declaratory relief, such as narrowing the issues in dispute, in taxation appeal proceedings brought under Part IVC of the TAA.