PROCEEDING IN CERTAINTY: TAX RULINGS

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The value of the ability to proceed in certainty, when preparing a tax return or making an agreement, is recognised by the Commonwealth's system of private binding tax rulings. But the utility of, and the ability to obtain, a ruling has recently been questioned by the agency involved. One key is the accuracy of the facts laid out for the Australian Taxation Office's (ATO's) consideration. Another key is the ATO's confidence in the facts so laid out by the applicant. The ATO has been proactive in seeking solutions and has engaged with practitioners. Issues include resourcing and timeliness; the ability to state facts sufficiently and accurately; who should be the master of the 'facts' when making a ruling; what the ATO should do if it has no confidence in the facts as presented; and the extent to which the ATO can be expected to engage with an applicant for a ruling in delivering a useful product.

Income tax is self-assessed, either (for corporate entities) as a matter of law or (for other entities such as individuals) in a substantial sense. In the latter case, the Commissioner of Taxation generally accepts a return on its face.[1]

The former model of assessment was for the Commissioner of Taxation's officers to look through a return and supporting documents, and themselves to make a calculation or 'assessment' of the tax due.[2] We have not seen that, on a mass basis, for more than two decades. There will be no return to that system.

There are penalties for making an incorrect statement in a tax return.[3] Even when an entity engages a tax agent to prepare the return, the statement is attributed to the entity[4] and there is only a limited safe harbour applicable to an entity who has given everything relevant to the registered tax agent or BAS agent.[5]

There are other penalties applicable to actions and omissions under the tax laws. Further, a taxpayer has a reputational risk if it falls into dispute with a revenue authority (regardless of the merits of the dispute).

The tax laws are complex.[6] The reach of those laws is wide, into every sector of the economy, including the third sector. The agency administering the laws is large. It has a range of skills and expertise within its ranks, which can be called upon to meet needs. Those caught by the laws likewise have a diverse range of abilities. Their advisers are more or less resourced. Small businesses and unsophisticated individuals can find themselves with a complex tax issue.[7] Some citizens have a risk profile such that they prefer to disclose an arrangement, and have the agency's view, before filing a return.[8] Some deals cannot proceed economically unless the agency's view is known.[9]

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Thus, in the move to self-assessment, the Commonwealth provided a system of binding private rulings, in part to address the risk of penalty associated with lodgement of an incorrect return. The reports and recommendations at the time, in the early 1990s, will be examined later in this article.

As we have seen, a second matter calling for an ability to apply to the Commissioner for advice relates to prospective transactions. Some transactions will proceed regardless of the taxation consequences. It is then a matter of correctly preparing a return, which may in fact involve deliberately misstating the return in favour of the Commissioner so as to avail the objection and appeal process once the Commissioner issues an assessment (or an assessment is deemed issued, for corporate entities). Of course, it is open to an entity to apply to the Commissioner for advice, which will be issued before the return must be completed and filed, but that does not assist with the transaction that must be priced (or rejected) based on tax consequences.

Where the transaction is sensitive to the tax consequences, the parties to the transaction may each apply to the Commissioner for advice about its consequences. Prior to a system of private rulings in Australia, this was done by applying for an Advance Opinion. In my observation, the system worked well, and the Commissioner would generally not depart from an opinion he expressed, except for good reason.[10] For a matter to proceed with greater certainty, including as to price and terms, a system of private binding rulings was nevertheless thought desirable.

Matters considered by government in introducing private binding rulings

The move toward self-assessment of income tax formally began in the 1986-87 year. By 1989-90, companies and superannuation funds were subject to full self-assessment, as opposed to the 'first stage' self-assessment that had begun a few years earlier:

> The essential difference between first stage and full self assessment is that, under the latter system, the taxpayer goes the one step further than ascertaining the taxable income by also calculating the tax payable on that income and remitting that amount to the ATO with a return that contains only limited information. The ATO does not issue an assessment on the basis of the return lodged.[11]

As at the present date, individuals remain at 'first stage' self-assessment.

The 1990 Consultative Document identified a number of advantages, including 'the elimination of receipt, checking and handling of bulky paper returns'. That was estimated to reduce costs of return processing, which in 1989-90 were about $80 million.[12]

Rather:

> [There would be] a shift in emphasis from processing work [which] allows the ATO to devote its resources to more productive tasks by helping taxpayers to meet their obligations, for example, through enhanced enquiry and advisory services, and more generally, by focusing more closely on taxpayer needs, or by taking enforcement action against those who don't comply.[13]

The 1990 Consultative Document recorded 'strong support among professional and other bodies for extending self-assessment arrangements', but the 'support' was conditioned on changes including legislative changes for 'greater taxpayer certainty under the law'. Accordingly, the intention was to 'authorise the issue of general Taxation Rulings and Private Rulings that are binding on the Commissioner of Taxation, and make Private Rulings subject to review by the AAT or a court'.[14]

The Commonwealth went on to explain what was proposed in relation to rulings, again emphasising that this was not 'a further way of producing uncertainty'.[15] The idea would be for a system of private rulings and general taxation rulings to be given effect, the Commissioner being bound by both. In relation to private rulings, there would then be a system by which a person dissatisfied could object and then seek review or appeal the objection decision. There would then be limits on the ability of the taxpayer to contend for a different outcome from the subject of the private ruling, to ensure finality.[16]

There would be consequences for the taxpayer (although I note that there have been changes to legislative arrangements over the years) if the taxpayer declined to follow a ruling, including a private ruling.[17]

An Information Paper was issued in August 1991, further fleshing out the intention of the Commonwealth.[18]

One point which must have arisen during consultation was whether a taxpayer would be able to request a private ruling on the application of the general anti-avoidance provisions contained in pt IVA of the *Income Tax Assessment Act 1936* (Cth). As we will see, the key provisions in that Part provide a number of unweighted criteria for the Commissioner to evaluate in deciding whether to make a determination. The making of such a determination triggers the potential for adjustment to tax liability and special penalty arrangements. The 1991 Information Paper says:

> Taxpayers will be able to request Rulings on Part IVA issues, but will be required to specifically and separately address all the matters listed in each of the sub-paragraphs of paragraph 177D(b), where applicable. The Ruling may state that no guarantee will be given that the taxation consequences sought will be achieved, or that it should not be assumed that the arrangements will not be challenged by the Tax Office. In both cases the reasonably arguable position will not be affected. The Tax Office will not enter into correspondence or discussion aimed at establishing how schemes devised to exploit perceived loopholes in the law might be structured or altered to facilitate marketing of the scheme.[19]

This perhaps jumps a little ahead. The Commissioner was not going to be empowered to make rulings in the abstract. Rather, the idea was to have private rulings which addressed 'the taxation consequences arising from a transaction, act or event which is proposed to take place or has already taken place'.[20] Thus, in applying for a ruling, the taxpayer had to detail the transaction, et cetera, and it was anticipated that 'copies of all relevant documents or copies of extracts, draft documents … and flow charts of funds' would be provided.[21]

The Taxation Laws Amendment (Self Assessment) Bill 1992 was introduced into the House of Representatives on 26 May 1992. This was part of a package of measures (foreshadowed in the 1990 Consultative Document and the 1991 Information Paper), as noted in the second reading speech by the Minister Assisting the Treasurer.[22]

The second reading speech says, materially:

> Taxpayers who are genuinely uncertain about the tax effect of a completed or proposed arrangement would be able to seek a Private Ruling from the Commissioner. The Commissioner will be bound by the ruling to the extent that the tax that would be payable by the taxpayer would be reduced to reflect the tax that would be payable under the ruling. …
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> A taxpayer will be able to have an unfavourable Private Ruling … reviewed by the AAT or courts. When the review process is finalised, the decision of the AAT or the court will be legally binding and conclusive as to the application of the ordinary provisions of the legislation to an actual arrangement not relevantly different from the proposal or arrangement to which the Private Ruling related. …
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> The new system of binding and reviewable rulings will promote certainty for taxpayers, and thereby reduce their risks and opportunity costs.[23]

Initially, provisions about both public and private binding rulings were contained in the body of the *Taxation Administration Act 1953* (Cth) at pts IVAAA (public rulings) and IVAA (private rulings). Those provisions were rewritten and removed to sch 1 of that Act with effect from 1 January 2006. The structure of the current law is:

(a) objects and common rules are in div 357;
(b) public rulings are dealt with by div 358; and
(c) private rulings are dealt with by div 359.

Practical issues in obtaining certainty

From the beginning, it was seen that both the system of public rulings and the system of private rulings had to be studied carefully and applied sensibly (as part of a suite of measures available both to the Commissioner and the taxpayer), to mitigate uncertainty in the developing self-assessment environment.

Principles, and inferences drawn

A key issue for both public and private rulings was defining the 'arrangement' (nowadays, the 'scheme') to which the Commissioner's opinion as to the operation of the law applied. This was exemplified, in relation to public rulings, by litigation concerning deductions sought by the new owner of a power station, in *Bellinz v Commissioner of Taxation*[24] (*Bellinz*). A key issue appeared to be reliance by the foreign purchaser upon various utterances by the Commissioner over the years, expressed in more or less general terms. Some of those utterances were under old system non-binding public rulings. Those utterances could not bind the Commissioner. Other utterances, purportedly in binding public rulings, were qualified with words such as 'generally' in expressing the approach that the Commissioner might take. As the Full Court said:

> The binding quality which the legislation gives to a public ruling applies to the tax consequences of the arrangement or class of arrangements to which the ruling relates, and not, as the appellants contend, to the underlying philosophy behind the ruling.[25]

Another aspect of Bellinz — factual complexity

This case concerned review of a private binding ruling which the taxpayers had sought.

As well as expressing dissatisfaction with the Commissioner's departure from various statements over the years, as described above, the taxpayers were dissatisfied with the Commissioner's conclusion that the general anti-avoidance provisions in pt IVA would apply to the arrangement. (This issue could only arise in the event that the taxpayers were, contrary to other parts of the private ruling, entitled to the claimed depreciation.)

The Full Court noted:

> While there is nothing to suggest that in an appropriate case a ruling could not issue on Pt IVA of the Act, both the Commissioner and the taxpayer must be aware of the difficulty which a private ruling on a Pt IVA issue will create. Section 177D(b) sets out the various matters to which the Commissioner shall have regard in reaching the conclusion that a person … entered into or carried out the scheme … for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with it. One of those matters is 'the manner in which the scheme was entered into or carried out'. Where the arrangement in respect of which a private ruling is sought has not yet been carried out, it is difficult to see how there could be adequate facts upon which to base a private ruling. Even where the scheme has been carried out, there may in many cases be difficulty in obtaining all relevant facts, particularly those relating to the manner in which the scheme was entered into or carried out. In the present circumstances there is no need to consider these difficulties.[26]

There remains unease as to the effectiveness of a ruling about the operation of pt IVA of the *Income Tax Assessment Act 1936* (Cth). Essentially, value judgments must be made, given unweighted criteria, and upon a diverse range of classes of facts potentially material to the value judgments.

Transactions in progress as ruling proceeds

Another practical issue that arises, for a prospective transaction, is that the scheme or arrangement the subject of a private ruling application must remain constant, even throughout the objection process and beyond on review by the tribunal or appeal to the Federal Court.

I make no complaint about timeliness on the part of the Commissioner. Some matters are more or less complex. The Commissioner has undertaken from time to time to resource his consideration of serious commercial transactions in progress.

However, with a prospective transaction in the course of negotiation, it may be impractical for the parties fully to negotiate an agreement then wait for the Commissioner to embark on a consideration of an application for a private ruling on the finalised documents. So Merkel J, at first instance in *Bellinz*,[27] pointed out that a problem arose in that:[28]

> the Lessor Partners from time to time sought to comply with objections raised by the Commissioner by making amendments, or agreeing to make amendments, to their transaction documents. As a consequence the documents recording the arrangements did not necessarily accord with the agreed description of the arrangements or the applicant's submissions as to the arrangements. Whilst I have endeavoured to accommodate the discrepancies I would point out that the Court is not giving an advisory opinion on the basis of an arrangement that might be paid. A private ruling was applied for and given on the basis of the arrangement in respect of which the private ruling was sought by the applicants. That arrangement was recorded in the documentation … executed by the parties. Yet the agreement by the parties as to the arrangement on which the ruling was sought departs from the documentation.[29]

Strictures about changing the scheme

Relevance of the scheme

As noted, the basis for making a private binding ruling, and for any legal consequences that flow, is specification of the relevant scheme.

In accordance with s 357-60 of sch 1 to the *Taxation Administration Act 1953* (Cth), a ruling binds the Commissioner in relation to the taxpayer if (relevantly) the ruling 'applies' to the taxpayer.

Section 359-5 provides that the Commissioner may, on application, make a written ruling on the way in which the Commissioner considers a relevant provision 'applies' or would 'apply' to a taxpayer in relation to a specified scheme.

Thus the application of a ruling is tied, in part at least, to specification of the scheme.

A private ruling has to:

(a) identify the entity to which it applies and specify the relevant 'scheme'; and
(b) identify the provision to which it relates.[30]

Objection

It is possible for an applicant who is dissatisfied with a private ruling to object. In general the objection and appeal process has proven unsatisfactory. Nevertheless, there are cases where it is wise to follow the procedure. An important strategic consideration is that the applicant tends to give up rights of objection against any subsequent assessment of taxation because of s 14ZVA of the *Taxation Administration Act 1953* (Cth). That is a problematic provision, but some comfort about its potential to annihilate rights was provided in the key decision of *Rosgoe v Commissioner of Taxation*[31] (*Rosgoe*).

An applicant might be better to lodge a return (usually in accordance with the ruling) and then object to an assessment. That may prove more satisfactory, as the applicant would then be able to conduct an objection and any review or appeal on the basis of the facts that have actually occurred and may be proven by admissible evidence, as opposed to looking only at the written terms of a scheme. The ruling is only as good as the stated 'scheme', and it may be a barren exercise to dispute it where its stated facts will be put in issue at the stage of a disputed assessment.

Constancy of scheme

A major limitation of the objection and review or appeal system with private binding rulings is that the scheme under consideration must remain constant throughout that process.[32] Thus the tribunal could not, on the hearing of an application for review of an objection against a private ruling, redefine the arrangement. A further limitation is that the agency may not consider that the facts stated in the 'scheme' are incapable of proof. Rather, the scheme is taken as correct.[33] That could lead to hesitation on the part of the agency. There are various ways of dealing with this.

Section 357-105 permits the Commissioner to obtain further information. Additional information provided by the applicant may be taken into account in making the private ruling. If the information comes from a third party, that information should be provided to the applicant so that the applicant has a reasonable opportunity to respond before the making of the ruling.[34]

If further information comes to hand during the course of the objection process, the Commissioner may consider that new information. But if the additional information 'is such that the scheme to which the application related is materially different from the scheme to which the ruling relates' then the objection is disregarded and the Commissioner is to request the applicant to make a fresh application for private ruling.[35] There is a question as to whether that additional information is able to be used to change the 'scheme', at least prior to objection. (At objection stage, it seems not.)[36]

Finally, it is possible to make a ruling based on *assumptions*, in accordance with s 357-110. The exact role of assumptions is still debated, and it is not necessary for the purposes of this article to express views.[37]

Practical problems have arisen:

(a) At first instance in *Bellinz*,[38] Merkel J noted that the transaction documents kept developing during the hearing of the appeal from the objection decision. His Honour recounted that he had 'endeavoured to accommodate these matters' but that this tended to 'emphasize the importance of the Commissioner stating the arrangement on which he was ruling … with clarity and precision in the ruling itself'.

(b) A consistent problem in recent matters has been the endeavour by the applicant to place before the Commissioner a large amount of evidential material, presumably to attempt to cover the applicant for purposes of any later allegation of non-disclosure of a material fact. This leads to the 'scheme' being stated as comprising a written narrative together with the few binders of material annexed.
(c) One potential difficulty with that approach is that the agency may find, in the mass of evidential facts, contradictory indications on some material ultimate factual conclusion. The distinction between evidential, and ultimate, facts is one known from the law of the stated case: *EIE Ocean BV v Commissioner of Stamp Duties*.[39] Indeed, there is some analogy with a stated case, although it is a weak analogy.

The particular difficulty that arose in *Rosgoe*, above, is that the Commissioner looked to the mass of material provided and drew the conclusion of fact that the applicant had been conducting a business.[40] This was significant in terms of the analysis of a receipt by the applicant.

Justice Logan found that it was not for the Commissioner to add that finding of fact in making the ruling. The Commissioner's appeal to a Full Court was settled.[41] However, there were two lessons in Logan J's judgment which remain practical considerations for an administrator:

(a) If the Commissioner had thought the statement of the arrangement put to him for ruling was deficient, he might have declined to make a ruling or might have made an assumption.[42]
(b) So far as the applicant was concerned, if the true state of affairs was other than as stated in the scheme for the ruling, the applicant would be unable safely to rely on the ruling: [32].

This shows up limitations in the private ruling system. The Commissioner is being confronted with large amounts of evidential material, doubtless for good and genuine reasons, making disclosure to an agency. But the Commissioner is limited to some extent in what he may do with that evidential material. And the Commissioner (and the applicant) are hamstrung to some extent during the objection and the review or appeal process from dealing with information that emerges. Information might emerge entirely innocently, as with further drafts of documents with a prospective transaction the subject of a ruling application, or the Commissioner may, through his various sources of information, come across information germane to the accuracy of the scheme put for ruling.

Whether the Commissioner must give a ruling

There has been recent litigation concerning whether the Commissioner was obliged, in certain factual circumstances, to give a private binding ruling. However, the decision of *Hacon Pty Ltd v Commissioner of Taxation*[43] is under appeal, and this limits the extent to which counsel concerned should prudently discuss the matter.

Justice Logan decided that the Commissioner's decision to decline to make a private ruling should be quashed and the matter should be remitted to the Commissioner for the purposes of dealing with that ruling application according to law.

A known feature of the ruling application was that it mentioned the potential application of sections in pt IVA of the *Income Tax Assessment Act 1936* (Cth), which is highlighted above, and which have been the subject of comment over the years.

One section that was in contest was s 359-35, which provides that the Commissioner 'must' comply with an application but subject to express exclusions.

Justice Logan found as follows:

> Difficult to see though that may be, there is no express exemption in the Pt 5-5 rulings system in respect of the furnishing of rulings as to the application of Pt IVA of the ITAA36 in respect of an arrangement yet to be carried out. Its administration should not be approached as if there is. The private ruling system provisions now found in Pt 5-5 are, and their earlier counterparts always were, intended to effect a profound reform in revenue law and practice, both within the Commissioner's office and amongst taxpayers. It is imperative that their invocation or attempted invocation by taxpayers via a ruling application and the administration of the provisions by the Commissioner be approached with this firmly in mind. Pedantry has no place in their administration, or in dealings by taxpayers with the Commissioner.
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> It is the duty of an officer of the Executive tasked by Parliament with carrying into effect the terms of an Act to do that in accordance with the letter, and spirit, of that Act, difficult though that may be. It is equally a responsibility of those who seek to have the advantage of the legislatively conferred benefit to co-operate with that officer of the Executive, here the Commissioner, in his discharging what may be a difficult duty. Of course, in relation to a particular ruling application a position may be reached where, even after a request for further information, a response, and after giving full voice to beneficial legislative ends in relation to the making of assumptions, it is just not possible for the Commissioner to make the ruling applied for. If so, the TAA, as noted, provides lawful bases for the Commissioner to decline to make a ruling. But these are safe havens after a long voyage, not ports of first call.
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> It necessarily follows, on above analysis, that, in the circumstances of this case, the Commissioner became subject to an imperative obligation to request information which he considered necessary. This he did not do. Indeed, in the letter of 12 July 2016, he expressly stated that he refrained from so doing. This was not permissible. The Commissioner made an error of law which, in the context of the Pt 5-5 rulings scheme of which s 357-105(1) is part, is also a jurisdictional error.
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> …
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> It is also necessary to bear in mind that, even if after giving every consideration to the beneficial end to which the ruling system is directed, the Commissioner, for cause, declines to make a ruling, that a ruling has been sought in good faith will not be irrelevant in the context of any later penalty decisions which relate to the 'scheme' in respect of which a ruling was sought.
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> In summary, the Commissioner's administration of the ruling system miscarried as soon as he reached the point of considering that there was a need for further information from the applicants.[44]

The Commissioner has appealed.

Suggested remedies

The need for the private binding ruling system was established historically, on moving to a more general self-assessment system.

The current private binding ruling system has some limitations. I will spell out each of the limitations that I have identified and suggested ways of dealing with them.

First, the scheme remains *relatively* static through to objection stage (with exceptions identified above) and then *completely* static beyond objection. This evidently troubled Merkel J in *Bellinz*, before whom successive drafts of transaction documents, in a live transaction, were placed. Part of the solution may already be with us.

The institution of tax lists in both the Administrative Appeals Tribunal and Federal Court has led to a more streamlined and rapid procedure. However, there is no indication of any particular delay in *Bellinz*.

The reality is that a transaction in progress poses special difficulties. In that kind of situation, the remedy may be simply to recognise limitations of having to resort to the judicial system and instead to concentrate on administrative solutions with the agency concerned. The Commissioner offers an early engagement service, which is more in the nature of a compliance 'product'. It may be the true solution. Even that process contemplates that a ruling may be issued, if relevant.[45]

Another possibility, though subject to real constitutional issues as to whether there is truly a 'matter' before a court, is to allow variation of the scheme, by consent of the parties, as it progresses through review or appeal.[46]

The second issue is whether the Commissioner ought to have a power to find ultimate facts.

Rosgoe, whether accepted or not, now poses real difficulty in practice.

The Commissioner, confronted with a deal of evidential material by taxpayers and their advisers, may feel that the current legislative solutions are inadequate.

Failing to make a ruling might be problematic.

Certainly, reaching an ultimate factual conclusion which is not in accordance with the written narrative accompanying the folders of documents often provided is also problematic. (An attempt to insert that factual conclusion in the stated 'scheme' would meet resistance if it is controversial.)

In short, perhaps the Commissioner should have more power in setting the scheme.

According to the agency's website, the early engagement process actually contemplates 'full and true disclosure'. Perhaps this is the answer — a collaborative approach to settling the stated 'scheme'.

There is evidently current controversy concerning the power of the Commissioner to decline to give a private binding ruling. As counsel in the current reported matter, which is on appeal, I should not discuss that further.

But, in the long run, the result of any judicial decision will need to be examined to see if further changes are necessary.

When we hark back to the origins of, and reasons for, a private binding ruling system, it seems that some sort of system, including one that gives a high degree of assurance to an applicant, remains warranted.

The tax laws are no less complex than they were in 1992, when self-assessment is generally seen as commencing. The transactions are no less complex. The timelines have been accelerated by technology and the pace of business — there was little by way of email in commerce in 1992, for example. Penalties for an incorrect return are still with us. There is heightened reputational risk nowadays with regard to tax matters. It ought to be easier to comply with tax obligations. The private binding ruling system, perhaps subject to modernisation, remains part of the mix.

Endnotes

1 Assessments either issue or are deemed to issue, with no-one looking at returns individually on a routine basis. Returns are doubtless selected for closer scrutiny based on metrics and sampling techniques. The

agency's sources of information are wide. For example, a land transaction will come to the agency's attention automatically, so the agency can check a return is then filed dealing with that land transaction.

2 The definition of 'assessment' for the purposes of the income tax laws still uses the term 'ascertainment': *Income Tax Assessment Act 1997* (Cth) s 995-1(1), read with *Income Tax Assessment Act 1936* (Cth) s 6(1) and *Taxation Administration Act 1953* (Cth) sch 1, s 155-5(2)(f)–(h).

3 *Taxation Administration Act 1953* (Cth) sch 1, s 284-5.

4 Section 284-25.

5 Section 284-75(6). The entity will, however, not be liable to penalty if the entity or its agent 'took reasonable care in connection with the making of the statement'. This becomes relevant since taking reasonable care may have involved applying to the Commissioner for the Commissioner's opinion concerning the matter.

6 *Carrasco v The Commissioners for Her Majesty's Revenue and Customs* [2017] 1 WTLR 1; [2016] UKFTT 0731, [25]; *Azer v Commissioner of Taxation* (2016) ATC 10-429 [25].

7 For example, the capital gains tax concessions for small business, in the *Income Tax Assessment Act 1997* (Cth) div 152, raise complex issues of valuation, characterising relationships and characterising property. The complexity starts with the location of key definitions within each of divs 152, 328 and 995, with an overlay by which div 152 modifies aspects of div 328.

8 This was, at least initially, the position in *Rosgoe v Commissioner of Taxation* (2015) ATC 20-539; appeal to the Full Court discontinued by the Commissioner in circumstances to which I am not privy.

9 *Bellinz v Commissioner of Taxation* (1998) 84 FCR 154, 158–9, appears (at least initially) to have been in that category.

10 See Withdrawn taxation ruling IT 2500, from para 12. The Commissioner notes (para 14) that the kinds of situations where the Commissioner would depart from an Advance Opinion would be confined to situations where there had been legislative change, where an applicable tribunal or court overturned or modified an interpretation of the law on which the Advance Opinion was predicated, or the approach adopted in the Advance Opinion was no longer considered appropriate. Further, the Commissioner indicated that generally there would be no retrospective departure. Nevertheless, an Advance Opinion was not legally binding.

11 Consultative Document, 'A Full Self Assessment System of Taxation', forming part of the Tax Simplification Statement made 13 December 1990 by Treasurer Paul Keating. This is referred to here as the '1990 Consultative Document'.

12 1990 Consultative Document, foreword.

13 Ibid, italics added.

14 Ibid.

15 Ibid, para 4.6.

16 Ibid, para 4.17.

17 Ibid, paras 4.15 and 4.16. The former penalty for failure to follow a private ruling has been repealed, but doubtless this would be taken into account in assessing whether the taxpayer had a reasonably arguable position, or had acted reasonably, in determining whether the penalty should be assessed.

18 Information Paper August 1991, 'Improvements to self-assessment — priority tasks', referred to here as '1991 Information Paper'.

19 At para 8.17.

20 Ibid, para 8.5.

21 Ibid, para 8.10.

22 *Australian Federal Tax Reporter*, 'New Developments', para 992-040, and see particularly pp 887, 653. Under the heading 'Consultation' the Minister refers to the two documents of 1990 and 1991 in saying that Government had 'consulted extensively with taxpayer and tax professional representative bodies'.

23 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1992, 2774 (Peter Baldwin) (emphasis added).

24 *Bellinz v Commissioner of Taxation* (1998) 84 FCR 154.

25 Ibid 169C (Hill, Sundberg and Goldberg JJ).

26 Ibid 170C-D.

27 (1998) 38 ATR 350; 98 ATC 4399.

28 (1998) 98 ATC 4399, 4405.

29 Ibid (emphasis added).

30 Section 359-20

31 *Rosgoe v Commissioner of Taxation* (2015) ATC 20-539

32 *Commissioner of Taxation v McMahon* (1997) 79 FCR 127, 133, 140–141, 151.

33 *Cooperative Bulk Handling Ltd v FCT* (2010) 79 ATR 582, [15], [16].

34 Sections 357-115 and 357-120.

35 Section 359-65.

36 Ibid.

37 *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397, 400, 415.

38 *Bellinz Pty Ltd v FCT* (1998) ATC 4399, 4405–6.

39 [1998] 1 Qd R 36, 39A.

40 In fact, that argument may have emerged during the review before the AAT, but it matters not for present purposes.

41 The appeal was resolved in circumstances not known to the author. It may be that the agency does not accept everything in the reasons for judgment. The agency has not issued a Decision Impact Statement at time of writing.
42 2015 ATC 20-539, [23].
43 2017 ATC 20-64.
44 *Hacon v Commissioner of Taxation* [2017] FCA 659 [43]–[45], [48]–[49].
45 Australian Taxation Office, *Early Engagement* (1 December 2016) <https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-advice-products-(rulings)/Early-engagement/>.
46 The initial important case concerning the private binding ruling system, *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397, does deal with constitutional issues and the question of whether there truly was a 'matter' before a Chapter III Court.