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Practical Compliance Guidelines: Australian tax administration law innovation or overreach?

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Abstract

Practical Compliance Guidelines (PCGs) were introduced by the Australian Taxation Office in 2016. They number 61 to date and are innovative, often useful and sometimes controversial.

This article aims to offer a 'field guide' or study of PCGs to examine what they are, where they came from and where they fit in Australia's tax administration law framework.

An examination of each PCG is undertaken to create a typology, reflecting the nuanced design of each PCG and sharpening the analysis of areas of strength and opportunities for improvement.

Overall the PCG is found to be an innovative, transparent and sound tool, the use of which should be widened especially in dealing with the administration of principles-based legislation.

There are some areas for improvement however. The most important involve finding ways to improve judicial accountability and parliamentary oversight of PCGs or in some cases to use legislative instruments instead of PCGs.

The need for PCGs is a reminder that the Commissioner of Taxation has the job of administering legislation as it is enacted, with any and all of its imperfections. Unfortunately a PCG cannot fix bad law.

Keywords: tax administration; administrative law; general power of administration; practical compliance guidelines; responsive regulation

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1. INTRODUCTION

The Australian Taxation Office (ATO) introduced Practical Compliance Guidelines (PCGs) in 2016 and has to date published 61 PCGs on the ATO website.[1] As their name suggests, PCGs provide practical compliance guidance for taxpayers. At a high level that description is right but that is far from the end of the matter.

Many PCGs are significant and sometimes innovative. Some PCGs provide taxpayers a nuanced model for risk-based compliance on significant tax issues such as transfer pricing. Some PCGs also help resolve traditionally difficult problems in the transition from one interpretation of the law to another, whether caused by legislation, new case law or changing views of the ATO. Some seem less significant but are useful in offering taxpayers practical ways to save compliance costs by offering taxpayers simplified calculation methods or rules of thumb.

PCGs are therefore not surprisingly a topic of continuing interest and importance in the Australian tax system. This is reflected most recently in the investigation being undertaken by the Inspector-General of Taxation and Taxation Ombudsman (IGTO) into the Exercise of the General Powers of Administration vested in the Commissioner of Taxation (Commissioner) announced in December 2021 and which is ongoing. The general power of administration (GPA), as will be explained, is the primary legal foundation empowering the Commissioner to create PCGs and for ATO staff to act on them.

In these circumstances, academic study of PCGs is warranted. This article aims to be the first published study. With over six years practical experience of PCGs in the field there is a sufficient basis for reflection on the utility of PCGs, opportunities for wider deployment, whether there are more appropriate alternatives and protections for taxpayers.

This article has three main sections following this introduction.

Section 2 is general in nature and examines the following matters. *First*, what is a PCG? Where does it fit within the Australian framework of Australian law and tax administration? *Second*, what is the organisational context of the PCG? *Third*, what are the legal foundations for making and publishing a PCG? *Fourth*, what are the legal avenues available for a taxpayer to challenge a PCG?

Section 3 will examine the 61 PCGs in order to create a typology of the types and purposes to which PCGs have been put. This will draw out the nuances between PCGs within the total population of PCGs. Comments will be made on the strengths and appropriateness of particular PCGs.

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[1] ATO, Legal Database, https://www.ato.gov.au/law/#Law/table-of-contents?docref=PCG. The number of 61 is a net number of PCGs finalised. For brevity, consistency and clarity this article will use the standard refencing system employed by the ATO for citing its publications. This referencing system is the generally accepted usage. Citations used in this article are as follows: Practical Compliance Guideline (PCG); Practice Statement Law Administration (PS LA); Taxation Determination (TD); Taxation Ruling (TR); Miscellaneous Tax (MT). All documents referred to are accessible on the ATO Legal Database: see https://www.ato.gov.au/law/#Law.

By way of conclusion in section 4 the article will make observations as to the merits and deployment of PCGs and recommendations for review of the accountability mechanisms for PCGs and the future deployment of PCGs.

2. EXAMINATION OF PCGS IN GENERAL

2.1 What is a PCG?

PCG 2016/1 sets out, according to its title, in respect of PCGs, their 'purpose, nature and role in the ATO's public advice and guidance'. Four key points are observed.

The *first* point that is made by the Commissioner is the commitment of the ATO to provide 'clear and practical advice and guidance on which taxpayers can rely to manage their tax affairs'.[2] These are not empty words.

Since one of the earliest PCGs, PCG 2016/5, a notice has appeared at the commencement of each PCG stating:

> Relying on this Guideline
>
> This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this guideline in good faith, the Commissioner will administer the law in accordance with this approach.

The express promise is that a PCG can be relied on and indeed the implied expectation of the ATO is that it should be relied upon by taxpayers. Reliance by taxpayers will achieve the ATO's desired compliance outcomes.

PCGs are a logical progression in risk-based tax administration that in Australia really came into its own from the early 1990s with the introduction of self-assessment. As will be explained, ATO thinking was informed for a period by 'Responsive Regulation' theory that focuses on nuanced and adaptive regulatory responses to compliance risks.

The *second* point is a clear focus for PCGs to be used to provide compliance guidance to taxpayers, on significant matters[3] especially when the content is detailed, technical and may only affect a relatively small number of taxpayers.[4]

To create that focus there is a clear differentiation between a PCG and ATO guidance on the law such as the premier form of guidance, the public ruling.[5] As will be discussed later in this article, PCGs are expressly not making statements of the Commissioner's view of the interpretation of the law.[6] Statements of the ATO view of the law are usually made in other ATO products such as public and private rulings.[7] Also PCGs do not purport to create a rule binding on a taxpayer or to be legislative such as a regulation or legislative instrument. That said, ATO officers are bound as public officials to follow

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[2] PCG 2016/1, 'Practical Compliance Guidelines: Purpose, Nature and Role in ATO's Public Advice and Guidance', [4].
[3] Ibid [9].
[4] Ibid [9], [14].
[5] Ibid [4]–[5], [20]–[22], [24].
[6] Ibid [23].
[7] See *Taxation Administration Act 1953* (Cth) Sch 1, Part 5-5 ('*TAA 1953*').

PCGs, ensuring consistency so as to secure the purpose of the PCG.[8] In that limited sense PCGs do have some legal operation but not in the sense of purporting to state the rights and obligations of taxpayers. Indeed it is sometimes the case that PCGs are published as part of a suite of other ATO documents that do state the ATO view of the law such as a public ruling.

PCGs are also carefully distinguished from the ATO's Practice Statements on Law Administration. Those Statements are from 2016 to be directed to the internal ATO audience.[9]

Finally PCGs are not intended to replace general information and guidance for taxpayers published on the ATO website, such as fact sheets.[10]

The *third* point is to define what practical compliance means in a given context by the intentional use of the PCG in some cases (what will later in this article be called Type VIII PCGs) to create risk-defined zones to which the compliance response of the Commissioner, such as the risk of audit and dispute, is calibrated. To quote the Commissioner's policy:

> In addition to public rulings, taxpayers may also benefit from broader law administration guidance that conveys the ATO's assessment of relative levels of tax compliance risk across a spectrum of behaviours or arrangements. Such guidance may, for example, enable taxpayers to position themselves within a range of behaviours, activities or transaction structures that the ATO describes as low risk and unlikely to require scrutiny – to safely 'swim between the flags'.[11]

The policy later refers to 'safe harbours'.[12] The Commissioner's policy states:

> A 'safe harbour' may be described as conduct that is taken to comply with a rule or law that might ordinarily apply on the basis of more uncertain standards. Safe harbours are sometimes provided specifically in legislative provisions, or a provision may contemplate the creation of safe harbours by an administrator. Other safe harbours determined by an administrator may represent practical, purposive interpretation of a statutory provision.
>
> In appropriate circumstances, such as those described in paragraph 6 of this Guideline, the Commissioner may make sensible resource allocation decisions consistently with safe harbour approaches and express those approaches in practical compliance guidelines. In such cases, safe harbours can provide additional certainty and compliance savings for taxpayers in the face of provisions that are otherwise uncertain in their application or impose unexpectedly heavy compliance cost burdens. From the ATO's perspective, safe harbours can provide an efficient and consistent means of assessing levels

[8] PCG 2016/1, above n 2, [27].
[9] Ibid [12]–[13]. An example that expressly puts this policy into effect is PCG 2016/11, 'Fuel Tax Credits – Apportioning Fuel Used in a Heavy Vehicle with Auxiliary Equipment', which updated PS LA 2013/4 (GA), 'Apportioning Taxable Fuel Used in a Vehicle for Powering the Auxiliary Equipment of a Vehicle'.
[10] PCG 2016/1, above n 2, [14].
[11] Ibid [5].
[12] Ibid [10]–[11].

> of taxpayer compliance, allowing the ATO to direct its compliance resources to higher risk areas of the law.

The exact words on safe harbours have been recited because of their apparent importance in the Commissioner's policy on PCGs yet we find that in some important PCGs in Type VIII, such as concerning transfer pricing, there is an express disavowal that there is a safe harbour. In other words, the harbours are charted but they may not be so safe.

Which *segues* to the *fourth* point, the legal and administrative protections for taxpayers of following a particular PCG. The PCG is 'intended to guide the behaviour of taxpayers who wish to operate in a low tax risk environment, as well as to signal when the ATO considers certain behaviour to be of a higher risk of non-compliance with the law'.[13] The term 'low risk' does not mean 'no risk'. So what exactly does it mean or, more precisely, what are the consequences of taking a position defined in a PCG as low risk or a higher risk rating? Many PCGs are quite explicit as to the ATO's allocation of resources to compliance activities depending on the risk, eg, whether an audit or dispute may be expected or whether the ATO will draw a line as to when compliance action may occur such as prospectively but not retrospectively.

The ATO PCG policy also states that there will be protection from general interest charge or shortfall interest charge where there has been reasonable, good faith reliance on a PCG.[14]

One may then wonder what is the position with respect to protection from culpable penalties. PCG 2016/1 is silent as, it seems, is the ATO guidance on penalties generally. That may be in large part because where a taxpayer acts consistently with a PCG to take a low risk position, that is, to 'swim between the flags', there is the practical result that there is no increase in primary tax so there is no occasion for imposition of further penalties.

In cases where a penalty may be imposed, there seem to be several pathways to penalty protection. These are in the order that if the first is unavailable then the next may be available. *First*, where the PCG explicitly offers a safe harbour there may be no penalty.[15] It is likely that when the ATO disavows a PCG as offering a safe harbour that it has disengagement of this first form of penalty protection squarely in mind.[16]

Second, one might wonder whether PCG 2016/1, in encouraging taxpayer reliance, creates the possibility for statutory protection from culpability base penalties where a taxpayer treated a law in a particular way. One way might be that the PCG establishes or contributes to establishing a general administrative practice.[17] Another way is to the extent that the taxpayer treated a law as applying a particular way that agreed with a statement in a publication approved by the Commissioner.[18] It might be hypothesised

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[13] Ibid [27].
[14] Ibid [26], referring to *TAA 1953*, above n 7, Sch 1, s 361-5.
[15] See PS LA 2012/5, 'Administration of the False or Misleading Statement Penalty – Where There Is a Shortfall Amount', [9], [11L] citing *TAA 1953*, above n 7, Sch 1, s 284-75(6) (which sets out additional statutory conditions to qualify for penalty relief). The ATO notes that a safe harbour is not a statutorily defined term: see PS LA 2012/5, fn 16.
[16] PS LA 2012/5, above n 15, fn 16.
[17] *TAA 1953*, above n 7, Sch 1, s 284-224(1)(b).
[18] Ibid Sch 1, s 284-224(1)(c).

that the ATO in response to both ways could argue that, because a PCG involves no statement of law, either form of penalty protection has no application but the ATO position in Taxation Ruling TD 2011/19 does not take such a limited position and expressly extends to penalties.[19] Instead, the Commissioner states that '[a] general administrative practice is a practice which is applied by the Commissioner generally as a matter of administration. It consists of the habitual or customary, that is repeated, adoption of a view in multiple cases'.[20] The publication of a PCG would seem to clearly qualify for penalty protection for several reasons. One is that the PCG arguably establishes the Commissioner's general administrative practice by their publication or later conduct relying on and being consistent with the PCG.[21] The other is that, analogous to Law Administration Practice Statements, PCGs are publications of the Commissioner even if they do not establish a general administrative practice in the circumstances.[22]

Third, following a PCG in good faith ought to in most, if not all cases, offer penalty protection for exercising reasonable care.[23] It would not however assist in establishing penalty protection because there is a reasonably arguable position as a PCG is not a relevant authority.[24] The main ATO guidance on these penalty topics, Taxation Rulings MT 2008/1 and MT 2008/2, are silent in respect of PCGs.

2.2 The organisational context of PCGs

Whilst of course PCGs were launched in 2016 under the current Commissioner there are clear antecedents from earlier times. As PCG 2016/1 notes, immediately prior to the launch of PCGs, advice of a similar nature could be found in ATO Law Administration Practice Statements and on the ATO website.[25] In the author's view, the publication by tax administrators of compliance guidance has occurred much further in the past in various forms such as a number of types of published written guidance, published alerts, media releases, ATO speeches and statements in important consultation forums.

The immediate antecedents of PCGS can be seen in the early 1990s in the explicit shift to risk-based tax administration in parallel with the introduction of the self-assessment system in Australia.

In many respects, the ATO was more a leader in the move to a risk-based approach to tax administration than a follower. This is well apparent in Organisation for Economic Co-operation and Development (OECD) literature advocating approaches that the ATO had already pioneered, a 2004 Report referring to no less than seven examples from Australia.[26] A 2009 OECD Report presented four case studies, two from the ATO.[27] Another example was the Commissioner writing in the early 2000s to the boards of

[19] TD 2011/19, 'Tax Administration: What Is a General Administrative Practice for the Purposes of Protection from Administrative Penalties and Interest Charges?', [28].
[20] Ibid [1]; see also [30]–[33].
[21] Ibid [4], [42]–[46].
[22] Ibid [48]–[49].
[23] *TAA 1953*, above n 7, Sch 1, s 284-90(1) Item 3.
[24] Ibid Sch 1, ss 284-15(3), 284-90(1) Item 4.
[25] PCG 2016/1, above n 2, [12].
[26] OECD, 'Compliance Risk Management: Managing and Improving Tax Compliance', Guidance Note (October 2004).
[27] OECD Forum on Tax Administration, 'General Administrative Principles: Corporate Governance and Tax Risk Management', Information Note (July 2009).

Australia's largest companies about tax risk and publishing a 'Governance Guide for Board Members and Directors', which was fully extracted in the Report and advocated for adoption by all OECD members.[28] Tax risk assessment is now 'a key element of modern tax administration' according to the OECD, in 2017 citing the ATO as an exemplar with a centralised risk management function in the field of public and multinational businesses with cross-border intra-group dealings, prioritising transfer pricing risks.[29] PCGs continue on the same strategic trajectory.

The legal and policy shift to self-assessment in the early 1990s reflected the realigning of the ATO and the tax system to primarily focus on risk. This shift was provided for in legislation to introduce the legal mechanisms for taxpayer self-assessment rather than assessment by the Commissioner, cognate changes to the system for penalties and interest to appropriately sanction taxpayer behaviour in instances of non-compliance and the development of the public and private rulings system and other forms of ATO guidance to help taxpayers voluntarily comply.

Importantly, the ATO compliance model, originally introduced in 1998 by the Cash Economy Task Force,[30] included a pyramid from highly non-compliant to highly compliant, calibrating taxpayer risk profiles and ATO consequences. It has been developed and refined over time but the foundational thinking is well embedded in the ATO.

That foundation lies at the heart of the PCG and ATO compliance thinking to this day.[31] The scholarship of 'responsive regulation', especially in Australia led by academics John Braithwaite and Valerie Braithwaite,[32] goes back well into at least the early 1990s. It has been directly influential on the development of the thinking of the ATO and tax authorities according to Professor Judith Freedman, Professor of Tax Law at the University of Oxford.[33] Professor Freedman calls the compliance pyramid 'the Braithwaite model' and says it has been adopted by the ATO and other tax administrators.[34]

ATO organisational arrangements in around 1994 shifted from functional divisions to being organised around taxpayer market segments so that risks were prioritised in tax administration. Whilst nomenclature has changed and the concept has evolved, the basic

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[28] Ibid 13 and Attachment.
[29] OECD, BEPS Action 13, Country-by-Country Reporting: Handbook on Effective Tax Risk Assessment (September 2017) 15.
[30] Valerie Braithwaite and Jenny Job, 'The Theoretical Base for the ATO Compliance Model' (Centre for Tax System Integrity Research Note 5, 2003) 1, https://openresearch-repository.anu.edu.au/bitstream/1885/42101/2/researchnote5.pdf.
[31] ATO, 'Compliance model', https://www.ato.gov.au/about-ato/managing-the-tax-and-super-system/strategic-direction/how-we-help-and-influence-taxpayers/compliance-model/.
[32] There is a large literature on Responsive Regulation. An important survey of it is in John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *University of British Columbia Law Review* 475. An important engine for Responsive Regulation theory was the Australian National University (ANU) Centre for Tax System Integrity which underpinned the work of John and Valerie Braithwaite (1999-2005). The Centre was a partnership of the ATO and the ANU.
[33] Judith Freedman, 'Responsive Regulation, Risk and Rules: Applying the Theory to Practice' (2011) 44(3) *University of British Columbia Law Review* 627; Kristina Murphy 'Moving Towards a More Effective Model of Regulatory Enforcement in the Australian Taxation Office' [2004] (6) *British Tax Review* 603.
[34] See, for example, Valerie Braithwaite and John Braithwaite, 'Managing Taxation Compliance: The Evolution of the ATO Compliance Model' in Michael Walpole and Chris Evans (eds), *Tax Administration in the 21st Century* (Prospect Media, 2001) 215.

risk architecture of 1994 informs the current ATO structure. This is well apparent in the ATO organisational chart in which the divisions include the Client Engagement Group and its market/risk subdivisions.[35] The central focus on risk remains core to the ATO and the deployment of PCGs, as explained by current ATO Second Commissioner Jeremy Hirschhorn, who leads the Client Engagement Group, who said in 2019, referring to PCGs in respect of transfer pricing:

> The ATO has been much more deliberate in exposing its risk analysis and frameworks to the taxpaying community. These are often in the form of PCGs, which set out rules of thumb for determining whether the ATO is likely to accept the price at face value, or will more deeply probe whether the price makes sense in the particular circumstances.
>
> We are using PCGs more and more to allow companies to make informed decisions as to the risk profile that they wish to adopt, rather than potentially inadvertently taking on tax risk.[36]

Under the rubric of the ATO compliance model there are many other compliance strategies which, like PCGs, aim to deter and prevent, such as 'nudging' taxpayers to comply by letter writing campaigns.[37]

Obviously the ATO continues to develop its thinking and the risk model is not static. For example, in the context of the 'Tax Gap', there is a shift emerging from risk to tolerance.[38]

2.3 Legal foundations for the PCG

2.3.1 The emergence of modern administrative law principles in Australia

Before the article addresses the legal technical aspects of PCGs it is helpful to examine the emergence of modern administrative law principles in Australia. Much has been written about it but reference will be made here especially to a 2007 paper by former Commissioner Michael D'Ascenzo that brings the topic into the setting of Australian tax administration.[39] As will be explained when this article turns to the legal foundations of PCGs and the Commissioner's general power of administration, following

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[35] ATO, 'ATO Organisational structure' (5 June 2023), https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/n75148_ATO_organisational_structure.pdf

[36] Jeremy Hirschhorn, 'Future of Tax Administration' (Paper delivered to the PricewaterhouseCoopers Global Tax Symposium, Paris, 14 November 2019), available at: https://www.ato.gov.au/Media-centre/Speeches/Other/Future-of-tax-administration/.

[37] See, for example, Christian Gillitzer and Mathias Sinning, 'Nudging Businesses to Pay their Taxes: Does Timing Matter?' (Tax and Transfer Policy Institute Working Paper 13/2018, June 2018); Nassim Khadem, 'How the ATO is Nudging Australians to Pay More Tax', *Sydney Morning Herald* (15 August 2018), https://www.smh.com.au/money/tax/how-the-ato-is-nudging-australians-to-pay-more-tax-20180813-p4zx8x.html.

[38] Jeremy Hirschhorn, 'Beyond Tax Gap – How a Better Understanding of Tax Performance Changes Tax Administration' (Speech to the 14th International ATAX Tax Administration Conference, 24 November 2021), available at: https://www.ato.gov.au/Media-centre/Speeches/Other/Beyond-tax-gap---how-a-better-understanding-of-tax-performance-changes-tax-administration/.

[39] Michael D'Ascenzo, 'Effectiveness of Administrative Law in the Australian Public Service' (2007 National Administrative Law Forum, Australian Institute of Sport, Canberra, 14-15 June 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3087692.

administrative law principles is mandated by the ATO in a Practice Statement published in 2009 and still current.[40]

As D'Ascenzo explains, the modern framework of administrative law emerged in the 1970s and early 1980s. There were major changes to norms, values and processes in government and the rights of citizens based on landmark legislation, notably the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) which will be discussed later and the *Freedom of Information Act 1982* (Cth) (FOI).

Before these reforms, D'Ascenzo observed that:

> There is some truth that, as with other public sector agencies, the internal workings of the ATO would have been somewhat opaque to many.[41]

In parallel with FOI has been the general practice of public service agencies publishing many internal manuals and circulars that otherwise would be unknown or unobtainable. With the rulings system starting in the 1990s, ATO transparency gained pace.

Of course, as has been earlier observed, this bias to publication has also been harnessed to drive compliance strategies. In that synthesis, PCGs can be seen as both reflecting transparency and compliance strategy.

To put this synthesis into a broader theoretical construct, it was observed by Australian academic John Bevacqua in 2018 that '[t]here is a solid foundation for the OECD's conclusion that treating taxpayers fairly will foster greater willingness among them to comply with their tax obligations'.[42] Bevacqua points to 'significant Australian and international research efforts to confirm the positive relationship between taxpayer trust in the system of tax administration and compliance behaviour'.[43]

2.3.2 PCGs as 'soft law'

With the publication of PCGs in the area of transfer pricing, which started in 2017 and will be discussed further later in the article, has come an undercurrent of criticism and concern in the legal and tax professions, much unpublished, to the effect that the ATO uses PCGs more or less to improperly step from administrator into the role of legislator and to 'make the law'. An example of a considered and balanced critique that touches on this was published in 2019 by Michael Jenkins, a partner of Ernst & Young, and raises the question whether PCGs are 'soft law' referring to an important 2010 article by Australian law academic Professor Robin Creyke.[44]

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[40] PS LA 2009/4, 'When a Proposal Requires an Exercise of the Commissioner's Powers of General Administration', [4]; PS LA 2016/1, 'Transfer Pricing Adjustments with Potential Customs Implications', [8].
[41] D'Ascenzo, above n 39, 2.
[42] John Bevacqua, 'Taxpayer Compliance Effects of Enhancing Taxpayer Rights – A Primer for Discussion of a Dedicated Research Agenda' (2018) 4(2) *Journal of Tax Administration* 6, 7.
[43] Ibid (references omitted).
[44] Michael Jenkins, '"Practical" Safe Harbours and Australia's Transfer Pricing Rules' (2019) 53(10) *Taxation in Australia* 543, 546, citing Robin Creyke '"Soft Law" and Administrative Law: A New Challenge' (2010) 61 *AIAL Forum* 15.

The question of 'soft law' in Australian and international administrative law circles gained currency in the new millennium as D'Ascenzo pointed out in 2007 in a paper in which he was assisted by Professor Creyke.[45] D'Ascenzo said:

> The new emphasis on policy, rules of conduct and professionalism has been dubbed 'soft law'. 'Soft law' has several core elements. As outlined in an Administrative Review Council background paper:
>
> > Soft law is concerned with rules of conduct or commitments. Second, these rules or commitments are laid down in instruments which have no legally binding force as such, but are nonetheless not devoid of all legal effect. Third, these rules or commitments aim at or lead to some practical effect or impact on behaviour.
>
> In other words officials are now expected not only to comply with law and policy but also with ethical standards of behaviour in the workplace.[46]

PCGs are 'soft law' as defined by the Administrative Review Council as the term itself is potentially quite broad.

A leading administrative law treatise describes 'soft law' in perhaps starker and broader terms:

> Government agencies often make decisions pursuant to non-statutory (and therefore non-binding) rules structures.[47]

Professor Creyke gives a wide range of examples of soft law:

> Descriptions of soft law embrace instruments many of which will be familiar to the administrative law community. They include 'internal guidelines, rule books and practice manuals', 'circulars, operational memoranda, directives, codes [of conduct]'. Two leading English authors on this topic list eight categories of soft law: procedural rules, interpretive guides, instructions to officials, prescriptive/evidential rules, commendatory rules, voluntary codes, rules of practice, management or operation, and consultative devices and administrative pronouncements.[48]

'Soft law' can refer to an extension of normative obligations on public officials beyond legal obligations such as a code of conduct rather than regulatory statements by a public official. D'Ascenzo, in introducing the topic of 'soft law' referred to the ATO's Integrity Framework as it applies to ATO officers rather than to ATO statements as to taxpayer compliance which as noted earlier have a long history.

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[45] D'Ascenzo, above n 39, fn 1. See also Duncan Bentley, 'The Rise of "Soft Law" in Tax Administration – Good News for Taxpayers?' (2008) 14(1) *Asia-Pacific Tax Bulletin* 32.
[46] D'Ascenzo, above n 39, 8 (footnotes omitted).
[47] Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) [3.240].
[48] Creyke, above n 44, 15 (footnotes omitted). Aronson, Groves and Weeks offer similar examples: see n 47, above.

That said, as Creyke notes, there are various 'soft law' instruments by Government or public officials to regulate third parties that fall short of being by or under legislation. PCGs arguably fall into this category.

Another example of 'soft law' in the tax sphere, referred to by Justice Jennifer Davies of the Federal Court (as she then was) in a 2020 article, is the integration into Australian law of OECD Model Conventions and Commentaries and the OECD Transfer Pricing Guidelines and the commentaries on the Multilateral Instrument.[49] Her Honour presciently observed that:

> It is likely that in the future the question of the use which can be made of, and the weight to be attributed to, soft law sources will become a significant issue for consideration and determination.[50]

There are two major questions to be further explored with respect to 'PCGs' and 'soft law'. The *first* is their public utility as 'soft law' and the *second* concerns their place in ATO administration that Commissioners past and present state is governed by and accountable under administrative principles. The article will deal with the first now and the second shortly.

2.3.3 Public utility of 'soft law' and PCGs

Professor Creyke refers to a number of areas in which 'soft law' offers 'practical advantages', some of which Jenkins says apply to PCGs:

> They can be made by government without the delay and complexity associated with the creation of legislation; they are flexible, informal, cheap, and largely immune from judicial review.
>
> Soft law rules are not only easy to make but they are easy to change. … [S]oft law fosters a collaborative approach between government and those being regulated – assuming that codes and guidelines are developed in conjunction with users and those being regulated. Soft law, more than legislation, is better able to provide innovative solutions, tailored to meet the needs of individual industries or particular government agencies.[51]

Professor Creyke also notes a number of problems:

> Despite its growth and apparent popularity there are problems. These include government use of soft law to make law without resort to Parliament, to instruct judges on the meaning of statutes and to insulate bureaucracies from review.
>
> Practical issues of concern to government and business are that soft law is generally drafted by 'loving hands at home' with the attendant problems of lack of clarity and, in some cases, legal error, that can arise.[52]

Professor Creyke also comments that:

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[49] Hon Justice Jennifer Davies, 'Tax Stability' (2020) 44(1) *Melbourne University Law Review* 424, 436.
[50] Ibid 437–8.
[51] Creyke, above n 44, 17–18 (footnotes omitted); Jenkins, above n 44, 546.
[52] Ibid 18 (footnote omitted).

> A more significant danger is that agencies can attribute an inflated stature to their own policies. Agency policies are designed to structure discretion, provide certainty and consistency, and guide officials in decision-making. These are laudable objectives but if policies are couched in mandatory terms, this can obscure the fact that a more flexible application of rules is permissible. For example, the overarching statement on corporate policies with the Australian Taxation Office states:
>
> > It is mandatory for all Tax Office employees to … follow Practice Statements relevant to the tasks they are performing [except] 'where there are concerns about the application of the Practice Statement (for example, unintended consequences)'.
>
> This overstatement could lead to internal policies being applied inflexibly.[53]

Professor Creyke's appraisal encapsulates part of the undercurrent of unpublished criticism of some PCGs in the legal and tax professions that PCGs inflexibly lay down rules that bind ATO officers and hamper the achievement of sensible outcomes based on individual circumstances and negotiation.

To further evaluate the public utility of PCGs there is a need to examine specific PCGs. This will be pursued in section 3 of this article.

Professor Creyke also asks whether there is an 'accountability deficit' in respect of 'soft law'. This essentially refers to the questions as to the extent of parliamentary and judicial oversight. This is another theme in the undercurrent of criticism of PCGs.

These questions or concerns are examined in the next sections which begin to explore PCGs in light of the technical operation of Australian administrative law.

2.3.4 Legal source and scope of power to make PCGs

The Commissioner explains the legal source of power to make PCGs in these terms:

> The provision of compliance guidance can be seen as consistent with the duty of good management stemming from the Commissioner's general powers of administration of the taxation laws. Balanced against the duty to assess and collect the revenue properly payable under the law, the duty of good management involves efficient resource allocation decisions to achieve optimal, though not necessarily maximum, revenue collection.[54]

Both sentences are important and should be examined carefully.

The general power of administration (GPA) is conferred by legislation using the formula which appears in the some thirty or more statutes administered by the Commissioner in whole or part:[55]

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[53] Ibid 18–19 (citing Tax Office Practice Statement System (PS 2003/01) 3 (as it then read)).
[54] PCG 2016/1, above n 2, [8].
[55] See the Terms of Reference published by the Inspector-General of Taxation and Taxation Ombudsman into 'The Exercise of the Commissioner's General Powers of Administration', available at: https://www.igt.gov.au/wp-content/uploads/2021/12/Terms-of-Reference-GPA-1.pdf.

> The Commissioner has the general administration of this Act.[56]

The predominantly English cases concerning the Commissioner's power to settle disputes as to tax liability have given rise to the expression the duty of 'good management' required by the GPA and this terminology is, as noted earlier, referred to by the Commissioner in explaining the source of power for PCGs.[57]

The 1982 English House of Lords decision in the *Fleet Street Casuals Case* is helpful in explaining the complex coalescence in the GPA of the duty of good management and the wide managerial discretion conferred to perform that duty combined with the duty on the Revenue to taxpayers to act fairly.[58] The issue arose in a challenge to the UK Revenue establishing a scheme like a taxpayer amnesty for a class of taxpayers that did not extend to all taxpayers. Lord Diplock described the breadth of powers conferred on the Revenue in these terms (emphasis added):

> All that I need say here is that the board are charged by statute with the care, management and collection on behalf of the Crown of income tax … In the exercise of these functions the board have a *wide managerial discretion* as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection. … I do not doubt, however, and I do not understand any of your Lordships to doubt, that *if it were established that the board were proposing to exercise or to refrain from exercising its powers not for reasons of 'good management' but for some extraneous or ulterior reason, that action or inaction of the board would be ultra vires and would be a proper matter for judicial review* if it were brought to the attention of the court by an applicant with 'a sufficient interest' in having the board compelled to observe the law.[59]

Lord Scarman also said:

> Nor do I accept that the duty to collect 'every part of inland revenue' is a duty owed exclusively to the Crown … I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising

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[56] See, for example, *TAA 1953*, above n 7, s 3A.

[57] There is a helpful body of case law and commentary arising in respect of the Commissioner's power to settle disputes the detail of which are beyond the scope of this article: See David W Marks QC, 'Not My Money to Give Away' (2018) 22(1) *The Tax Specialist* 18; Matthew Walsh, 'Tax Deeds' (2018) 21(5) *The Tax Specialist* 211. The predominantly English cases and some Australian cases are discussed.

[58] Although the case has relevance for the UK law in respect of the doctrine of legitimate expectations, the Australian courts appear to have in some respects diverged from the UK on this doctrine. In any event, the issue of legitimate expectations is not relevant to the question of the GPA and is not relied upon by the author or the Australian courts or the ATO in respect of the analysis of the GPA. To the extent that the issue of legitimate expectations is dealt with statutorily, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') concerns itself with statutory concepts that, although derived from general law legitimate expectations, stand in their own terms such as whether a person is 'aggrieved' and whether a statutory ground of review is made out. See further discussion in section 2.4.3 below.

[59] *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 636–7 ('*Fleet Street Casuals Case*').

> within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect.[60]

The balancing required by the Commissioner involves the two particular legal conditions that are mentioned by the Commissioner in his policy on PCGs, quoted earlier.[61]

That duty will arise once the Commissioner possesses a sufficient basis to conclude that revenue is payable so that there is an obligation to assess and collect revenue.[62] That basis will be in part factual, normally based on information and documents available to the ATO, and legal in the conclusion that based on the available taxable facts a legal liability arises. It follows that the PCG, by taking the position that no further compliance resources will be applied, avoids the duty arising in particular cases because the Commissioner will not have a basis to assess and collect tax in respect of a particular taxpayer.

Nevertheless, the Commissioner also states that 'the duty of good management involves efficient resource allocation decisions to achieve optimal, though not necessarily maximum, revenue collection'.[63] This condition reflects the statutory obligation on the Commissioner as an accountable officer under section 15 of the *Public Governance, Performance and Accountability Act 2013* (Cth).[64] It follows that the Commissioner must have regard to the most efficient use of compliance resources and compliance costs in the tax system.

It is therefore not apt to describe the GPA as simply a statutory discretion such as to remit interest or penalties[65] because it ignores the duties imposed on the Commissioner, the power conferred to discharge the duty and the legal conditions that control or must be balanced against the exercise of the GPA. As was noted by the Full Court of the Federal Court in 1998, once the duty to assess arises under an Act that the Commissioner is charged to administer there is an obligation to assess and there is no question of discretion to not assess.[66] No conduct by the Commissioner can operate as an estoppel against the operation of the Act, the Full Court citing the High Court in *Wade's Case*.[67] To avoid the duty to assess arising, PCGs appear to be carefully drafted so as to state that compliance resources will not in effect be deployed such that a duty to assess and collect may arise.

It should therefore be asked how broad is the Commissioner's power in relation to PCGs? In one sense it can be said that the power is very broad because the courts have construed the GPA as giving a wide managerial discretion in respect of the administration of the whole of each Act the Commissioner administers. Thought of as

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[60] Ibid 651; Marks, above n 57, 20.
[61] See n 54, above.
[62] *Macquarie Bank Ltd v Commissioner of Taxation* [2013] FCAFC 119 [11]; *Denlay & Anor v Federal Commissioner of Taxation* (2011) 193 FCR 412; *Federal Commissioner of Taxation v Donoghue* (2015) 237 FCR 316; *Bellinz Pty Ltd v Federal Commissioner of Taxation* (1998) 84 FCR 154, 167–8 per Hill, Sundberg and Goldberg JJ ('*Bellinz*').
[63] See PCG 2016/1, above n 2, [8].
[64] See also s 26.
[65] *TAA 1953*, above n 7, s 8AAG, Sch 1, s 298-20.
[66] *Bellinz*, above n 62, 167–8.
[67] Ibid 164 citing *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105, 117 per Kitto J ('*Wade*').

day-to-day ATO administration that power is very wide. That said, the managerial discretion must be exercised consistent with the duties on the Commissioner.

Nevertheless, the GPA that underlies PCGs has been described by the Commissioner as 'narrow' in a still current 2009 Law Administration Practice Statement in that it can 'only be exercised in relation to management and administrative decisions' and is subject to the 'operation of administrative law principles'. The Practice Statement summarises the operation of the principles in these precise terms, largely reflecting *ADJR Act* grounds of review that will be discussed below:[68]

What the Commissioner must do
Make decisions based on merit
Act fairly, in good faith and without bias, enabling each party the opportunity to state their case.
Treat taxpayers fairly and equitably. This means treating taxpayers equally, rather than treating them in exactly the same manner.
Avoid conferring an advantage on a taxpayer (or taxpayers) thereby creating 'a privileged group who are not so much taxed by law as untaxed by concession'.
What the Commissioner cannot do
Exceed the authority conferred on him by the law – such actions being invalid and of no legal effect.
Use the powers for improper purposes or in bad faith – the powers must be used for a purpose that is stated in, or implied by, the tax laws.
Limit his discretion by inflexibly applying a policy or rule. Policy must not conflict with another principle of administrative law, and the Commissioner must generally be prepared to depart from the policy in appropriate (if only exceptional) cases.
Act at the direction of someone else, delegate his power to anyone else (unless authorised to do so), or enter into a binding undertaking regarding the future exercise or non-exercise of his discretionary power in a way that is against the public interest.
Be prevented from lawfully exercising his discretion by the doctrine of estoppel.

That 2009 Practice Statement in hindsight appears to be designed to explain the Commissioner's views on the GPA in answer to pressure to dispense with the clear operation of the law to conform with the purported policy or in cases where legislation was argued to have unintended and inappropriate results. This context is especially

[68] PS LA 2009/4, above n 40, [4] and Appendix B [11].

evident in a detailed 2009 speech by then Second Commissioner Bruce Quigley given two months before the Practice Statement was published,[69] eight years before the introduction of the Commissioner's Remedial Power (CRP) in 2017 and in which he argues the case for the GPA being 'narrow'.[70]

Laying the foundations for PCGs being squarely within the scope of the GPA, the 2009 Practice Statement states:

> The GPA are narrow in scope and governed by the operation of administrative law principles. A proper exercise of the powers is confined to dealing with management and administrative decisions, such as the allocation of compliance resources more broadly recognised as practical compliance approaches.[71]

2.3.5 PCGs and the Commissioner changing a view of the law

Whilst one of the core strategic uses of the PCG is as a risk-based compliance tool, another is to facilitate a change of view of the law by the Commissioner. Such changes may be for a range of reasons, such as revision of ATO legal opinions, new case law or new legislation. Regardless any change of legal view presents the Commissioner competing pressures to discharge the obligation to follow the law and to treat taxpayers fairly who may have relied on an earlier view of the law stated by the Commissioner.

The GPA, in empowering the Commissioner to allocate compliance resources, provides a mechanism for dealing with these pressures typically by stating that the new view of the law will be applied prospectively and compliance resources will not be allocated to auditing cases prior to that date where the taxpayer can demonstrate bona fide reliance on the former ATO view and there is no fraud, evasion or tax avoidance. Specific examples will be examined in section 3.

The Commissioner's policy on applying a view of the law prospectively is set out in Law Administration Practice Statement 2011/27. Relevant to statements in PCGs to support a changing view of the law, the Commissioner states:

> The Commissioner needs to make decisions about the allocation of ATO resources to compliance and other activities that promote the efficient, effective, economical and ethical use of those resources. In doing so the Commissioner must still comply with the law.
>
> In the present context, this concept means you must do more than a simple cost-benefit analysis of whether a given audit process is likely to result in recovering an amount of revenue that is greater than the cost of undertaking the audit. The Commissioner may and should give substantial weight to broader considerations, including the benefits to the tax system of administering the law in a way that promotes certainty and fairness in practice.
>
> While the Commissioner can't use the powers of general administration to accept non-compliance with the law, as part of the duty of good management, the Commissioner can decide not to undertake compliance action on a

[69] Bruce Quigley, 'The Commissioner's Powers of General Administration: How Far Can He Go?' (Paper presented to the 24th National Convention of the Taxation Institute of Australia, Sydney, 12 March 2009).
[70] Ibid 5.
[71] PS LA 2009/4, above n 40, [4].

particular issue for prior years or periods. PS LA 2009/4 addresses the exercise of the Commissioner's powers of general administration, including a range of factors the Commissioner will take into account in deciding whether to undertake compliance action in relation to prior years or periods.[72]

2.3.6 PCGs – lack of parliamentary oversight

PCGs are not specifically subject to parliamentary oversight because there is no legal requirement for that to occur although potentially a PCG might be subject to the consideration of a parliamentary committee when examining tax administration. That said, PCGs are not made by Parliament such as a statute or a regulation or rule made under statute. Also, PCGs are not a legislative instrument that is required to be tabled in Parliament because they neither bear the designation under statute of being legislative instruments nor determine the law or alter the content of the law and do not have any effect on a privilege or interest, impose an obligation, create a right, or vary or remove an obligation or right.[73] The Commissioner does not register PCGs as a notifiable instrument although the Commissioner may do so.[74]

The article will return to the policy question of whether there should be parliamentary oversight in section 4. To anticipate that discussion, the case for parliamentary oversight from a policy perspective is especially appropriate where a PCG, by making a rule of thumb or simplified compliance method, is to the advantage of one class of taxpayer over another. In these cases, taxpayers who miss out on concessional treatment offered by a PCG, such as because they are not defined to be in a concessional class, have no recourse. It would be better for the legislation to either make express provision for the concession or for the concession to be by way of legislative instrument tabled in Parliament and subject to parliamentary oversight. By contrast, it is submitted that a PCG that is part of a risk assessment strategy or a changing view of the law does not warrant parliamentary oversight because affected taxpayers will have rights of objection and appeal if they take a position contrary to the Commissioner's view. The next section will explain the judicial recourse available (or not) to make good the point.

2.4 What are the legal avenues available for a taxpayer to challenge a PCG?

2.4.1 Objections and appeals under Part IVC of the TAA 1953

As an overriding proposition, a taxpayer that disagrees with a position of the Commissioner in a PCG and is adversely assessed for tax (and potentially penalties) may object and appeal against the Commissioner's position under Part IVC of the *TAA 1953* (Part IVC) essentially on the merits of the law and evidence, rather than administrative law principles, which focus on procedural regularity.

To that extent, PCGs are not legally coercive because taxpayers have the right to dispute the Commissioner's substantive position. The only issue however in a Part IVC proceeding is whether the Commissioner's taxation decision, such as an assessment, is excessive or otherwise incorrect.[75] The procedural steps involved in respect of a PCG

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[72] PS LA 2011/27, 'Determining Whether the ATO's Views of the Law Should Be Applied Prospectively Only', [13] (footnotes omitted).
[73] See *Legislation Act 2003* (Cth) s 8.
[74] Ibid s 11.
[75] *TAA 1953*, above n 7, ss 14ZZO and 14ZZK.

will not be relevant in the proceeding as they will precede the assessment or other action to create the legal liability to tax and penalties. In any event, taxpayers can choose to ignore PCGs and have the right to test their case in court under Part IVC.

By contrast, a taxpayer that might miss out on the benefit of a PCG or simply wishes to challenge the rightfulness of the Commissioner's position in a PCG, but is otherwise unaffected by it, will have no Part IVC rights. This is because they have no assessment or other decision of the Commissioner open to challenge under Part IVC.[76]

2.4.2 Judicial review challenges at general law

Beyond the right to object and appeal under Part IVC the rights of judicial review of PCGs in Australia appear to be very limited to the point of being virtually non-existent.

The two jurisdictional pathways for judicial review under administrative law principles (as distinct from Part IVC merits review) offer different challenges.

Review under general administrative law principles under section 39B of the *Judiciary Act 1903* (Cth) and section 75(v) of the Constitution will almost certainly be refused in the discretion of the court if review under Part IVC is available.[77] That will in practical terms knock out judicial review claims where the taxpayer is able to pursue a Part IVC objection and appeal.

In cases where there is no Part IVC objection and appeal because the applicant is not affected by a taxation decision, the applicant will be unable to challenge the Commissioner's position either at common law (because they lack a sufficient interest or standing)[78] or under the *ADJR Act*, as will be further discussed below, because they are unlikely to be a person who is 'aggrieved' by the decision. This precise situation was the fact pattern in the *Fleet Street Casuals Case* where a citizen unsuccessfully sought judicial review of a form of amnesty.

2.4.3 Jurisdiction for judicial review under the ADJR Act

The *ADJR Act* is Australia's premier legal regime for judicial review and the operation of administrative law principles. It operates in respect of specific statutory powers conferred on the Commissioner unless, as will be explained, there is an exemption. An example of decisions under specific powers that are not exempt is under the Commissioner's information gathering powers.[79]

Despite the Commissioner's policy that the GPA is 'governed by the operation of administrative law principles',[80] judicial review under the *ADJR Act* is unlikely to be available in respect of the exercise of the Commissioner's GPA by way of making or giving effect to a PCG.

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[76] See also the conclusive and prima facie evidence rules that also significantly affect the means by which decisions of the Commissioner can be challenged: ibid Sch 1, Div 350, especially s 350-10.
[77] *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 153 per Gummow, Hayne, Heydon and Crennan JJ; also 174–6 per Kirby J.
[78] *Fleet Street Casuals Case*, above n 59, 633 per Lord Wilberforce.
[79] *TAA 1953*, above n 7, Sch 1, s 353-10.
[80] PS LA 2009/4, above n 40, [4], Appendix B [11].

Even before getting to the question of whether the exemptions in Schedule 1(e) apply, which is discussed at the end of this section, there is the threshold question of whether there is any jurisdiction under the *ADJR Act* at all.

By way of explanation, the starting point is to establish jurisdiction under either section 5(1) (which deals with decisions) or section 6(1) (which deals with conduct for the purpose of making a decision) of the *ADJR Act*. The jurisdictional criteria or conditions to obtain an order of review on specified grounds under either section are almost the same so this article will deal with section 5(1), the more important of the two provisions.

Section 5(1) relevantly states:

> A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court … for an order of review in respect of the decision on any one or more of the following grounds …

Breaking down section 5(1), *first*, there must be a person who must be aggrieved. It has been observed that the condition is 'not encased in any technical rules' and is not limited to a person who is legally interested in the decision.[81] Nevertheless, as the Full Court of the Federal Court ruled in 2015, the grievance of the applicant must be special to them and different to that of other members of the community. More pointedly the Court said:

> The applicant's interest must not be remote, indirect or fanciful. The interest must be above that of an ordinary member of the public and must not be that of a mere intermeddler or busybody.[82]

The test appears to be essentially the same as applied in the *Fleet Street Casuals Case* to deny standing for judicial review for a public spirited citizen opposed to a PCG.

Second, there must be a 'decision to which this Act applies'. This is a defined term in section 3(1) of the *ADJR Act* although the term 'decision' alone is undefined, the expression 'making of a decision' referring inclusively to a wide range of cases.[83] A decision must be of an 'administrative character',[84] which itself is, according to Aronson, Groves and Weeks, rarely defined in case law 'beyond saying that its only antitheses are legislative and judicial'.[85] It may be accepted that a decision to make a PCG is of an administrative character because it is neither legislative nor judicial.

The established view of the High Court in *Bond* is that a reviewable decision under the *ADJR Act* generally will:

> entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate

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[81] LexisNexis, Practice and Procedure, High Court and Federal Court of Australia, [160,055.60 – Service 292] ('Administrative Appeals') citing a large body of case law.
[82] *Assarapin v Australian Community Pharmacy Authority* (2015) 239 FCR 161, 173, quoting *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50, 65–6 per Lockhart J.
[83] *ADJR Act*, above n 58, s 3(2).
[84] Ibid s 3(1) (definition of 'decision to which this Act applies').
[85] Aronson, Groves and Weeks, above n 47, [2.480]; general discussion, [2.470]–[2.500].

> decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an indeterminate decision, might accurately be described as a decision under an enactment.[86]

A PCG in and of itself will often not operate as a reviewable decision as explained in this passage because typically a PCG expresses an administrative policy that foreshadows other decisions that may be made in certain circumstances, some of which may themselves be final, operative and determinative such as an assessment of tax or penalties.

There is a separate question, assuming there is a 'decision', whether that decision is 'under an enactment'. A decision made under the GPA is not such a decision according to long standing authority of *Hutchins*, a decision of the Full Court of the Federal Court.[87] *Hutchins* concerned voting by the Commissioner at a meeting of bankruptcy creditors. In addition to the GPA being the source of power it was relevant that the Commissioner's vote alone was not conclusive as to the rights of the applicant.

Aronson, Groves and Weeks seem to be of the view that *Hutchins* is no longer good law as to whether a decision under the GPA is not a 'decision under an enactment'[88] given the High Court decision in *Tang*.[89] In *Tang*, the majority of the Court appears to reject the reasoning in *Hutchins* that the decision was too remote from the GPA as a legislative source of power to be 'under an enactment'.[90] The majority found that it was sufficient for a 'decision to be under an enactment' that the decision be required or authorised by the enactment,[91] which in the case of a PCG appears to be satisfied by the GPA as a source of power. Nevertheless the majority did not overrule *Hutchins* as the decision did not affect the rights of the applicant.

Later cases have not gone quite as far as Aronson, Groves and Weeks in dismissing the reasoning in *Hutchins* in light of *Tang* but the writing is on the wall. For example, the reasoning of *Hutchins* that there was no decision under an enactment was considered by Gyles J in *obiter dicta* in a decision of the Full Court of the Federal Court in 2006, his Honour concluding that the majority in *Tang* had 'indicated … that the adoption of a proximate source test, such as applied by Black CJ in that case, was not appropriate'.[92]

That said, in *Bilborough*,[93] Kiefel J (then of the Federal Court and now Chief Justice of the High Court) did not go quite as far. In that case the Court rejected an application for judicial review of the decision of the Commissioner to reject a taxpayer's offer of

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[86] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337 per Mason CJ with whom Brennan and Deane JJ concurred ('*Bond*'). See also the majority of the High Court in *Griffith University v Tang* (2005) 221 CLR 99, 113 per Gummow, Callinan and Heydon JJ referring positively to *Bond*, above. *Griffith University v Tang* ('*Tang*') is widely followed by appellate courts and was referred to in passing with apparent approval on the question of being 'under an enactment' in *Minister for Home Affairs v DLZ18* (2020) 270 CLR 372, 398.

[87] *Hutchins v Deputy Commissioner of Taxation* (1996) 65 FCR 269 ('*Hutchins*').

[88] Aronson, Groves and Weeks, above n 47, [2.560].

[89] *Tang*, above n 86.

[90] Ibid 109, 114.

[91] Ibid 130–1.

[92] See *Guss v Deputy Commissioner of Taxation* (2006) 152 FCR 88, 91–2 per Gyles J, referring to *Tang*, above n 86, 124–5.

[93] *Bilborough v Deputy Commissioner of Taxation* (2007) 162 FCR 160 ('*Bilborough*').

compromise of a tax debt. Her Honour appears to treat the reasoning in *Hutchins* as consistent with *Bond* and *Tang* and does not state that the Court is bound to reject the reasoning in *Hutchins* that was criticised in *Tang*.[94] Her Honour instead concisely summarises the test in *Tang* and then concludes on the facts that the second part of the test is failed:

> The majority in *Tang* 221 CLR at [89] concluded that the determination of whether a decision is 'made … under an enactment' involves two criteria, both of which must be met: the 'decision must be expressly or impliedly required or authorised by the enactment' and 'the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment'.[95]

Her Honour refers to the power to recover unpaid taxes and compromise tax debts as being authorised by the GPA but concludes that the decision to accept a compromise does not confer a right on the applicant because that decision derives not from statute but the general law. One readily infers from the context that Her Honour is referring to contract law.[96]

It follows that identifying precisely the decision which has a substantive effect on legal rights and obligations that is made under an enactment is critical to establishing jurisdiction for judicial review under the *ADJR Act*. In that regard, Aronson, Groves and Weeks refer to a series of Federal Court authorities concerning steps by the ATO that were preliminary to a decision but were not reviewable, largely post the High Court decision in *Bond*, in which none of the steps amount to a final or operative decision. *Tang,* in its focus on the effect on legal rights and obligations, confirms the trend of authority. Aronson, Groves and Weeks draw a contrast between such cases including *Hutchins* and those where the administrative action does have a substantive effect such as writing letters to a taxpayer expressing an opinion as to tax liability and then withdrawing it.[97] It may be that some administrative action derived from a PCG could be drawn into judicial review if there is a decision giving it a substantive effect. In my view the Commissioner is likely to submit, and the courts would accept, that if the decision with substantive effect is an assessment or otherwise creates a tax liability then there may well be a reviewable decision under the *ADJR Act* but for the operation of the statutory exemption from review in Schedule 1 of the *ADJR Act* for decisions that fall into the class applicable to most tax Acts. That exemption applies to:

> decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty …[98]

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[94] Ibid 165–6.
[95] Ibid 166.
[96] Ibid.
[97] Aronson, Groves and Weeks, above n 47, [2.380], referring to *Australian Wool Testing Authority Ltd v Federal Commissioner of Taxation* (1990) 26 FCR 171.
[98] *ADJR Act*, above n 58, Sch 1, para (e).

The remedy for the applicant, if there is one, then only lies in Part IVC objection and appeal proceedings.

2.4.4 Grounds for judicial review under the ADJR Act

Given the foregoing analysis of why judicial review under the *ADJR Act* is most likely to be unavailable, a consideration of the grounds of review is from a strictly legal perspective virtually pointless in relation to PCGs.

To add to the pessimism, from the perspective of an applicant for judicial review, Aronson, Groves and Weeks identify a considerable body of judicial authority refusing to grant judicial review to hold bureaucrats to the non-procedural (ie, substantive) terms of non-statutory instruments.[99] In other words, there is no prospect of a court reviewing the substantive terms of a PCG.

Also, judicial review will not help an applicant to bind the Commissioner to statements in a PCG. As noted earlier, an administrative pronouncement by the Commissioner cannot act as an estoppel against the operation of statute.[100] Also as a general principle the courts have established that the statutory power or discretion of an administrator cannot be fettered by administrative action. As Aronson, Groves and Weeks put it, as a general rule, rigid or blanket policies are forbidden.[101]

Importantly, the grounds for review in sections 5 and 6 of the *ADJR Act* are a legislative statement and the Commissioner is, as noted earlier, committed to following them in respect of the GPA and so presumably also in respect of PCGs that the Commissioner says are made pursuant to the GPA.

With some editing of the language of sections 5 and 6 of the *ADJR Act*, the grounds are:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorised by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

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[99] Aronson, Groves and Weeks, above n 47, [3.270].
[100] See n 67, above.
[101] Aronson, Groves and Weeks, above n 47, [5.250].

(h) that there was no evidence or other material to justify the making of the decision;

(j) that the decision was otherwise contrary to law.

The reference in paragraph (e) above to an improper exercise of a power shall be construed as including a reference to:

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(j) any other exercise of a power in a way that constitutes abuse of the power.

Of course, whether or not these administrative principles are satisfied or not will depend on the facts of each case. To reiterate, even though, as explained above, judicial review before the Federal Court may never be available in a particular case, these grounds of review appear to be the administrative law principles that the Commissioner has committed to and expects to be followed. There is a form of oversight and accountability through the power of the IGTO to investigate and report where administrative law principles have not been followed. The IGTO jurisdiction covers PCGs and the exercise of the GPA even though the same decisions or actions are generally not subject to judicial review as explained earlier.[102]

3. EXAMINATION OF SPECIFIC PCGS

3.1 Introduction

One of the purposes of this study is to build a better informed discussion of modern tax administration. Unfortunately there are some misconceptions to be dispelled.

[102] See *Inspector-General of Taxation Act 2003* (Cth) s 15, which gives the IGTO the powers conferred by s 15 of the *Ombudsman Act 1976* (Cth). Note especially ss 15(1) of the latter Act which essentially states the reporting jurisdiction of the Ombudsman (and therefore for the IGTO) in terms that correspond closely to the grounds of judicial review under the *ADJR Act*, above n 58.

One popular example is the perception that the use of PCGs is increasing. The facts tell another story. The numbers total 61 and have reduced every year since PCGs were introduced. Here is the breakdown:

2016 – 18 (17 + the PCG Policy statement in PCG 2016/1)

2017 – 10

2018 – 9

2019 – 8

2020 – 7

2021 – 5

2022 – 3

2023 – 1

This trend might be explained by a number of factors. The author speculates that, as the ATO gains more experience with PCGs, it is deploying them more selectively for cases such as Typologies VI–X, discussed below, where there is a risk matrix model (such as in the areas of transfer pricing, section 100A of the *Income Tax Assessment Act 1936* and diverted profits tax). PCGs of the latter type are probably seen by the ATO as especially worth the investment because they are part of a major compliance risk strategy.

Another criticism is that the PCG is really the ATO making law. At its highest, PCGs are 'soft law' as discussed earlier. Nevertheless, PCGs are carefully drafted to not present a view of the law. Instead, where appropriate, the ATO issues legal views in Public Rulings that are a companion to a PCG, presenting a total package.

Although not presenting a legal view, PCGs bring a much needed discipline in certain cases to the questions facing the Commissioner of 'what are we worried about' and 'what we will tell the world we will do about it'. Other publications available to the Commissioner that convey compliance perspectives are calibrated to their audience and context, such as the ATO website or Tax Alerts, but PCGs often offer much more in terms of necessary detail and judgment as will be apparent from the exploration of the 10 types of PCG, as will be discussed shortly.

Another misconception is that the ATO is insufficiently consultative about PCGs. The facts are that the ATO consults widely on draft PCGs and since 2017 has published consultation compendiums on the ATO Legal Database in a number of instances.

To start the analysis, it is important to recognise that not all PCGs are the same – the nuances between them matter. Care is needed in making generalisations so PCGs should be studied to discover patterns, themes and typologies. That is why this section of the article will look at particular PCGs.

3.2 A PCG typology

On the basis of the author's review of every PCG, it is suggested that PCGs may be grouped into the following types having regard to their main purpose or purposes:

I. Alleviating taxpayer compliance costs.

II. Transition to accommodate system change problems.

III. Simplifying the burden on a party to fund a tax payment by another party.

IV. Resolving uncertainty about tax rate changes.

V. Supporting transition to new legislative regimes.

VI. General guidance as to how a legislative provision will be administered.

VII. Safe harbours and rules of thumb – no risk assessment model.

VIII. Risk assessment model to modify taxpayer behaviour.

IX. Transition to a new ATO view of the law.

X. Restructuring in light of new legislation.

The typology is descriptive like an ornithological field guide rather than a theoretically rigorous taxonomy. It is not so exact that a PCG can only fall into one type. Some PCGs have several main purposes, such as PCG 2022/2 (section 100A) which exhibits purposes in the Types I and II but is best included in Type IX. In fact it is entirely appropriate that PCGs are nuanced in their design and purpose so as to respond appropriately to the particular administrative situation they are to address.

Examples of each type will be examined and discussed in the following sections. The order starts with types designed to be entirely ameliorative of costs and other difficulties facing taxpayers (Types I–VII) before turning to PCGs with a strategic agenda to influence taxpayer behaviour through risk models and changes in the ATO view of the law (Types VIII–X).

3.3 Type I: alleviating taxpayer compliance costs and complexity

It may come as a surprise to the critics of PCGs that the first three PCGs dealt with fuel tax credits.[103]

The drive for PCGs on fuel tax credits does not seem to have run out of gas, the latest PCG on fuel tax credits being published in 2021.[104] In fact PCGs on fuel tax credits total seven, on average one each year since the PCG was introduced.

These PCGs largely offer practical, simplified compliance methods for various situations and classes of claimants such as basic calculation methods for small claimants and for heavy vehicles;[105] simplified fuel tax credit rate calculation for non-business

[103] PCG 2016/2, 'Fuel Tax Credits – Practical Compliance Methods for Small Claimants'; PCG 2016/3, 'Fuel Tax Credits – Fuel Tax Credit Rate for Non-Business Claimants', and PCG 2016/4, 'Fuel Tax Credits – Incidental Travel on Public Roads by Certain Vehicles'.
[104] PCG 2021/2, 'Fuel Tax Credits – Basic Method for Heavy Vehicles'.
[105] PCG 2016/2, above n 103; PCG 2021/2, above n 104.

claimants;[106] fair and reasonable apportionment of fuel costs between creditable and non-creditable cases;[107] and farmers in disaster affected areas.[108]

The fuel tax credit PCGs appear to be directed to reducing taxpayer compliance costs and some PCGs are explicit in stating this purpose.[109] This purpose typifies the first type of PCG with an additional characteristic that there is no evident purpose of influencing taxpayer behaviour in the light of any risk assessment as typifies the next type of PCG.

One doubts that claimants who benefit from these PCGs will complain but what about claimants who do not benefit and have to comply with the full rigour of the law? The latter have no standing to obtain judicial review of these PCGs, as noted earlier. Given that PCGs are not created by the Parliament or subject to parliamentary oversight, is the well-intentioned use of PCGs in this type of case objectionable as it treats fuel tax credit claimants differently?

No doubt a good parI of the problem is the Commissioner having to administer legislation that if applied to the letter would impose disproportionate compliance costs on some claimants for the fuel tax credit. It is submitted that this is a case where in a perfect world the legislation would either be better drafted so as not to create unnecessary cost burdens or provide for a mechanism for the Commissioner to alleviate compliance costs that is subject to parliamentary oversight, at least by empowering the Commissioner to make a legislative instrument under the *Legislation Act 2003* (Cth). But tax administration occurs in far from a perfect legislative world and the Commissioner is left to administer the law that is enacted not that which is perfected.

There are a number of other PCGs that seem designed to fall within this first type of PCG and they also share the same difficulty just identified.

PCG 2016/7, 'GST Joint Ventures in the Energy and Resource Industry', points nicely to the question of why as a matter of good public policy that industry enjoys special treatment over others. It is hard for the author to bracket that industry with some of the more worthy classes benefited by some fuel tax PCGs such as farmers in a disaster affected area where a special case exception hardly needs to be explained.

PCG 2016/10, 'Fleet Cars: Simplified Approach for Calculating Car Fringe Benefits', is another example where the good public policy explanation for simplification applies to fleet cars but not other cases of fringe benefits taxpayers.

Another example where a PCG benefits a narrow class without immediately obvious policy explanation is PCG 2021/1, 'Application of Market Value Substitution Rules When There Is a Buy-Back or Redemption of Hybrid Securities – Methodologies for Determining Market Value for Investors Holding Their Securities on Capital Account'. Here the PCG offers a technical explanation:

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[106] PCG 2016/3, above n 103.
[107] PCG 2016/4, above n 103; PCG 2016/8, 'Fuel Tax Credits – Apportioning Fuel for Fuel Tax Credits'; PCG 2016/11, above n 9. There are examples of PCGs offering apportionment methods, eg, PCG 2019/8, 'ATO Compliance Approach to GST Apportionment of Acquisitions That Relate to Certain Financial Supplies'.
[108] PCG 2019/2, 'Fuel Tax Credits – Practical Compliance Methods for Farmers in Disaster Affected Areas'.
[109] Eg, PCG 2016/2, above n 103, [2].

> 4. The ATO recognises the practical problems faced by investors in determining the market value of a hybrid security for the purposes of calculating capital proceeds from a buy-back or redemption. This Guideline provides a practical compliance approach for determining the market value of a hybrid security for capital gains tax (CGT) purposes when it is bought back or redeemed (as relevant) from an investor holding it on capital account.

It may be confidently observed that hybrid securities are not the only case where the CGT rules present challenges in determining market value so why have a PCG for only this situation and not others?

The problem here is the lack of parliamentary oversight over PCGs that discriminate between different classes of taxpayer by administering the law differently in respect of the same rules.

Of course, there are other PCGs that appear to offer practical compliance options that reduce compliance costs and complexity which do not discriminate between taxpayers such as simplified transfer pricing record-keeping options;[110] GST and countertrade transactions with no net revenue effect;[111] and GST – inbound tour operators and agency.[112]

Some PCGs also apply a sensible *de minimis* rule that avoids discrimination such as 10 per cent of the value, eg, GST and countertrades; and exempt car benefits and exempt residual benefits in determining the private use of vehicles.[113]

It is the author's submission that the preferred approach in all cases is that this first type are subject to parliamentary oversight, especially where there is discrimination between taxpayers. Ideally, to ensure a basic level of accountability, legislation would be enacted to empower the Commissioner to make a legislative instrument that is registered and tabled in Parliament under the *Legislation Act 2003* (Cth) in these cases rather than use a PCG. Put another way, discrimination between taxpayers should be a matter authorised by and accountable to Parliament. Of course the Commissioner is subject to accountability in various ways but the PCG itself, as has been explained, is not subject to parliamentary oversight or judicial review.

3.4 Type II: transition to accommodate system change problems

Another accommodation of compliance problems faced by taxpayers is in respect of the systems for compliance. No doubt in an increasingly digital compliance environment system readiness or fitness for purpose is of increasing practical importance.

PCG 2019/7 offers a compliance approach for large APRA-regulated superannuation funds in respect of pension tax bonuses not included in members' opening account balances on commencement of a pension. The PCG wording is important:

> 1. This Guideline provides a transitional compliance approach for large Australian Prudential Regulation Authority (APRA) regulated superannuation

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[110] PCG 2017/2, 'Simplified Transfer Pricing Record-Keeping Options'.
[111] PCG 2016/18, 'GST and Countertrade Transactions'.
[112] PCG 2018/6, 'GST – Inbound Tour Operators and Agency'.
[113] PCGs 2016/18, above n 111, and PCG 2018/3, 'Exempt Car Benefits and Exempt Residual Benefits: Compliance Approach to Determining Private Use of Vehicles'.

> funds that provide a pension tax bonus to members where the superannuation funds are facing practical difficulties in complying with certain legislative requirements….
>
> 11. We recognise that some superannuation funds that wish to provide pension tax bonuses to members may need to modify existing systems to ensure full automation, and integration with core processing and integrity controls with respect to having the value of the pension tax bonus correctly reflected in the member's pension account balance.[114]

Another example of a PCG that provides for transitional support due to taxpayer system issues is PCG 2017/3, 'Income Tax – Supporting the Implementation of the Changes to the Taxation of Transition to Retirement Income Streams'.

All very sensible, but these funds are unlikely to be the only entities with system challenges. Perhaps the ATO will offer PCGs to others in worthy cases who need similar dispensations from the rigours of legislation whilst they put compliant systems in place. There is a lingering question however as to how far and in what cases the Commissioner should go in the name of taxpayer systems transition. The author understands that, especially in the financial services sector, the ATO will give practical compliance guidance about system compliance that does not make it into PCGs. The issue is not a lack of legal power to make a PCG but ensuring that system compliance guidance is transparent in a public form and subject to parliamentary oversight. Again there is a serious question why such guidance is not in a legislative instrument tabled in Parliament.

3.5 Type III: simplifying the burden on a party to fund a tax payment by another party

Some PCGs assist taxpayers not in respect of the methods to comply such as in the first two types, but in funding tax obligations.

An example is PCG 2018/4, 'Income Tax – Liability of a Legal Personal Representative of a Deceased Person'. PCG explains:

> 4. This Guideline is intended to enable LPRs of smaller and less complex estates to finalise those estates without concern that they may have to fund a liability of the deceased from their own assets. It sets out when an LPR will be treated as having notice of a claim by the ATO (including a claim arising from an amended assessment).

Seems very sensible but many entities are in the position of having to fund a liability out of a third party source, eg, a trustee from a trust estate, an agent from a principal. What is the policy justification for giving one class of entity an advantage over others in this situation?

Again, a legislative instrument would be a better approach than a PCG.

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[114] PCG 2019/7, 'Compliance Approach for Large APRA-Regulated Superannuation Funds in Respect of Pension Tax Bonuses Not Included in Members' Opening Account Balances on Commencement of a Pension'.

3.6 Type IV: resolving uncertainty about tax rate changes

Clarity about what is the legislated tax rate is fundamental to taxpayer compliance but sometimes practical clarity can be elusive.

An example of seeking to address this problem is PCG 2018/8, which is entitled 'Enterprise Tax Plan: Small Business Company Tax Rate Change: Compliance and Administrative Approaches for the 2015-16, 2016-17 and 2017-18 Income Years'. PCG explains:

> 1. This Guideline sets out the ATO's compliance and administrative approaches for corporate tax entities that have faced practical difficulties in determining their corporate tax rate and corporate tax rate for imputation purposes in the 2015-16, 2016-17 and 2017-18 income years.

Obviously the Commissioner must have formed the view that there would be a compliance problem unless taxpayers were assisted in transition to the changed rates. The intent of the administrative solution problem is laudable but should not the legislation as to rates be clear without a PCG? Would not it be better to deal with this issue in a legislative instrument, so in addition to the usual reasons that have been mentioned, the Parliament has on the record examples of practical compliance difficulties caused by legislation, which may provide a prompt for improved legislation in future?

3.7 Type V: supporting transition to new legislative regimes

Sometimes new legislative regimes have transitional compliance problems. The Commissioner will sometimes issue a PCG to help affected taxpayers.

Here is another from the financial services sector. PCG 2016/9 is entitled 'Attribution Managed Investment Trusts: Clearly Defined Rights on Transition to the AMIT Regime in 2017'. As will be shown, the PCG title promising 'clearly defined rights' is as a consequence of contorted language to say that the Commissioner will administer the law by reference to a fiction. The unfortunate words are exemplars of the problem of a PCG trying to escape statutory requirements.

> If the trustee wishes to make the choice for the trust to be an AMIT for the income year commencing 1 July 2016, there is limited time available to modify or replace the trust's constituent documents prior to 1 July 2016. Accordingly, where the relevant modifications or replacement are made on or after 1 July 2016 and no later than 31 October 2016, the ATO will administer the law on the basis that the relevant rights were in existence 'at all times' in respect of the income year commencing 1 July 2016 where …[115]

That is, subject to the specified conditions, the Commissioner will accept that changes to a trust deed in a four-month period after the end of the 2016 year of income were in existence at all times in that year of income.

This is a fiction that may be very helpful for affected taxpayers but could go beyond the power of a GPA by essentially saying the Commissioner will administer the law on the

[115] PCG 2016/9, 'Attribution Managed Investment Trusts: Clearly Defined Rights on Transition to the AMIT Regime in 2017', [5].

basis that black is white. It is not the same as a PCG providing transitional relief by not allocating resources, which does not suffer the same objection.[116]

It is also puzzling that the PCG was issued based on post year-end events involving trusts to deem them as having occurred within the year of income just ended given that the Commissioner in 2011 withdrew rulings that had stood since 1966 to provide a more or less similar concession as it was contrary to judicial authorities.[117] Those authorities are only reinforced by the 2022 High Court decision in *Carter* that require that present entitlement of a beneficiary must be established by whether within the year of income the beneficiary has a legal entitlement, without regard to post year-end events.[118]

In all, it would be better that legislation was drafted to properly provide for the transition or that the Commissioner was empowered to make a legislative instrument to deal with the transition.

3.8 Type VI: general guidance as to how a legislative provision will be administered

Some PCGs simply provide general guidance to a class of affected taxpayers as to how a legislative provision will be administered. One example is PCG 2018/1 which is headed 'ATO Compliance Approach – Attribution of ADI Equity Capital and Controlled Foreign Entity Equity' and explains how the ATO will administer section 820-300(3) of the *Income Tax Assessment Act 1997* (*ITAA 1997*) in the context of a taxpayer's calculation of its 'adjusted average equity capital'. There are numerous other examples, many indicating how a statutory discretion conferred on the Commissioner will be exercised.[119]

Such guidelines are useful but should not under administrative law principles, as discussed earlier, be followed slavishly. This is especially the case with respect to statutory discretions.

A variation within this type of PCG involves the Commissioner sensibly accommodating very minor processing time delays in respect of certain deductible superannuation contributions.[120]

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[116] Eg, PCG 2017/5, 'Superannuation Reform: Commutation Requests Made Before 1 July 2017 to Avoid Exceeding the $1.6 Million Transfer Balance Cap'; PCG 2017/6, 'Superannuation Reform: Commutation of a Death Benefit Income Stream Before 1 July 2017'; PCG 2020/5, 'Applying the Non-Arm's Length Income Provisions to "Non Arm's Length Expenditure" – ATO Compliance Approach for Complying Superannuation Entities'.

[117] See Notices of Withdrawal IT 328W and IT 329W (24 August 2011).

[118] *Federal Commissioner of Taxation v Carter* (2022) 96 ALJR 325.

[119] Eg, PCG 2016/6, 'Determining Source of Certain Hedging Gains for the Purposes of Section 770-75'; PCG 2016/16, 'Fixed Entitlements and Fixed Trusts'; PCG 2019/3, 'Wine Equalisation Tax: Attribution and Retention of Title Clauses'; PCG 2019/4, 'Retirement Villages: ATO Compliance Approach – Exit Allocable Cost Amount Calculation at Step 4 for Certain Resident Liabilities Under Lease Premium or Loan/Lease Occupancy Agreements'; PCG 2019/5, 'Capital Gains Tax and Deceased Estates – the Commissioner's Discretion to Extend the 2-Year Period to Dispose of Dwellings Acquired from a Deceased Estate'; PCG 2020/2, 'Expansion of Estimates Regime to GST, LCT and WET'; PCG 2020/4, 'Schemes in Relation to the JobKeeper Payment'; PCG 2021/3, 'Determining if Allowances or Benefits Provided to an Employee Relate to Travelling on Work or Living at a Location – ATO Compliance Approach'; PCG 2022/1, 'Non-Commercial Business Losses – Commissioner's Discretion Regarding Flood, Bushfire or COVID-19'.

[120] PCG 2020/6, 'Timing of Income Tax Deductions for Superannuation Contributions Made Through the Small Business Superannuation Clearing House – ATO Compliance Approach'.

PCGs within Type VI are very sensible and appropriate exercises of the Commissioner's GPA and do not give rise to any of the difficulties mentioned in respect of some other PCGs.

3.9 Type VII: safe harbours and rules of thumb – no risk assessment model

Some PCGs offer safe harbours or rules of thumb without having a risk assessment (those with a risk assessment are covered in Type VIII).[121]

The quantification involved in some of these PCGs does have the appearance of soft law right on the edge of the Commissioner appearing to use the PCG legislatively.

PCG 2022/3, 'Goods and Services Tax and Residential Colleges – ATO Compliance Approach', seems to go a little bit further. As paragraph 15 explains:

> The Commissioner has developed the ATO charity benchmark market values for use by certain charities in specified circumstances for applying section 38-250. These values are not actual market values and are intended to operate as proxies for market value. The purpose of the ATO charity benchmark market values is to:
>
> - reduce compliance costs for relevant charities that would otherwise be required to incur costs on engaging valuers to assist in determining relevant market values, and
> - provide assurance that the Commissioner will not allocate compliance resources to review the GST outcomes for accommodation and meals where the ATO charity benchmark market values have been correctly applied.

The ATO charity benchmark values are not created by or under specific legislation and are published on the ATO website.[122]

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[121] PCG 2016/5, 'Income Tax – Arm's Length Terms for Limited Recourse Borrowing Arrangements Established by Self-Managed Superannuation Funds', which offers safe harbours for certain arrangements consistent with arm's length dealing; PCG 2016/12, 'Petroleum Resource Rent Tax – Deductibility of General Project Expenditure Relating to the Overhead Component of Time Written Costs', which offers a safe harbour for unrelated JV parties that satisfy certain conditions; PCG 2016/14, 'Discount to the Valuation of Housing Fringe Benefits Provided by Retirement Village Operators', which states that a 10 per cent discount is acceptable; PCG 2017/15, 'GST and Customer Owned Banking Institutions', which explains when the Commissioner will accept, as a matter of practical administration, a rate of no more than 18 per cent as the extent of creditable purpose for certain acquisitions; PCG 2020/3, 'Claiming Deductions for Additional Running Expenses Incurred Whilst Working from Home Due to COVID-19'. According to para 4, 'This Guideline provides a simpler alternative to the approach in PS LA 2001/6 by specifying a fixed rate per hour that covers all of the running expense items referred to in paragraph 1 of this Guideline for taxpayers covered by paragraph 7 of this Guideline. This alternative shortcut rate (described in paragraphs 26 and 27 of this Guideline) is expected to be particularly helpful for taxpayers now working from home because of the COVID-19 emergency'. From 1 July 2022, PCG 2023/1 applies with a revised fixed rate method unless taxpayers choose to claim actual expenses.

[122] ATO, 'Benchmark Market Value Tables', https://www.ato.gov.au/Business/Bus/GST-and-supplies-by-charities---benchmark-market-values/?anchor=Referencetables#Referencetables.

It is submitted that a PCG is not an appropriate vehicle to establish benchmarks and other rules of thumb. The appropriate vehicle is by way of regulation or a legislative instrument to ensure parliamentary oversight of the instrument.

3.10 Type VIII: risk assessment model to modify taxpayer behaviour

This type of PCG features in the Commissioner's policy on PCGs[123] and is the most obvious application of responsible regulation theory discussed earlier.

It is also the type of PCG that has captured most attention within the tax profession and also the most criticism. Indeed, it is curious that less than 10 per cent of PCGs, a handful of transfer pricing and related PCGs which have risk models and so fall under Type VIII, have come to heavily colour professional opinion about PCGs.

Although much of the concerns of the tax profession about PCGs relate to Type VIII transfer pricing PCGs, the first PCG of this type was PCG 2016/13, 'Petroleum Resource Rent Tax – Deductibility of General Project Expenditure'. It revealed the hallmark of a Type VIII PCG in offering a risk assessment-based allocation of ATO compliance resources. Next came PCG 2016/17, 'ATO Compliance Approach – Exploration Expenditure Deductions', advancing a more developed guidance emphasising taxpayer self-assessment of tax risks, governance and substantiation.

PCGs on transfer pricing started to arrive in 2017 and further refined this type of PCG, with risk ratings matched by correlated ATO compliance responses vividly depicted in risk zones in bold primary and secondary colours to get the message across as to likelihood of review/audit, alternative dispute resolution (ADR) or litigation and access to the Advance Pricing Arrangement (APA) program. Self-assessment of risks by taxpayers remains a core expectation.[124]

Significantly, despite the promise of PCG 2016/1 of safe harbours,[125] many Type VIII PCGs expressly state that no safe harbour is created.[126] The significance of this statement was discussed earlier. The absence of a safe harbour arguably undermines the effectiveness of the PCG by reducing the incentive for taxpayers to adopt a low or lower risk position when there is no safe harbour. Such PCGs, to use the vernacular, seem to wave a big stick without offering much of a carrot for compliant behaviour compared to 'safe harbour' PCGs (Type VII). Be that as it may, that is the Commissioner's call under the GPA.

PCGs on topics not far afield from transfer pricing also emerged to offer a risk assessment model PCG such as PCG 2017/8, 'Income Tax – the Use of Internal Derivatives by Multinational Banks' (relating to arm's length principles); and PCG 2017/10, 'Application of Paragraphs 215-10(1)(c) and 215-10(1)(d) of the *Income Tax*

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[123] PCG 2016/1, above n 2.
[124] See PCG 2017/1, 'ATO Compliance Approach to Transfer Pricing Issues Related to Centralised Operating Models Involving Procurement, Marketing, Sales and Distribution Functions'; PCG 2017/4, 'ATO Compliance Approach to Taxation Issues Associated with Cross-Border Related Party Financing Arrangements and Related Transactions'; PCG 2019/1, 'Transfer Pricing Issues Related to Inbound Distribution Arrangements'; PCG 2020/1, 'Transfer Pricing Issues Related to Projects Involving the Use in Australian Waters of Non-Resident Owned Mobile Offshore Drilling Units – ATO Compliance Approach'.
[125] PCG 2016/1, above n 2, [5].
[126] Eg, PCG 2017/1, above n 124, [26]; PCG 2020/1 [12], [29], [45], [64].

Assessment Act 1997', which concerns the issue of non-share equity through permanent establishments and touches on transfer pricing and arm's length principles.

Type VIII PCGs have been issued in the context of international anti-avoidance rules such as PCG 2018/5, 'Diverted Profits Tax', and PCG 2019/6, 'OECD Hybrid Mismatch Rules – Concept of Structured Arrangement'.

Interestingly the PCGs include the statement that:

> Notwithstanding strictly applied the law requires taxpayers to test for the existence of a structured arrangement each time a payment is made under a scheme, in practical terms the Commissioner recognises the significant compliance burden such an approach would entail.

The PCG then offers a short cut method. This may be sensible but is open to the same criticism for Type I PCGs, eg, PCG 2020/7, 'ATO Compliance Approach to the Arm's Length Debt Test' and PCG 2021/5, 'Imported Hybrid Mismatch Rule – ATO's Compliance Approach'.

Type VIII PCGs have also been issued in a purely domestic tax context and include PCG 2018/2, 'Propagation arrangements adopted by Registrable Superannuation Entities' and PCG 2021/4, 'Allocation of Professional Firm Profits – ATO Compliance Approach', with no 'safe harbour'.

In the author's view, Type VIII PCGs, especially those on transfer pricing and others modelling that approach such as PCG 2022/2 on Section 100A (Type IX), represent the high point in the appropriate and strategic use of PCGs. They are consistent with the proper use of the Commissioner's GPA, despite some reservations raised about the disavowal of a 'safe harbour' in some cases. That is not a comment on the merits of the settings in the PGC risk model but an observation as to the legality, design and construction of these PCGs to achieve their strategic purpose in a framework of normatively acceptable taxpayer protections in the form of taxpayer choice to follow a PCG or take another position and have their day in court.

It is observable that many Type VIII PCGs deal with the administration of tax legislation which depends on concepts of arm's length dealing and pricing. It is perhaps this type of provision, which relies on market-based principles rather than highly prescriptive legislative rules, that has the greatest call for this type of PCG. This is because compliance risk is highly dependent upon the facts and evidence.

It may be that where there is principles-based legislative design, such as where market valuation is an issue (including under the CGT market value substitution rules),[127] there is scope for further Type VIII PCGs. For example, perhaps the ATO's market valuation guidelines should be developed with risk-assessment guidance as a Type VIII PCG?

3.11 Type IX: transition to a new ATO view of the law

The groundwork for this type of PCG is laid by Law Administration Practice Statement 2011/27 and the case law underlying it that was examined earlier. It will be recalled that

[127] See *Income Tax Assessment Act 1997* (Cth) s 116-30.

in exercise of the GPA the Commissioner may decide only to allocate compliance resources in respect of a particular topic prospectively.

The occasion for and merit of the change of ATO view of the law is a separate question to the use and validity of the PCG.

PCGs of this type that simply reflect a change of ATO view because legal interpretations have changed represent one sub-type and all said and done are relatively straightforward as to role and operation of the PCG. An early example is PCG 2017/13, 'Division 7A – PS LA 2010/4 Sub-Trust Arrangements Maturing In or After the 2016-17 Income Year'. The PCG states at the outset:

> Relying on this Guideline
>
> This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws applicable to sub-trust arrangements entered into in respect of trust entitlements arising prior to 1 July 2022. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.
>
> Our view in Taxation Determination TD 2022/11 *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?* differs from the views in Taxation Ruling TR 2010/3 *Income tax: Division 7A loans: trust entitlements* and the administrative approach in Law Administration Practice Statement PS LA 2010/4 *Division 7A: trust entitlements.* TR 2010/3 and PS LA 2010/4 have been withdrawn but will continue to apply to trust entitlements arising before 1 July 2022.
>
> TD 2022/11 applies to trust entitlements arising on or after 1 July 2022.

A more recent example is PCG 2022/2 in respect of section 100A of the *Income Tax Assessment Act 1936* (Cth). The PCG does double duty in that it provides guidance as to *first* the application of ATO compliance resources prospectively in respect of the revised ATO view of the law set out in Taxation Ruling TR 2022/4 and *second* a detailed risk model typical of Type VIII PCGs.

Although some controversy continues to surround the ATO's view as expressed in an associated Taxation Ruling TR 2022/4 and in the risk examples in the PCG, published with the PCG as a package, the legal basis for and terms of the PCG fall within the GPA power.

A more complicated sub-type is where the ATO revises its view in the light of a court decision and also is aware of a government announcement to change the law.

PCG 2018/9 on corporate residency and central management and control is a prime example. The ATO had a view of the law in a taxation ruling[128] that was withdrawn in

[128] TR 2004/15, 'Income Tax: Residence of Companies Not Incorporated in Australia – Carrying on Business in Australia and Central Management and Control'.

light of the High Court decision in *Bywater* in 2018.[129] In the PCG the Commissioner explains at the outset:

> In the 2020-21 Budget, the former Government announced technical amendments to clarify the corporate residency test. Legislation to implement this announcement remains unenacted. Announced measures that are not yet law will be subject to consideration by the Government. Taxation Ruling TR 2018/5 *Income tax: central management and control test of residency* and this Guideline provide our existing view on the central management and control test of corporate residency.[130]

To date, although it is understood that the current government may introduce legislation to clarify the corporate residency test, it has not yet done so. As a consequence the ATO has continued to extend a transitional compliance approach but has advised recently that the transitional position will not be extended beyond 30 June 2023.[131]

Generally speaking, taxpayers obtain clear guidance by the promulgation of a change of ATO view of the law on a prospective basis so that they can organise their affairs accordingly and are not disadvantaged by the view being applied retrospectively. That organising of affairs may involve restructuring, which can be a complex topic that is dealt with under Type X.

3.12 Type X: restructuring in light of new legislation

A complex topic for any tax system will be the introduction of new integrity legislation and the question of taxpayers restructuring in advance of its commencement to be in compliance. That restructuring may be encouraged by the legislature and the tax administrator as it promotes compliance with the new law. That said there is the risk of the restructuring attracting the operation of general anti-avoidance rules (in Australia Part IVA of the *Income Tax Assessment Act 1936* (Cth) (Part IVA)).

PCG 2018/7 is intended to address the question of restructuring in light of new cross-border hybrid mismatch rules and Part IVA. The PCG states:

> 3 … where taxpayers have existing hybrid arrangements and it is expected they will attract the operation of the hybrid mismatch rules, a likely response would be for affected taxpayers to restructure out of their hybrid arrangements to avoid any potential adverse impact of the rules. The enactment of the hybrid mismatch rules with a deferred commencement date is intended to allow taxpayers time to review their existing hybrid arrangements and to unwind or restructure out of such arrangements in advance of the rules if they so choose.
>
> 4. Concerns have been raised about the potential for the Commissioner to apply Part IVA to cancel all or part of a tax benefit where a taxpayer restructures an existing hybrid arrangement to avoid the application of the hybrid mismatch rules. This may involve, for example, replacing a hybrid financing instrument

[129] *Bywater Investments Ltd v Federal Commissioner of Taxation* (2016) 260 CLR 169.
[130] PCG 2018/9, 'Central Management and Control Test of Residency: Identifying Where a Company's Central Management and Control is Located', preamble.
[131] Ibid [104AA].

> with a debt instrument to eliminate tax benefits in another country but preserve tax benefits going forward, in the form of deductible debt, in Australia.
>
> 5. This Guideline is designed to assist taxpayers to manage their compliance risk in these circumstances where their intention is to eliminate double non-taxation outcomes, consistent with the underlying objective of the hybrid mismatch rules. It does so by outlining restructuring that the Commissioner considers to be 'low risk' and to which the Commissioner would not seek to apply Part IVA.[132]

This type of PCG reflects a number of elements of other types of PCGs, such as transitioning to new legislation (Type V), the exercise of the power conferred under Part IVA (Type VI) and a risk assessment model (Type VIII). It is illustrative of a carefully designed PCG to deal with a significant matter.

As with all Type VIII PCGs, taxpayers may choose to run the gauntlet and act on their own risk assessment and view of the law, all the time retaining Part IVC rights of objection and appeal.

In all, it is a very useful PCG on a difficult topic and illustrative of the proper use of the Commissioner's GPA.

4. CONCLUSIONS

PCGs have become reasonably well-established in Australian tax administration. An in-depth international comparative study of compliance guidance is beyond the scope of this article and may be a large job worth undertaking but would need to have regard to jurisdictional specific considerations such as the differences in legal rules governing compliance guidance such as legislative authority, oversight and judicial rule.

More realistically, examination of the performance of the PCG system may be worth pursuing simply to improve what overall appears to be a generally sound initiative. There would be a question of who should undertake such an examination. Presumably in the ordinary course the ATO has or will undertake its own reviews as might the Auditor-General. Also the IGTO has embarked on an investigation of the Commissioner's GPA and may touch on the PCG. Academics should also focus on PCGs as a cutting edge of tax administration.

In that spirit of positive support for PCGs in general and calling for their continued study, the author offers a number of observations from the study undertaken in this article. Reference to relevant discussion in the article is in parentheses.

PCGs are a generally sound, transparent and innovative compliance tool in tax administration. PCGs contribute to transparency for taxpayers and also for the government in policy development.

In terms of future deployment of PCGs, PCGs that support principles-based legislation could be especially useful. As noted there are already examples in connection with

[132] PCG 2018/7, 'Part IVA of the Income Tax Assessment Act 1936 and Restructures of Hybrid Mismatch Arrangements' (footnotes omitted).

transfer pricing that provide a model for risk based PCGs for other principle based rules such as market valuation and arm's length dealings in the CGT rules (see section 3.9).

PCGs that offer guidance about how the ATO administers a provision, including a statutory discretion are very useful (provided the guidelines are not followed slavishly). (see section 3.8) PCGs involving risk models are especially valuable and their use should be expanded in cases of significant compliance risks (see section 3.10).

PCGs to manage changes of the ATO view by distinguishing between prospective operation of the new view and not applying retrospectively get the balance right (see sections 2.3.6, 3.11).

PCGs should be subject to appropriate taxpayer protections and judicial or parliamentary oversight. Although Part IVC provides significant taxpayer rights in some cases, judicial review following administrative law principles is practically unavailable. The Commissioner's commitment to administrative law principles in respect of the GPA is therefore laudable but lacks the mechanism for judicial review before the courts in most if not all cases. This jurisdictional problem requires further consideration to either create appropriate pathways for judicial review under the *ADJR Act* or increased parliamentary oversight of PCGs (see sections 2.3.1, 2.3.5, 2.3.7, 2.4 generally).

It would be very hard to conceive that the ATO would be concerned that judicial and parliamentary accountability would have a chilling effect on tax administration given the Commissioner's commitment to administrative law principles and to the transparency that lies at the heart of PCGs.

Where there is presently an absence of judicial and specific parliamentary oversight PCGs should be made subject to the normative standard of accountability involved in making at least a legislative instrument so that they are tabled in Parliament or, where appropriate, in primary legislation or regulations. Given acceptance of Australian legislative norms as they stand today in current parliamentary procedure and practice, primary legislation should be preferred instead of a legislative instrument in cases of significant new policy, fundamental changes to policy, rules having a significant impact on individual rights and liberties and administrative or civil penalties for regulatory offences.[133] Otherwise, a legislative instrument would be appropriate. It is a question for further research and debate outside the scope of this article as to the use and benefits or problems that arise using legislative instruments.

This will require legislative change such as to bring the instrument under the *Legislation Act 2003* (Cth) and will take it out of being a PCG made pursuant to a GPA. Priority cases for this are where currently PCGs seek to assist taxpayers by offering compliance assistance but discriminate against others who do not get that support (see sections 3.3 – 3.5) or seem to create 'rules of thumb' that lack any specific legislative basis other than the GPA (see section 3.9).

[133] See the Attorney-General's Second Reading speech for the introduction of the Legislative Instruments Bill 2003, Commonwealth Parliamentary Debates, House of Representatives (26 June 2003) 17,623 (Hon Daryl Williams), referring to the Administrative Review Council report, 'Rule Making By Commonwealth Agencies' (1992). See also Department of Prime Minister and Cabinet (Cth), *Commonwealth Legislation Handbook* (2017) [1.10]; Parliament of Australia, Senate, *Odgers' Australian Senate Practice* (14th ed including updates to 30 June 2022) ch 15.

Sometimes PCGs are a means by which the Commissioner assists with the transition into new legislation or otherwise cushions taxpayers from the disproportionate burdens of new legislation. The goal is important but the question needs to be asked as to the cause of the problem and the methods to solve it. Passage and improvement of legislation is no doubt an ongoing challenge but pushing the problem back to the Commissioner as the administrator creates its own issues. Legislation will never be perfect but tabling a legislative instrument that addresses legislative compliance problems ensures parliamentary oversight and puts the matter transparently on the public record. Hopefully this will 'nudge' Treasury, the Office of Parliamentary Counsel and law-makers to do better in making laws that are easier to administer and comply with. Also, sometimes the law just needs to be fixed and a PCG should not and cannot be used to 'solve the problem (see sections 3.6, 3.7).

The administration of PCGs as to penalty relief should be made more explicit. The disavowal of 'safe harbours' in some important PCGs seems to be at cross purposes with the general message in PCG 2016/1 and with giving appropriate incentives to taxpayers to choose to take a low risk approach as set out in a PCG (see sections 2.1, 2.2, 3.9, 3.10).

By way of final observations, the author embarked on this study aware of some polarisation of views between the ATO and the legal and tax profession about PCGs. This polarity is overly simplistic given the various types of PCG. PCGs are often an innovative utilisation of the Commissioner's GPA. That said sometimes a PCG cannot fix bad law. The accusation of overreach in the form of the Commissioner 'making law' is not sound but there are areas in which legislative instruments should replace PCGs and there is an 'accountability deficit', as Professor Creyke calls it in respect of 'soft law', where PCGs are not subject to parliamentary or judicial oversight.