



28 February 2022

Inspector-General of Taxation and Taxation Ombudsman
GPO Box 551
SYDNEY NSW 2001

Email: gpa@igt.gov.au

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION – THE EXERCISE OF THE COMMISSIONER’S GENERAL POWERS OF ADMINISTRATION

The SMSF Association welcomes the opportunity to provide this submission in response to the Inspector-General of Taxation and Taxation Ombudsman’s review of the Commissioner’s general powers of administration.

Unlike the Commissioners remedial powers (“CRP”), the process of applying for the Commissioner to exercise their general powers of administration (“GPA”) are clearly set out in PS LA 2009/4.

The current GPA process lacks transparency, is lengthy and does not provide for sufficient stakeholder engagement.

We note that footnote 14 of PS LA 2009/4 suggests that:

“The appropriate communication product where the GPA has a public audience would normally be a Practical Compliance Guideline.”

This is not always the case and we have seen alternative ATO resources used to communicate the application of the GPA.

One example of this is where an underpayment of an account-based pension has occurred. In limited circumstances, the Commissioner allows the fund the ability to treat the pension as continuing, despite a small underpayment. It has in effect created a practical solution by applying a *de minimis* principle.

The impact of a minor underpayment is significant. The outcome is disproportionate to the value of the underpayment. It can cause the pension to fail for the whole of the year of income, results in the loss of pension fund tax concessions, is a compliance breach for certain pension products, and can have transfer balance cap consequences.



The use of the GPA by the ATO in this scenario was appropriate. However, an ATO practical compliance guide (“PCG”) was not issued. The Commissioner has instead opted to publish web-based material. Refer to ATO QC 47661.

Publishing the GPA in this manner and not as a PCG makes the tracking of the GPA impossible. Users have no visibility to historical versions. Web material is frequently reviewed, updated, and moved. It makes version control or tracking challenging.

Relying on web content in good faith diminishes a taxpayer’s ability to rely on the GPA to provide them with protection ordinarily afforded by a PCG.

There has been a reluctance to apply GPA in other circumstances that are in urgent need of remedy. Or in the example of the non-arm’s length expense provisions, the GPA has only been applied to address in part.

A legislative change saw the existing non-arm’s length income provisions in *Income Tax Assessment Act 1997* section 295-550 expanded to include non-arm’s length expenses.

The Commissioner has issued PCG 2021/4 noting in paragraph 10 that *the ATO will not allocate compliance resources to determine whether the NALI provisions apply to the 2018/19 to 2021-22 income years where the fund incurred non-arm’s length expenditure of a general nature that has a sufficient nexus to all ordinary and/or statutory income derived by the fund in those respective income years.*

The above is welcomed and practical relief when we consider the relative quantum of the expense in the context of the size of the fund and the significant tax consequences that would be incurred.

We acknowledge that the ATO has been consulting with industry and Treasury on a legislative fix to remove gross distortions caused from this legislative change. However, the PCG needed to go further and provide a practical, *de minimis* test that could be applied in the context of a minor expense that relates to a specific investment or source of fund income.

Applying the GPA in this way would deliver a pragmatic outcome. Otherwise, a minor or trifling expense has the potential to trigger significant tax consequence.

Currently there is no visibility on the GPA matters being considered by the Commissioner. We would welcome:

- Increased disclosure and reporting
- Greater transparency on matters being considered and the review processes
- Introduction of a consultation processes
- Publication of reasons for not exercising the GPA



If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to be "P. Burgess", written over a light blue grid background.

Peter Burgess
Deputy CEO/Director of Policy and Education
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than \$820 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.