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Session 6: Reassessments and refunds

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1 Introduction

The purpose of this paper is to examine the approach of each State or Territory to reassessments and refunds.

Reassessments and refunds are regulated primarily by the *Taxation Administration Act* of each jurisdiction.¹ Each Act has:

- one or more sections empowering reassessment (eg Vic s 9), amongst other provisions dealing with assessments generally (eg Vic pt 3);
- one or more sections requiring a reassessment and refund upon a successful objection (eg Vic ss 114–116);
- a part or division dealing with refunds otherwise or generally (eg Vic pt 4);
- exclusionary provisions that attempt to limit how a taxpayer can compel a refund or reassessment (eg Vic ss 96(2), 17, 127, 18).

The statutory provisions – read with the relevant administrative policies and case law – give rise to a number of questions. What is a reassessment and how is it made? What are the time limits on reassessment? What is the effect of a reassessment on the previous assessment, on existing objection proceedings, on recovery? Does the commissioner have a discretion not to make an increasing reassessment in a case of under-assessment? In an alleged case of over-assessment, does the commissioner have a duty to consider making a decreasing reassessment? How does the reassessment function interact with the objection process? How do the refund provisions interact with the objection process? For example, can a taxpayer, instead of objecting, seek a reassessment and refund? What are the time limits on refunds? Are there other restrictions? In what cases is interest payable? Is it open to a taxpayer to seek a refund by way of a common law action in restitution, for example? How is the balance struck in revenue collection between finality² and accuracy³?

The paper is divided into six parts:

1. this introduction;
2. a table collecting the relevant legislative provisions and administrative policies of each of the eight jurisdictions;
3. a discussion of the table, beginning with the topic of assessments generally;
4. a discussion of certain issues regarding reassessments;

¹ *Taxation Administration Act 1997* (Vic), *Taxation Administration Act 1996* (NSW), *Taxation Administration Act 2001* (Qld), *Taxation Administration Act 2003* (WA), *Taxation Administration Act 1996* (SA), *Taxation Administration Act 1997* (Tas), *Taxation Administration Act 1999* (ACT), *Taxation Administration Act* (NT).

² 'There must be a point in time in which taxation matters are finalised': Second Reading, State Taxation (Amendment) Bill (1992), Legislative Assembly, 6 November 1992, *Parliamentary Debates*, p 566.

³ The 'task' of the commissioner 'is to ensure that the correct amount of tax is paid, "not a penny more, not a penny less": *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) 32 FCR 148 at 155.

5. a section considering refunds, including refunds where an amount greater than that assessed is paid by mistake and where an amount assessed and paid is said to be excessive;
6. a short conclusion.

2 Table of provisions and policies of each jurisdiction relevant to reassessments and refunds

VIC (TAA 1997)	NSW (TAA 1996)	QLD (TAA 2001)	WA (TAA 2003)	SA (TAA 1996)	TAS (TAA 1997)	ACT (TAA 1999)	NT (TAA)
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2.1 Terminology

<p>1. Section 3(1):</p> <p>'assessment' means an assessment made by the Commissioner under Part 3 of the tax liability of a person, and includes a reassessment, a compromise assessment and a deemed assessment';</p> <p>'reassessment' means reassessment of tax liability under section 9'.</p>	<p>Section 3(1):</p> <p>'assessment' means an assessment made by the Chief Commissioner under Part 3 of the tax liability of a person under a taxation law, and includes: (a) a reassessment and a compromise assessment under Part 3, and (b) an assessment by the Supreme Court or the Civil and Administrative Tribunal on an application for a review'.</p>	<p>'Dictionary':</p> <p>'assessment' means a determination, under part 3, of a taxpayer's liability for tax for which an assessment notice is given, and includes a reassessment';</p> <p>'reassessment' means a determination, under part 3, of a variation of a taxpayer's liability for tax for which an assessment notice is given'.</p>	<p>'Glossary':</p> <p>'assessment' means a determination of a kind referred to in section 13(1), whether the determination is made by way of a self-assessment or an official assessment'. Section 13(1) refers to an assessment as a 'determination' of the amount of tax payable, etc. 'Self-assessment' is defined in s 14, 'official assessment' in s 15(1), the latter being an assessment made by the Commissioner;</p> <p>'reassessment' does not include an interim assessment or an original assessment'. An 'interim assessment' is the assessment of a portion of the tax payable (s 16A). The definition of 'original assessment' is as one might expect.</p>	<p>Section 3(1):</p> <p>'assessment' means an assessment by the Commissioner under Part 3 of the tax liability of a person under a taxation law, and includes—(a) a reassessment and a compromise assessment under Part 3; and (b) an assessment by the Minister or the Supreme Court on an objection or appeal under Part 10, and assessed has a corresponding meaning'.</p>	<p>Section 3:</p> <p>'assessment' means—(a) an assessment made under Part 3 of the tax liability of a person; and (b) a reassessment; and (c) a compromise assessment';</p> <p>'reassessment' means reassessment of tax liability under section 19'.</p>	<p>'Dictionary':</p> <p>'assessment' means—(a) an assessment, reassessment or compromise assessment of the tax liability of a person under a tax law, made by the commissioner under part 3; or (b) an assessment substituted by the ACAT on review under part 10'.</p> <p>Section 3(1):</p> <p>'assessment' means an assessment, or a reassessment, made under this Act'. Section 18(2) provides that an assessment is: '(a) a determination that a specified amount of tax, or that no tax, is payable by a particular person, or in respect of a particular instrument, transaction or event, under a taxation law; or (b) a determination [that an exemption applies]'.</p>
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VIC (TAA 1997)	NSW (TAA 1996)	QLD (TAA 2001)	WA (TAA 2003)	SA (TAA 1996)	TAS (TAA 1997)	ACT (TAA 1999)	NT (TAA)
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2.2 Assessments and reassessments

2. 'PART 3—ASSESSMENT OF TAX LIABILITY' (ss 8–17)	'PART 3—ASSESSMENT OF TAX LIABILITY' (ss 8–17)	'PART 3—ASSESSMENTS OF TAX' (ss 11–28, split into five divisions)	'PART 3—ASSESSMENTS OF TAX' (ss 13–30, split into three divisions)	'PART 3—ASSESSMENT OF TAX LIABILITY' (ss 8–17)	'PART 3—ASSESSMENT OF TAX LIABILITY' (ss 18–26)	'PART 3—ASSESSMENT OF TAX LIABILITY' (ss 7–18)	'PART 3—ASSESSMENT OF TAX LIABILITY' (ss 18–30, split into five divisions)
3. '8 General power to make assessment' (1) The Commissioner may make an assessment of a tax liability of a taxpayer. (2) An assessment of a tax liability may consist of or include a determination that there is not a particular tax liability.'	'8 General power to make assessment' is identical to Vic s 8 (except that the reference is to the 'Chief Commissioner').	'11 When commissioner makes an assessment' (1) The commissioner must make an assessment if—(a) the commissioner is satisfied a taxpayer has a liability for tax; and (b) the taxpayer's liability is not required or permitted, under a revenue law, to be made by self assessment. (2) Also, the commissioner may make an assessment— (a) if the taxpayer's liability for tax is required or permitted to be made by self assessment under the revenue law; or (b) even if the taxpayer's liability for tax is nil. ...'	'15 Official assessments' provides that an assessment by the Commissioner, called an 'official assessment': • 'must' be made: '(a) if the person is or is likely to be liable to pay tax, but is not required to make a self-assessment; or (b) when a taxation Act specifically requires the Commissioner to do so'; • 'may' be made on the Commissioner's own initiative, even where the taxpayer has made a self-assessment; • 'may' be made 'in any other circumstances at the taxpayer's request'.	'8 General power to make assessment' is identical to Vic s 8. In addition there is '9 Taxpayer may request assessment' , which allows a taxpayer in certain circumstances to request the Commissioner to make an assessment (but not a reassessment).	'18 General power to make assessment' is materially the same as Vic s 8.	'7 General power to make assessment' is relevantly materially the same as Vic s 8.	'18 General power to make assessment' provides that the Commissioner 'may assess a tax liability' (sub-s (1)), and defines an 'assessment' (sub-s (2): see above row 1).
4. '9 Reassessment' (1) The Commissioner may make one or more reassessments of a tax liability of a taxpayer. (2) Nothing prevents the Commissioner—(a) from making a reassessment of a tax liability of a taxpayer after an amount previously assessed as being payable by the taxpayer has been	'9 Reassessment' , (1) is materially the same as Vic s 9(1). There is no equivalent to Vic s 9(2).	'17 Commissioner's general power to make reassessments' (1) [materially the same as Vic s 9(1)]. (2) [materially the same as Vic s 12(3): see below]. (3) The commissioner may make a reassessment under subsection (1) even if an	'16 Reassessments' (1) The Commissioner must make a reassessment—(a) if specifically required to do so under a taxation Act; or (b) if specifically required to do so under a direction given in the course of review proceedings; or (c) if a taxation Act provides for a rebate or refund of tax in particular circumstances, and	'10 Reassessment' , (1) and (3) are identical to Vic ss 9(1) and (2) respectively. 10(5): 'A decision not to make reassessment is a non-reviewable decision.'	'19 Re-assessment' , (1) and (2) are materially the same as Vic ss 9(1) and (2).	'9 Re-assessment' , (1) is materially the same as Vic s 9(1). There is no equivalent to Vic s 9(2).	'21 Reassessment' (1) Subject to this Act, the Commissioner may, after making an assessment, make a reassessment. (2) A reassessment may be made: (a) on the Commissioner's own initiative; or (b)

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paid; or (b) from making a reassessment of a tax liability under which the taxpayer is assessed as having liabilities that are additional to or greater than those under the previous assessment. ...'		objection or appeal against, or review of, the assessment of the taxpayer's liability for tax has started but not yet been decided. (4) The commissioner can not [sic] be compelled to make a reassessment under subsection (1) decreasing a taxpayer's liability for tax. (5) The commissioner's decision not to make a reassessment of a taxpayer's liability for tax is a non-reviewable decision.'	the circumstances were not taken into account when the previous assessment was made. (2) Subject to subsection (5), the Commissioner may also make a reassessment—(a) on his or her own initiative, if it appears that a previous assessment is or may be incorrect for any reason; or (b) on the application of the taxpayer. ... (3) [similar to Vic s 9(2)(a) – as to Vic s 9(2)(b), see s 18(2)] (4) A reassessment may consolidate 2 or more separate assessments into a single assessment.'				on receipt of a written application by the taxpayer. (3) A reassessment may: [confirm, increase, reduce or otherwise alter the earlier assessment]. ...'

5. *(time limit on reassessments)* **9(3)** The Commissioner cannot make a reassessment of a tax liability more than 5 years after the initial assessment of the liability, unless—(a) the reassessment is to adjust tax to give effect to a decision on an objection, review or appeal as to the initial assessment; or (b) at the time the initial assessment or a reassessment was made, all the facts and circumstances affecting the tax liability under the relevant taxation law of the person in respect of whom the assessment or reassessment was made were not fully and truly disclosed to the Commissioner; or (c) the reassessment is authorised to be made more than 5 years after the initial assessment by another taxation law.
- 9(3)** is materially the same as Vic s 9(3), except that:
- **9(3)(b)** has the extra words 'and, as a result the tax liability was assessed at a lower amount than the Chief Commissioner would otherwise have assessed it';
 - **9(3)(d)** is added: 'the reassessment is made as a consequence of an application by a taxpayer, being an application made within 5 years after the initial assessment of the liability, and the reassessment reduces the tax liability.'
- '21 Time for reassessment decreasing liability for tax' and '22 Time for reassessment increasing liability for tax'** provide that reassessments must be made within the **'limitation period'** – being '5 years after the assessment notice for the original assessment was given', the **'original assessment'** being 'the first assessment of a taxpayer's liability for tax for an instrument, transaction or other matter' (s 3(1)) – unless—
- in the case of a decreasing reassessment—the taxpayer, within the limitation period, asks for it;
 - in the case of an increasing reassessment— either (a)
- '17 Time limits on reassessments'**
- (1) A taxpayer is not entitled to apply for a reassessment more than 5 years after the original assessment was made.
- (2) The Commissioner may make a reassessment at any time after the previous assessment was made if—(a) the Commissioner has been directed, in the course of review proceedings, to make the reassessment; or (b) there are reasonable grounds for suspecting that there has been an evasion of tax, or that the previous assessment was made on the basis of false or misleading information.
- (3) The Commissioner may
- 10(4):** 'Despite the other provisions of this section, the Commissioner cannot make a reassessment of a tax liability more than five years after the initial assessment of the liability except—(a) with the agreement of the taxpayer; or (b) where there has been a deliberate tax default.' The phrase **'deliberate tax default'** is defined in s 3(1) to mean: 'a tax default that wholly or partly consists of or results from a deliberate act or omission by the taxpayer or a person acting on behalf of the taxpayer, and includes a tax default where the
- 19(3) and (4)** are materially the same as Vic ss 9(3) and (4) except that:
- the time limit is three not five years;
 - there is no equivalent to Vic s 9(3)(c);
 - there is s 9(3)(c) which provides that there is no time limit where 'the initial assessment was an assessment by way of estimate under section 21(2).'
- 9(3)** is materially the same as Vic s 9(3) except that there is no para (c).
- 9(4)** is materially the same as NSW s 9(4).
- 21(4)** is materially the same as NSW s 9(3).

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<p>(4) The time limited by subsection (3) applies even if the initial assessment is withdrawn.'</p>	<p>9(4) is similar to Vic s 9(4): 'The initial assessment of a tax liability remains the initial assessment of the liability for the purposes of this Act even if it is withdrawn under section 13.'</p>	<p>the commissioner reasonably believes there has been a 'deliberate tax default', which means a 'fraud or evasion of tax' or that a taxpayer or person acting for a taxpayer 'knowingly misleads the commissioner' about the taxpayer's liability; or (b) within the limitation period, the commissioner has given written notice to the taxpayer that an investigation has started.</p> <p>'23 Limitation period does not apply to particular reassessments' includes a provision similar to Vic s 9(3)(a).</p>	<p>make a reassessment of the amount of pay-roll tax payable on an original assessment that was made in or in relation to any of the 5 financial years that precede the financial year in which the reassessment is made.</p> <p>(4) However, in any other circumstances the Commissioner may only make a reassessment within 5 years after the date of the original assessment or on an application made within 5 years after the date of the original assessment.'</p>	<p>taxpayer, or a person acting on behalf of the taxpayer, deliberately failed to provide information to the Commissioner, or deliberately misinformed or misled the Commissioner, in relation to the tax liability in contravention of a taxation law'.</p>			
6. –	<p>9(2): 'A reassessment of a tax liability is to be made in accordance with the legal interpretations and assessment practices generally applied by the Chief Commissioner in relation to matters of that kind at the time the tax liability arose except to the extent that any departure from those interpretations and practices is required by a change in the law (whether legislative or non-legislative) made after that time.'</p>	<p>'20 Legal interpretations and practices applying to particular reassessments</p> <p>(1) Subject to subsections (2) and (5), a reassessment of a taxpayer's liability for tax must be made in accordance with the legal interpretations and assessment practices applied by the commissioner for assessing liability for tax in similar circumstances when the original assessment of the taxpayer's liability for tax was made.</p> <p>(2) If any legislative change made after an original assessment is made affects the legal interpretations and assessment practices to be applied under subsection (1), the reassessment must, to the extent that the interpretations</p>	<p>16(5): 'If an assessment is based on a particular interpretation of the applicable law or a particular practice of the Commissioner that was generally applied to assessments of that kind when the assessment was made, then the Commissioner cannot make a reassessment based on the ground that the interpretation or practice is or was erroneous.'</p>	<p>10(2): 'A reassessment of a tax liability is to be made in accordance with the legal interpretations and assessment practices generally applied by the Commissioner in relation to matters of that kind at the time of the initial assessment of the liability except to the extent that any departure from those interpretations and practices is required by legislative change made after the initial assessment.'</p>	<p>There is no equivalent to NSW s 9(2). But see:</p> <p>'29AA Effect on refund of change in interpretation</p> <p>If a person has paid, or purportedly paid, an amount of tax, the Commissioner cannot refund all or part of the amount based on a particular interpretation of the applicable law or a particular practice of the Commissioner that applied after the time at which it was paid, other</p>	<p>9(2) is materially the same as NSW s 9(2). And see:</p> <p>'23 No recovery of revenue amounts following non-legislative change in law</p> <p>(1) A revenue amount paid before a non-legislative change of the law [as defined in (3)] is not recoverable from the Territory on a ground of invalidity [as defined in (3)] if the ground came into existence because of the change of</p>	<p>'26 Time as at which tax liability is to be assessed</p> <p>(1) A tax liability is to be assessed by reference to the provisions of the relevant taxation law as in force when the liability arose.</p> <p>(2) However, the Commissioner must have regard to judicial decisions, affecting the interpretation of the relevant provisions, delivered since the tax liability arose.'</p>

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		and practices are changed because of the legislative change, be made in accordance with the changed interpretations and practices. ...'			than to give effect to a change in interpretation or practice brought about by a legislative change.'	law. (2) If a revenue amount paid before a non-legislative change of the law would have been refundable as an overpayment if the purported tax had been valid, that amount is refundable as if the purported tax had indeed been valid.'	
7. –	–	<p>'25 Reassessment does not replace previous assessment</p> <p>A reassessment does not replace the previous assessment but merely varies it by—(a) decreasing or increasing the taxpayer's liability for tax; or (b) changing the basis on which the taxpayer's liability for tax is assessed.'</p> <p>'69A Effect of making reassessment after appeal or review started' provides that a taxpayer in this situation may, instead of objecting to the reassessment, change the existing grounds of appeal or review to the extent that the taxpayer would have a right of objection to the reassessment.</p>	<p>'18 Effect of reassessment</p> <p>(1) A reassessment of an interim assessment or an original assessment supersedes the assessment and any earlier reassessment. ...</p> <p>(4) A reassessment does not invalidate proceedings for the recovery of tax, but the amount to be recovered is to be amended to take account of the reassessment.</p> <p>(5) If an objection to an assessment is lodged but a reassessment is made before the objection is determined, the objection may be continued against the reassessment to the extent that it is liable to the same objection or to an objection that is the same, or similar, in substance.'</p>	–	–	–	–
8. '11 Information on which assessment is made	'11 Information on which assessment is made' is materially the	'27 Assessments made on available relevant information' is similar to Vic s	'19 Assessments based on estimated or suspected liability' is similar to Vic s	'12 Information on which assessment is made' is identical to Vic s	'21 Information on which assessment is	'11 Information on which assessment is	'19 Information on which assessment is to be based' is

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<p>(1) The Commissioner may make an assessment on the information that the Commissioner has from any source at the time the assessment is made.</p> <p>(2) If the Commissioner has insufficient information to make an exact assessment of a tax liability, the Commissioner may make an assessment by way of estimate.'</p>	same as Vic s 11.	<p>11(1).</p> <p>'13 Default assessments' is similar in part to Vic s 11(2).</p>	<p>11(2).</p> <p>There is also '16A Interim assessments', an interim assessment being an assessment of a portion of the tax payable (where authorised).</p>	11.	made' is materially the same as Vic s 11.	made' is materially the same as Vic s 11.	materially the same as Vic s 11.
<p>9. '12 Compromise assessment</p> <p>(1) If it is difficult or impracticable for the Commissioner to determine a person's tax liability under a taxation law without undue delay or expense because of the complexity or uncertainty of the case or for any other reason, the Commissioner may make an assessment in accordance with this section.</p> <p>(2) The Commissioner, with the agreement of the taxpayer, may assess liability in an amount specified in, or determined in accordance with, the agreement.</p> <p>(3) Despite section 9, the Commissioner cannot make a reassessment of a tax liability assessed in accordance with this section—(a) except with the agreement of the taxpayer; or (b) unless, in the opinion of the Commissioner—(i) the assessment under this section was procured by fraud; or (ii) there was a deliberate failure to disclose material information.</p> <p>(4) An assessment or reassessment made under this section with the agreement of a taxpayer is a non-reviewable decision.</p>	<p>'12 Compromise assessment' is materially the same as Vic s 12, except that there is no sub-s (4) and there is a second type of case in which a compromise assessment can be made: 'for the purpose of settling a dispute between the Chief Commissioner and a person concerning the person's tax liability (whether or not a previous assessment has been made)'.</p>	<p>'12 Compromise assessments' is materially the same as Vic ss 12(1), (2), (4) (and Qld s 17(2) is materially the same as Vic s 12(3)).</p>	<p>'20A Compromise assessments' is similar to Vic s 12. The power is to compromise is differently premised: 'If the Commissioner considers it appropriate to do so to avoid undue delay or expense, to settle a dispute or for any other reason'.</p>	<p>'13 Compromise assessment' is similar to Vic ss 12 (1)–(4). The power to compromise is differently premised: 'if the Commissioner considers it appropriate to do so to settle a dispute or to avoid undue delay or expense or for some other reason'.</p>	<p>'22 Compromise assessment' is materially the same as Vic s 12 except that there is no equivalent to Vic s 12(5).</p>	<p>'12 Compromise assessment' is materially the same as Vic s 12 except that there is no equivalent to Vic s 12(4).</p>	<p>'20 Negotiated assessments' is materially the same as Vic s 12, except that the power to 'negotiate' is premised only upon the Commissioner being 'satisfied that there is good reason to do so'.</p>

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<p>(5) This section does not limit the power of the Commissioner to make an assessment by way of estimate under section 11.’</p>							
<p>10. ‘13 Withdrawal of assessment</p> <p>The Commissioner may withdraw an assessment at any time within 5 years after the date of service of the notice of assessment, whether or not the amount of tax specified in the notice of assessment has been paid.’</p>	<p>‘13 Withdrawal of assessment’ is materially the same as Vic s 13.</p>	–	<p>‘18A Withdrawal of assessments</p> <p>(1) The Commissioner may, within 5 years after the issue of a notice of assessment, withdraw the assessment.</p> <p>(2) An assessment may not be withdrawn if any amount of tax has been paid on the assessment.</p> <p>(3) The Commissioner must give a written notice of withdrawal to the taxpayer.</p> <p>(4) If an assessment in respect of an event or transaction is withdrawn, the assessment is taken never to have been made and, subject to this Act, the Commissioner may make an assessment in respect of the event or transaction at any time after the first-mentioned assessment is withdrawn.’</p>	<p>‘17 Cancellation of assessment</p> <p>If the Commissioner is satisfied that—(a) an assessment has been made in error; and (b) no amount has been paid as required under the assessment, the Commissioner may cancel the assessment.’</p>	<p>‘23 Withdrawal of assessment’ is materially the same as Vic s 13 except that the reference is to three not five years.</p>	<p>‘13 Withdrawal of assessment’ is materially the same as Vic s 13.</p>	<p>‘22 Withdrawal of assessment’ is materially the same as Vic s 13 except for the addition of a sub-section (2) specifying the consequences of the withdrawal.</p>
<p>11. ‘14 Notice of assessment or withdrawal of assessment</p> <p>(1) If the Commissioner makes or withdraws an assessment, the Commissioner must serve a notice of assessment or withdrawal on the taxpayer. ...</p> <p>(2) A notice of assessment must—(a) be expressed to be an assessment of liability to the tax; and (b) show the amount of tax assessed.</p>	<p>‘14 Notice of assessment, reassessment or withdrawal of assessment</p> <p>(1) The Chief Commissioner may issue a notice of assessment (showing the amount of the assessment).</p> <p>(2) If the Chief Commissioner has not issued a notice of</p>	<p>‘26 Assessment notice to be given to taxpayer’ is similar to, but goes beyond, Vic s 14 insofar as notices of assessment are concerned.</p> <p>In the case of a reassessment, the notice must state ‘the amount of the liability for tax under the previous assessment’ (s 26(2)(g)).</p> <p>‘More than 1 assessment may be included in the assessment</p>	<p>‘23 Assessment notices</p> <p>(1) When the Commissioner makes an assessment, he or she must issue an assessment notice.</p> <p>(2) However, the Commissioner does not have to issue an assessment notice—(a) if the Commissioner makes a reassessment on his or her own initiative, and no tax is to be paid or refunded as a result</p>	<p>‘14 Form of assessment and service on taxpayer</p> <p>(1) The Commissioner may make an assessment only by a written notice that is—(a) expressed to be an assessment of liability to the tax; and (b) in a form approved by the Commissioner.</p> <p>(2) The assessment must be served on the taxpayer</p>	<p>‘24 Notice of assessment of withdrawal of assessment</p> <p>(1) If the Commissioner makes or withdraws an assessment, the Commissioner—(a) may serve a notice of assessment or withdrawal on the</p>	<p>‘14 Notice of assessment, reassessment or withdrawal of assessment’ is materially the same as NSW s 14 except that there is no sub-s (5).</p>	<p>‘23 Notice of assessment, reassessment or withdrawal of assessment</p> <p>(1) The Commissioner may issue a notice of assessment.</p> <p>(2) The Commissioner must issue a notice of assessment if: (a) the</p>

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<p>(3) An amount of tax assessed in a notice of assessment is payable on or before the day specified by the Commissioner in the notice of assessment.'</p>	<p>assessment of the tax liability of a taxpayer, the Chief Commissioner must issue the notice if a request to do so is made by the taxpayer within 5 years after the liability arose.</p> <p>(3) If the Chief Commissioner makes a reassessment, the Chief Commissioner must issue a notice of assessment (showing the amount of the reassessment).</p> <p>(4) If the Chief Commissioner withdraws an assessment, the Chief Commissioner must issue a notice of withdrawal of assessment.</p> <p>(5) The notice is to be in a form approved by the Chief Commissioner.'</p>	<p>notice' (s 26(5)).</p>	<p>of the reassessment provided confirmation is given in writing if requested; or (b) if the Commissioner assesses the amount of tax payable and then immediately endorses an instrument to indicate the assessment; or ...</p> <p>(4) However, liability to tax is not dependent on service of the assessment notice.'</p> <p>'24 Form of assessment notice</p> <p>...(3) An assessment notice in relation to a reassessment must also—(a) state whether the amount payable is more or less than the amount assessed under the previous assessment; and (b) if an amount of tax has been overpaid—state whether the overpaid amount is to be refunded or credited to the taxpayer; and (c) if the amount of tax has been increased, or an amount of tax remains unpaid—state the due date for payment of the amount or amounts to be paid...'</p> <p>See s 18A(3) (above) regarding withdrawal notices.</p>	<p>concerned.</p> <p>(3) However, neither the validity of an assessment nor the recovery of an amount to which it relates is affected by failure to serve the assessment on the taxpayer. ...'</p>	<p>taxpayer; and (b) must serve such a notice on the taxpayer if the taxpayer so requests.</p> <p>(2) [similar to Vic ss 14(2) and (3)].'</p>		<p>taxpayer requests a notice of assessment within 5 years after the date of the assessment; or (b) the assessment is a reassessment.</p> <p>(3) If the Commissioner withdraws an assessment, the Commissioner must issue a notice of withdrawal of assessment.</p> <p>(4) A notice of an assessment of a tax liability must specify the amount assessed. ...</p> <p>(6) A notice under this section is to be in the approved form.'</p>
<p>12. '16 Receipt of tax is not an assessment</p> <p>The receipt by the Commissioner of a return or an amount as payment of a tax does not constitute the making of an assessment of tax liability.'</p>	<p>'17 Acceptance of money or return not necessarily an assessment</p> <p>The acceptance of money by the Chief Commissioner paid in connection with the lodging of a return or other document, or the</p>	<p>–</p>	<p>13(3) is materially the same as Vic s 16.</p>	<p>14(4) is identical to Vic s 16.</p>	<p>'25 Receipt of tax is not an assessment' is identical to Vic s 16.</p>	<p>'17 Acceptance of money not necessarily an assessment' is materially the same as NSW s 17.</p>	<p>'30 Acceptance of money not an assessment' is similar to Vic s 16.</p>

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	acceptance of a return or other document, is not, only because of the acceptance, an assessment.'						

2.3 Refunds generally

13. 'Part 4—Refunds of tax' (ss 18–23)	'Part 4—Refunds of tax' (ss 18–20)	'Part 4—Payments and refunds of tax and other amounts' (ss 29–53, split into five divisions, including 'Division 2—Refunds of tax and other amounts')	'Part 5—Payment and refund of tax' (ss 45–59, split into four divisions, including 'Division 3—Refunds of tax')	'Part 4—Refunds of tax' (ss 18–24)	'Part 4—Refunds of tax' (ss 27–33)	'Part 4—Refunds of tax' (ss 19–24)	'Part 4—Refunds of tax' (ss 31–33)
<p>14. '18 Application of Part</p> <p>(1) Proceedings for the refund or recovery of tax paid or purportedly paid under a taxation law, whether before or after the commencement of this section, must not be brought, whether against the Commissioner or otherwise, except as provided in this Part. ...</p> <p>(3) Subsection (1) and section 19 do not apply to a taxpayer if the taxpayer claims to be entitled to receive a refund or to recover tax paid or purportedly paid under a taxation law by reason of the invalidity of a provision of that law.</p> <p>(4) In this Part, <i>proceedings</i> includes—(a) seeking the grant of any relief or remedy in the nature of certiorari, prohibition, mandamus or quo warranto, or the grant of a declaration of right or an injunction; or (b) seeking any order under the <i>Administrative Law Act 1978</i>.</p>	<p>There is no equivalent to Vic s 18. But see ss 16, 119, 103A (below).</p>	<p>'36 Refunds made only under this division</p> <p>A person is not entitled to a refund of any amount paid, or purportedly paid, under a tax law other than under this division.</p> <p>37 Commissioner to refund tax and other amounts</p> <p>(1) An entitlement to a refund of an amount paid under a tax law arises if—(a) under a reassessment, a taxpayer's liability for tax is decreased; or (b) the amount paid by a person is more than the amount stated in any notice as payable by the person under the tax law.</p> <p>(2) Subject to sections 38 and 39, the commissioner must refund the overpaid amount.</p> <p>(3) However, the</p>	<p>–</p>	<p>100(2) (in pt 10): 'If an amount has been paid to the Commissioner as tax—(a) no proceedings may be brought for the recovery of the amount, or a part of the amount, unless the amount or part has been found to have been overpaid as a result of an assessment, or a decision on an application for a refund, made by the Commissioner, or by the Minister or the Supreme Court on an objection or appeal under this Part; and (b) no question may be raised as to liability to pay the amount, or a part of the amount, as tax except through an application to the Commissioner for an assessment or a refund, or in proceedings by way</p>	<p>'27 Application of Part' is materially the same as Vic s 18, although unlike Vic s 18(4) there is no definition of 'proceedings'.</p>	<p>–</p>	<p>'31 Refunds only made under this Part</p> <p>(1) A person is not entitled to recover any amount paid, or purportedly paid, under a taxation law except under this Part.</p> <p>(2) Subsection (1) applies whether or not the amount was paid under a mistake of law or fact.'</p>

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(5) For the avoidance of doubt, it is declared that an amount by which tax is overpaid is taken to be tax for the purposes of this Part.'		commissioner must not make a refund under subsection (1)(b) more than 5 years after the payment of the amount.		of objection or appeal under this Part.'			
<p>15. '19 Application for refunds</p> <p>(1) If a taxpayer claims to be entitled to receive a refund of or to recover tax paid or purportedly paid under a taxation law, the taxpayer must lodge with the Commissioner within 5 years after the payment was made an application for the refund of the payment.</p> <p>(2) An application for a refund cannot be made if the Commissioner has previously served a notice of assessment of the tax liability of the taxpayer in respect of the matter in respect of which the payment was made to the Commissioner.</p> <p>(2A) Subsection (2) does not apply to an application for a refund of tax paid or purportedly paid under the <i>Land Tax Act 2005</i> or a refund of a contribution paid or purportedly paid under Part 9B of the <i>Planning and Environment Act 1987</i>.</p> <p>(3) An application under subsection (1) must be in a form approved by the Commissioner.'</p>	–	<p>38 Applying amounts to current and future tax liabilities</p> <p>... (2) The commissioner may apply the whole or part of the amount as payment for—(a) any tax law liability of the taxpayer; or (b) any tax law liability of the taxpayer that the commissioner reasonably believes will become payable within 60 days after the entitlement to the refund arises. ...'</p>	<p>'54 Refunds</p> <p>(1) The Commissioner must refund tax to a taxpayer if—(a) as a result of a reassessment, it appears that an overpayment of tax has been made; or (b) the Commissioner is satisfied on an application for a refund under this section that an overpayment of tax has been made; or (c) in the circumstances of a particular case, the Commissioner is required by a taxation Act to make a refund of tax.</p> <p>(2) However, instead of repaying the amount to be refunded, the Commissioner may credit the amount of the refund against the taxpayer's existing and future tax liabilities...</p> <p>(3) An application for a refund may only be made—(a) on a ground on which refunds are authorised or required by a taxation Act; or (b) on the ground that the amount paid by the taxpayer exceeds the amount of tax payable in accordance with the relevant assessment.</p> <p>(4) An application for a refund under this section must be made—(a) within a period fixed by a taxation Act for making the application; or (b) if no period is fixed by a</p>	<p>'16—Refund resulting from assessment [in pt 3]</p> <p>If the result of an assessment of a taxpayer's tax liability is that the taxpayer has overpaid tax, the Commissioner must, subject to Part 4, refund the amount of the tax overpaid.'</p> <p>'18 General right to apply for refund</p> <p>(1) A taxpayer may make application for a refund of tax that has been overpaid by the taxpayer.</p> <p>(2) An application for a refund cannot be made under this section—(a) more than five years after the taxpayer made the payment...; or (b) if the Commissioner has previously made an assessment of the tax liability of the taxpayer in respect of the matter in respect of which the payment was made to the Commissioner.</p> <p>(3) A determination under this section as to whether there has been an overpayment, or as to the amount of an overpayment, is to be made in accordance with the legal interpretations and assessment practices</p>	<p>'28 Application for refund' is materially the same as Vic s 19 except that:</p> <ul style="list-style-type: none"> the time limit for refund applications is three rather than five years; only land tax is referred to in sub-s (2A). 	<p>'19A Application for refund</p> <p>(1) If a taxpayer claims to be entitled to a refund of tax paid under a tax law, the taxpayer may apply to the commissioner for a refund.</p> <p>(2) The application must be made within 5 years after the tax was paid</p> <p>(3) This section does not affect the operation of any other provision of a tax law that authorises or requires a refund of tax paid.'</p>	<p>'32 Entitlement to refund</p> <p>(1) If it appears to the Commissioner that a taxpayer has made an overpayment of tax, the Commissioner must refund to the taxpayer the amount of the overpayment.</p> <p>(2) However: (a) if a taxation law provides for a refund on application by the taxpayer, a refund is only to be made, in circumstances to which the relevant provision applies, on such an application; and (b) a refund cannot be made more than 5 years after the overpayment was made except to give effect to a reassessment of the relevant tax liability.</p> <p>(3) The Commissioner's decision to make a refund may be based on an assessment of the relevant tax liability or on any other evidence the Commissioner considers sufficient.</p>
<p>16. '20 When must Commissioner make a refund?</p> <p>(1) If—(a) an application for a refund is lodged with the Commissioner in accordance with section 19; and (b) the Commissioner finds that an amount has been overpaid by the applicant—the Commissioner—(c) must refund the overpaid amount;</p>	<p>'18 Entitlement to refund</p> <p>(1) If a taxpayer has paid a greater amount of tax in relation to a tax liability than the amount assessed for that liability, the Chief Commissioner must refund the difference to the taxpayer, subject to</p>				<p>'29 Refund' is materially the same as Vic s 20(1), except that a refund can be made within three years without the necessity for an application if an overpayment is identified by the</p>	<p>'19 Entitlement to refund' and '20 Offset of refund against other tax liability' are materially the same as NSW ss 18 and 19.</p>	

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<p>or (d) must—(i) apply the overpaid amount against any liability of the applicant to the State, being a liability arising under, or by reason of, a taxation law or another Act of which the Commissioner has the general administration; and (ii) refund any part of the overpayment that is not so applied.</p> <p>(2) Subsection (1)(d) does not apply in respect of a refund of a contribution paid under Part 9B of <i>the Planning and Environment Act 1987</i>.’</p>	<p>this Part.</p> <p>(2) For the avoidance of doubt, it is declared that an amount by which tax is overpaid is taken to be tax for the purposes of this Part.</p> <p>19 Offset of refund against other tax liability</p> <p>(1) Instead of making a refund to a taxpayer, the Chief Commissioner may apply the amount that would otherwise be refunded to meet tax or any other amount payable by the taxpayer under a taxation law.</p> <p>(2) A refund may be credited towards a taxpayer’s future liability, but only with the taxpayer’s consent.’</p>		<p>taxation Act — within 5 years of the date when the overpayment was made.’</p>	<p>generally applied by the Commissioner in relation to matters of the kind in question at the time the taxpayer made the payment in respect of which the refund is sought except to the extent that any departure from those interpretations and practices is required by legislative change made after the payment.</p> <p>(4) If the result of determination of an application under this section is that the taxpayer has overpaid tax, the Commissioner must, subject to the other provisions of this Part, refund the amount overpaid. ...</p> <p>19 Application of remaining provisions of Part</p> <p>The remaining provisions of this Part apply to refunds or refund applications whether under this Act or another taxation law.</p> <p>20 Form of application for refund</p> <p>An application for a refund must be made to the Commissioner in a form approved by the Commissioner.</p> <p>21 Commissioner may refuse to determine application until information etc</p>	<p>commissioner during an investigation.</p>		<p>(4) The Commissioner may refund the whole or part of the refundable amount by crediting the whole or part of the refundable amount against present or future liabilities of the taxpayer under a taxation law or another law administered by the Commissioner or under which the Commissioner exercises statutory functions.</p> <p><i>Example for subsection (4):</i> The Commissioner might credit the amount of a refund of stamp duty against a liability of the taxpayer as a member of a payroll tax group.</p> <p>(5) However, an amount is not to be credited against future tax liabilities unless the taxpayer consents.’</p> <p>Section 3(1) defines the following terms that are used in s 32: ‘overpayment, of tax, means a payment made to the Commissioner by a taxpayer in excess of the taxpayer’s tax liability and includes a</p>
<p>17. ‘21 What happens if Commissioner refuses a refund?</p> <p>(1) If—(a) a taxpayer has lodged an application for the refund of an amount in accordance with section 19; and (b) within the period of 3 months after the application was lodged—(i) the Commissioner has not—(A) refunded the amount; or (B) applied the amount in accordance with section 20(d)(i); or (C) refunded part of the amount and applied the remainder in accordance with section 20(d)(i); or (ii) the Commissioner has, in writing given to the taxpayer within that period, refused to make a refund— the taxpayer, within 3</p>	<p>–</p>				<p>‘30 Recovery of overpaid amounts</p> <p>A taxpayer may bring proceedings for the recovery of an overpaid amount if the taxpayer lodged an application under section 28.’</p>	<p>There is no equivalent to Vic s 21. The list of reviewable decisions in schedules 1 and 2 do not refer to any decision made under the refund provisions in part 4.</p>	

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<p>months after the end of that period or after that refusal, whichever first occurs, may bring proceedings for the recovery of the amount or, if the Commissioner has refunded or applied part, the remainder of the amount.</p> <p>(2) Subsection (1) applies whether or not the period for bringing proceedings for the refund or recovery of the amount prescribed by section 20A(1) of the <i>Limitation of Actions Act 1958</i> has expired.'</p>				<p>provided ...</p> <p>22 Offset of refund against other liability</p> <p>(1) The Commissioner may apply the whole or part of an amount that would otherwise be required to be refunded to meet any amount payable by the taxpayer under a taxation law (whether or not being the law in respect of which the refund became payable).</p> <p>(2) The whole or part of an amount that would otherwise be required to be refunded may be credited towards a taxpayer's future liability under a taxation law, but only with the taxpayer's consent.</p> <p>(3) A decision under this section is a non-reviewable decision.'</p>			<p>payment made in purported satisfaction of a tax liability that does not actually exist'; 'refund, of tax, includes a credit given to the taxpayer against present or future liabilities for tax'.</p>
<p>18. '22 Windfalls—refusal of refund</p> <p>(1) The Commissioner must not make a refund of tax unless satisfied that the person to whom the refund is payable (in this section called <i>the applicant</i>)—(a) has not charged to, or recovered from, and will not charge to, or recover from, any other person any amount in respect of the whole or any part of that tax; or (b) if the applicant has so charged or recovered any such amount, will reimburse, or will take all reasonable steps to reimburse, each other person for the amount</p>	<p>'20 Windfalls—refusal of refund</p> <p>The Chief Commissioner may refuse to make a refund to a taxpayer if: (a) the relevant taxation law provides for the passing on of the tax to another person, and (b) the tax sought to be refunded has been passed on to another person, and (c) the Chief Commissioner is not satisfied that appropriate arrangements have been made to pass</p>	<p>'39 General provision about refunds' is similar to Vic ss 22 and 23.</p>	<p>'55 Refunds etc. to be passed on to third parties in some cases</p> <p>(1) This section applies to payment of any of the following taxes—(a) pay-roll tax; (b) duty payable under Part III F or Part IV B of the <i>Stamp Act 1921</i>; (ba) duty payable under the <i>Duties Act 2008</i> Chapter 4.</p> <p>(2) If—(a) the tax payable by the taxpayer is paid out of money provided by a third party, or a third party</p>	<p>'23 Windfalls—refusal of refund</p> <p>(1) The Commissioner may refuse to make a refund if—(a) the relevant taxation law did not prevent the passing on of the tax to another person; and (b) the tax to be refunded has been passed on to another person; and (c) the taxpayer has not reimbursed that other person in an amount equivalent to the amount</p>	<p>'31 Refusal to refund' is materially the same as Vic s 22(1), and '32 Reimbursement after refund' is similar to Vic ss 22(2)–(5).</p>	<p>'21 Limitation of refunds of revenue amounts</p> <p>(1) The commissioner must not refund a revenue amount unless the person claiming the refund (the <i>claimant</i>)—(a) satisfies the commissioner that [(i) and (ii) materially the same as Vic (a) and (b) in s 22(1)];</p>	<p>'33 Windfalls</p> <p>(1) A taxpayer gains a windfall profit at the expense of another (the <i>third party</i>) if: (a) the third party pays tax on the taxpayer's behalf or indemnifies the taxpayer for the payment of tax; and (b) the amount of the tax, or a proportion of the amount, is refunded to the taxpayer under this</p>

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<p>charged or recovered.</p> <p>(2) If a refund is made to an applicant to whom subsection (1)(b) applies—(a) the applicant must—(i) within 90 days after receiving the refund, reimburse each other person for the amount charged to or recovered from that person; and (ii) notify the Commissioner in writing within 7 days after the end of that period that all amounts charged or recovered have been reimbursed; or (b) if any such amount is not reimbursed within that period, the applicant, within 7 days after the end of that period, must—(i) notify the Commissioner in writing of the amounts not reimbursed; and (ii) pay those amounts to the Commissioner, together with interest at the specified rate from the date the refund was made to the date of payment.</p> <p>Penalty: 50 penalty units.</p> <p>(3) An amount payable under subsection (2)(b)(ii) is a debt due from the applicant to the State.</p> <p>(4) In this section—specified rate means the percentage, not exceeding 20% per annum, that the Commissioner specifies when the refund is made; charge includes pass on.</p> <p>(5) For the avoidance of doubt, this section prevails over anything to the contrary in section 20 or 21.'</p>	<p>the tax sought to be refunded on to that other person.'</p>		<p>reimburses the taxpayer for payment of tax; and (b) the tax is, in whole or part, refunded or credited to the taxpayer (whether under this Division or not), then the taxpayer is to reimburse the third party in accordance with subsection (3) or (4), as the case requires...</p> <p>(5) The taxpayer must—(a) make the reimbursement to the third party within 90 days after the refund was paid or credited to the taxpayer or within any longer period allowed by the Commissioner; or (b) if the reimbursement is not made within that period— repay the amount of the refund to the Commissioner or ask the Commissioner to cancel the credit in the taxpayer's favour within 7 days from the end of that period.</p> <p>Penalty: \$20 000.</p> <p>(6) The Commissioner may recover any amount that should have been, but was not, repaid under subsection (5)(b) as if it were unpaid tax.</p> <p>(7) No action can be brought in a court to compel the Commissioner to take or refrain from taking proceedings for recovery of the amount refunded or credited to the taxpayer.'</p>	<p>of tax passed on to that other person.</p> <p>(2) A decision under subsection (1) is a non-reviewable decision.'</p>		<p>and (b) gives the commissioner a written undertaking that the claimant will not charge to, or recover from, any other person an amount paid in relation to the whole or any part of the revenue amount.</p> <p>(2) If the commissioner is not satisfied about the matters mentioned in subsection (1) (a), the commissioner must give the claimant written notice of his or her decision.</p> <p>(3) A person who contravenes an undertaking that the person has given under subsection (1) (b) is liable to pay the commissioner, as a penalty, an amount equal to double the amount that the person has charged to, or recovered from, another person by the contravention.'</p> <p>The phrase 'revenue amount' is defined in the 'Dictionary' to mean 'an amount</p>	<p>Part.</p> <p>(2) A third party is taken to indemnify a taxpayer for the payment of tax if the taxpayer identifies the tax as a component of the price of goods or services and receives or recovers the price of the goods or services (including the component referable to tax) from the third party.</p> <p>(3) A taxpayer must reimburse a third party for the amount of any windfall profit gained at the third party's expense.</p> <p>(4) A reimbursement under this section must be made within the relevant period.</p> <p>(5) Within 7 days after the end of the relevant period, the taxpayer must: (a) give the Commissioner a notice setting out the extent the windfall profit has been reimbursed as required by this section; and (b) return to the Commissioner any amount that has not been reimbursed together with interest at the statutory interest rate from the</p>

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<p>19. '23 Application of section 22 to proceedings</p> <p>Section 22 applies in respect of proceedings for the refund or recovery of tax paid or purportedly paid under a taxation law as if—(a) a reference in section 22 to the Commissioner (except in subsection (2)(b)(ii)) were a reference to the court; and (b) a reference in section 22 to the making of a refund were a reference to the making of an order or decision that a refund be made.'</p>	–	–	–	–	–	<p>of money paid voluntarily or under compulsion as a tax (including penalty tax)'.</p>	<p>date the refund was made to the date the amount is returned to the Commissioner.</p> <p>(6) A taxpayer must not fail to comply with an obligation imposed by this section.</p> <p><i>Maximum penalty:</i> 100 penalty units.</p> <p>(7) Before the Commissioner refunds tax to a taxpayer under this Part, the Commissioner may require the taxpayer to satisfy the Commissioner that the taxpayer has made appropriate arrangements for complying with the taxpayer's obligations under this section....</p> <p>(8) In this section: <i>relevant period</i> means the period of 90 days (or a longer period allowed by the Commissioner) from the date of the refund.'</p>
20. –	–	–	–	–	<p>'29A Payment of interest</p> <p>(1) In addition to the amount of an overpayment of tax refunded under section 29, the Commissioner is required to pay</p>	<p>'33 Application of certain sections' is materially the same as Vic s 23.</p> <p>'22 Judgments for the recovery of revenue amounts' reproduces the terms of ss 21(1) and (3) but in relation to a court not the commissioner.</p>	–

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21. '121 Appropriation of Consolidated Fund' (1) If the Commissioner is authorised or required—(a) to pay an amount under this Act; or ... the amount is to be paid from the Consolidated Fund which is appropriated by this section to the necessary extent. ...'	'111 Appropriation of Consolidated Fund' If the Chief Commissioner is authorised or required to pay an amount under this Act, the amount is to be paid from the Consolidated Fund which is appropriated by this section to the necessary extent.'	–	–	'24 Refunds paid out of Consolidated Account' A refund required to be paid by the Commissioner is to be paid out of the Consolidated Account which is appropriated to the necessary extent.'	interest [at the market rate] ...' '99 Appropriation' Any amount authorised or required to be paid by the Commissioner under this Act is to be paid from the Consolidated Fund which is appropriated by this section to the necessary extent.'	'125 Appropriation of public money' If the commissioner is authorised or required to pay an amount under this Act, the amount is payable from the public money of the Territory, which is appropriated accordingly.'	'140 Appropriation of Central Holding Authority' If the Commissioner is authorised or required to pay an amount under a taxation law, the amount must be paid from the Central Holding Authority which is appropriated by this section to the necessary extent.'

2.4 Reassessment and refund upon objection

22. 'Part 10—Objections, reviews and appeals' (ss 96–116)	'Part 10—Objections and reviews' (ss 86–106D)	'Part 6—Objections, reviews and appeals against assessments' (ss 63–77)	'Part 4—Objections and review proceedings' (ss 31–44)	'Part 10—Objections and appeals' (ss 82–100)	'Part 10—Objections, reviews and appeals' (ss 80–95A)	'Part 10—Objections and appeals' (ss 100–111)	'Part 11—Objections and appeals' (ss 107–129)
23. 96(2): 'No court or administrative review body, including the Tribunal, has jurisdiction or power to consider any question concerning an assessment or decision referred to in subsection (1), except as provided by this Part.'	'103A Review or appeal by other courts or tribunals' (1) No court or tribunal (or other body or person) has jurisdiction or power to consider any question concerning an assessment or other decision of the Chief Commissioner under a taxation law (including the determination of an objection under Division	–	'31 Procedure for challenging assessments' A taxpayer is not entitled to challenge the validity or correctness of an assessment, or of any other decision for which rights of objection or review are conferred by this Act, except—(a) in proceedings by way of objection or in review proceedings; or (b) in any other manner specifically provided in a taxation Act.'	'100 Exclusion of other proceedings or disputes as to tax liability' (1) The validity or correctness of an assessment or any other decision in respect of which rights of objection and appeal are conferred under this Part is not open to challenge in any proceedings other than proceedings by way of objection or appeal under	80(4) and (5) are materially the same as NSW s 103A.	–	'108 Certain decisions not subject to challenge except in proceedings by way of objection or appeal' The validity or correctness of a relevant decision [defined in s 107 to include an assessment] (or of a procedural decision

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VIC (TAA 1997)	NSW (TAA 1996)	QLD (TAA 2001)	WA (TAA 2003)	SA (TAA 1996)	TAS (TAA 1997)	ACT (TAA 1999)	NT (TAA)
	<p>1) except as provided by this Part.</p> <p>(2) Subsection (1) does not apply to a decision of the Chief Commissioner under Part 4, 7, 8, 9 or 11 (not being an assessment).’</p>			<p>this Part.</p> <p>(2) [see extract above].’</p>			<p>leading to the making of a relevant decision) cannot be challenged except in proceedings by way of objection or appeal under this Act.’</p>
<p>24. ‘96 Objection</p> <p>(1) A taxpayer may lodge a written objection with the Commissioner if the taxpayer is dissatisfied with— (a) an assessment, other than a compromise assessment; ... (d) a decision of the Commissioner under the <i>Payroll Tax Act 2007</i>.</p> <p>(1A) A reference in subsection (1)(d) to a decision does not include a refusal by the Commissioner to refund tax paid or purportedly paid by the taxpayer.</p> <p>(1B) For the avoidance of doubt, it is declared that an amount by which tax is overpaid is taken to be tax for the purposes of subsection (1A). ...’</p>	<p>‘86 Objections</p> <p>(1) A taxpayer who is dissatisfied with: (a) an assessment that is shown in a notice of assessment served on the taxpayer, or (b) any other decision (within the meaning of the <i>Administrative Decisions Review Act 1997</i>) of the Chief Commissioner under a taxation law, may lodge a written objection with the Chief Commissioner. ...’</p>	<p>‘63 Right to object</p> <p>(1) A taxpayer who is dissatisfied with an original assessment, other than a compromise assessment, may object to the assessment.</p> <p>(2) Also, a taxpayer who is dissatisfied with a reassessment increasing a taxpayer’s liability for tax... may object to the reassessment. ...’</p>	<p>‘34 Right to object</p> <p>(1) A taxpayer may object to— (a) an assessment, other than a compromise assessment; or (b) another decision under a taxation Act that affects the taxpayer’s liability to taxation; or...’</p>	<p>‘82 Objections</p> <p>A person who is dissatisfied with—(a) an assessment (other than a compromise assessment); or (b) a decision under Part 4 concerning a refund or an application for a refund of tax; or (c) any other decision of the Commissioner under a taxation law that is not declared to be a non-reviewable decision, may lodge a written notice of objection with the Minister.’</p>	<p>‘80 Objection</p> <p>(1) A taxpayer may object to—(a) an assessment, other than a compromise assessment or an assessment that gives effect to the determination of an objection made under section 84; or (b) a decision of the Commissioner under a taxation law, unless that law states that the decision is a non-reviewable decision. ...’</p> <p>80(1A) and (1B) are materially the same as Vic ss 96(1A) and (1B).</p>	<p>‘100 Objection</p> <p>(1) A taxpayer may lodge a written objection with the commissioner if the taxpayer is dissatisfied with— (a) an assessment, other than a compromise assessment, that is shown in a notice of assessment served on the taxpayer; or (b) a decision mentioned in schedule 1 or schedule 2; or (c) a decision under a tax law that is prescribed under the law for this section. ...’</p>	<p>‘109 Right to object</p> <p>(1) A person affected by a relevant decision may object to the decision. ...’</p>
<p>25. ‘97 Grounds for objection</p> <p>... (2) The grounds for the objection, in the case of a reassessment, may only relate to tax liabilities specified in the reassessment to the extent that they are additional to, or greater than, those under the previous assessment. ...’</p>	<p>‘87 Grounds for objection</p> <p>... (2) The grounds for the objection, in the case of a reassessment, are limited to the extent of the reassessment.’</p>	<p>63(3): ‘However, the right of objection to the reassessment is limited to the changes for the particular matters for which the reassessment is made.’</p>	<p>34(3): ‘If a reassessment is made and the time for lodging an objection to the previous assessment has expired, an objection may only be made against an increase in liability.’</p>	<p>‘84 Objection to reassessment’ is materially the same as Vic s 97(2).</p>	<p>80(3): ‘The grounds for objection to a reassessment are limited to the reassessment.’</p>	<p>‘101 Grounds for objection’, sub-s (2), is materially the same as NSW s 87(2).</p>	<p>109(2): ‘However, if the relevant decision is the reassessment of a tax liability, the decision is only liable to objection to the extent that it increases the assessed amount of the tax liability.’</p>

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VIC (TAA 1997)	NSW (TAA 1996)	QLD (TAA 2001)	WA (TAA 2003)	SA (TAA 1996)	TAS (TAA 1997)	ACT (TAA 1999)	NT (TAA)
<p>26. '99 Time for lodging objection</p> <p>(1) An objection must be lodged with the Commissioner within 60 days after the date of service of the notice of the assessment or decision on the taxpayer, except as provided by section 100. ...'</p> <p>'100 Objections lodged out of time', sub-s (1), gives the Commissioner a discretion to consider an objection lodged out of time.</p>	<p>89(1) and 90(1) are materially the same as Vic ss 99(1) and 100(1).</p>	<p>60(1)(d) and (2) are materially the same as Vic ss 99(1) and 100(1).</p>	<p>36 is similar with regard to the time limit upon objection, except that no extension of time to object can be given after 12 months after the 60-day objection period.</p>	<p>86 and 87(1) are materially the same as Vic ss 99(1) and 100(1) except that no extension of time to object can be given after 12 months.</p>	<p>82(1) and 83(1) are materially the same as Vic ss 99(1) and 100(1).</p>	<p>102 and 103(1) are materially the same as Vic ss 99 and 100(1).</p>	<p>110(1) and 111(1) are materially the same as Vic ss 99(1) and 100(1).</p>
<p>27. '111 Referral to Tribunal</p> <p>(1) The Tribunal must review a matter referred to it and, subject to subsection (2), may confirm, reduce, increase or vary the assessment or decision. ...'</p>	<p>'101 Powers of court or tribunal on review</p> <p>(1) The court or tribunal dealing with the application for review may do any one or more of the following: (a) confirm or revoke the assessment or other decision to which the application relates, (b) make an assessment or other decision in place of the assessment or other decision to which the application relates, (c) make an order for payment to the Chief Commissioner of any amount of tax that is assessed as being payable but has not been paid, (d) remit the matter to the Chief Commissioner for determination in accordance with its finding or decision, (e) make any further order as to costs or otherwise as it thinks fit. ...'</p>	–	<p>16(1)(b) envisages that in review proceedings the commissioner may be given a direction to reassess.</p>	<p>'98 Determination of appeal</p> <p>On an appeal, the Supreme Court may do one or more of the following: (a) confirm or revoke the assessment or decision to which the appeal relates; (b) make an assessment or decision in place of the assessment or decision to which the appeal relates; ...'</p>	–	<p>There is no equivalent (in the TAA) to Vic ss 111(1) and 112(1).</p>	<p>'122 Determining appeal</p> <p>In determining the appeal, the Tribunal may: (a) confirm the decision subject to the appeal; or (b) vary the decision subject to the appeal; or (c) substitute another decision that would have been available to the decision maker.'</p>
<p>28. '112 Supreme Court appeals</p> <p>(1) On the hearing of an appeal by the Supreme Court, the Court may make any order it thinks fit and may by order confirm, reduce, increase or vary the assessment or decision. ...'</p>	<p>make an order for payment to the Chief Commissioner of any amount of tax that is assessed as being payable but has not been paid, (d) remit the matter to the Chief Commissioner for determination in accordance with its finding or decision, (e) make any further order as to costs or otherwise as it thinks fit. ...'</p>	<p>'70C Deciding appeal</p> <p>The Supreme Court must allow the appeal completely or partly or disallow it.'</p>	–		<p>92(1) is materially the same as Vic s 112(1).</p>		<p>127, applicable to the Supreme Court, mirrors s 122, applicable to the Tribunal.</p>

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<p>29. '114 Giving effect to decision on review or appeal</p> <p>(1) Subject to section 115, within 60 days after the decision on review or appeal becomes final, the Commissioner must take any action that is necessary to give effect to it. ...'</p>	<p>'102 Giving effect to decision on review' is materially the same as Vic s 114, except that s 102(1) adds a sentence specifically mentioning a reassessment as the prime example of action necessary to give effect to the decision: 'That action may include amending any relevant assessment.'</p>	<p>'19 When commissioner must make reassessment—objections, court decisions or QCAT decisions</p> <p>(1) If the commissioner decides to allow an objection to an assessment in whole or part, or a court or QCAT makes a decision about a taxpayer's tax law liability, the commissioner must make any reassessment necessary to give effect to the decision. ...'</p>	<p>'39 Reassessment on determination of objection</p> <p>(1) If an objection is allowed wholly or in part, the Commissioner must make a reassessment accordingly. ...'</p>	<p>'88 Determination of objection', sub-s (4): 'The Minister may, after consideration of the objection, do one or more of the following: (a) confirm or revoke the assessment or decision to which the objection relates; (b) make an assessment or decision in place of the assessment or decision to which the objection relates.'</p>	<p>'93 Giving effect to decision on review or appeal', sub-s (1), is materially the same as Vic s 114(1).</p>	<p>'109 Giving effect to ACAT decision</p> <p>(1) Within 60 days after the day an ACAT decision becomes final, the commissioner must take any action, including amending any relevant assessment, that is necessary to give effect to the decision. ...'</p>	<p>'129 Giving effect to decision on objection or appeal</p> <p>(1) Effect is to be given to a decision on objection or appeal as follows: (a) if the decision affects an assessment of a tax liability—the Commissioner must make a reassessment to accord with the decision on the objection or appeal; (b) the Commissioner must make any payment required to give effect to the decision; (c) the Commissioner may recover any amount found to be payable...'</p>
<p>30. 'Division 3—Refund of amounts and payment of interest following successful objection, review or appeal</p> <p>115 Refund of amount</p> <p>(1) If—(a) a taxpayer's objection to an assessment is allowed in whole or in part; or (b) a taxpayer's review or appeal in respect of an assessment is upheld—the Commissioner must refund any amount paid under the assessment that is in excess of a requirement for payment under the relevant taxation law. ...'</p>	<p>'Division 3—Refund of amounts and payment of interest following successful objection or review' (ss 104, 105, 105A) is similar to Vic div 3. One difference is that, unlike Vic s 115, NSW s 104 is expressed to be subject to s 19 (see above), allowing the Commissioner to offset.</p>	<p>19 and 37 (above), require reassessment and refund respectively. Both are subject to ss 38 (offsets) and 39 (windfalls).</p>	<p>39(1), 16(1)(b), 43(3) and 54(1)(a) appear to have the effect that a reassessment and, if there is a resulting overpayment, a refund are required following a successful objection or review.</p>	<p>16, read with 88(4), 98, 90 and 99, appears to require a refund upon a successful objection or appeal.</p>	<p>'94 Refund of amount', '95 Payment of interest' and '95A Refunds payable, &c., consequent on related objections affecting taxation liability' are materially the same as Vic ss 115 and 116.</p>	<p>There is no equivalent to Vic s 115 in pt 10; but see s 19 in part 4.</p>	<p>129(1) read with 31–33 (above).</p>
<p>31. '116 Payment of interest</p> <p>In addition to an amount refunded</p>		<p>'61 Interest on particular overpayments following</p>	<p>39(2) and 43(3) have the same effect as Vic s 116 (requiring the payment interest</p>	<p>'90 Interest to be included in refund resulting from</p>		<p>'111 Interest payable on</p>	<p>129(3) and (4) are materially the same</p>

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VIC (TAA 1997)	NSW (TAA 1996)	QLD (TAA 2001)	WA (TAA 2003)	SA (TAA 1996)	TAS (TAA 1997)	ACT (TAA 1999)	NT (TAA)
<p>under this Part, the Commissioner is required to pay interest on the amount calculated at the market rate...’.</p>		<p>court’s or QCAT’s decision</p> <p>(1) This section applies if a taxpayer is entitled to a refund of tax or late payment interest (the overpaid amount) because of—(a) a reassessment giving effect to a decision of the Supreme Court under section 74 on an appeal by the taxpayer [strangely there is apparently no s 74]; or (b) an order of the Supreme Court on an application, under the <i>Judicial Review Act 1991</i>, by the taxpayer for a decision under a tax law; or (c) a reassessment giving effect to a decision of QCAT on an application for review made by the taxpayer under section 69.</p> <p>(2) The court or QCAT may order the commissioner to pay interest on the overpaid amount.</p> <p>(3) The interest must be calculated on a daily basis at the prescribed rate from the date the overpaid amount was paid to the commissioner to the date the refund is made by the commissioner.</p> <p>62 Interest only payable under this division</p> <p>A person is not entitled to interest on any amount the commissioner is required to refund to the person other than under this division.’</p>	<p>with a refund following a successful objection or review).</p>	<p>objection’ and ‘99 Interest to be included in refund resulting from appeal’ have the same effect as Vic s 116 (requiring the payment of interest with a refund following a successful objection or appeal).</p>		<p>refunds</p> <p>(1) If the taxpayer is entitled to a refund of an amount following the determination of an objection or a decision of the ACAT, the commissioner must pay interest on the amount calculated on a daily basis from the date of its payment by the taxpayer until the date of the refund at the market rate component under section 26.</p> <p>(2) Interest under this section is not payable to a person on an overpaid amount of interest or penalty tax under Part 5 in relation to any periods in relation to which the overpaid amount has been passed on by the person to another person and has not been refunded.</p> <p>(3) Section 20 applies to an amount of interest payable under this section as if it were a refund. ...’</p>	<p>as Vic s 116.</p>

VIC (TAA 1997)	NSW (TAA 1996)	QLD (TAA 2001)	WA (TAA 2003)	SA (TAA 1996)	TAS (TAA 1997)	ACT (TAA 1999)	NT (TAA)
<h2>2.5 Other provisions</h2>							
<p>32. '17 Validity of assessment'</p> <p>The validity of an assessment is not affected because a provision of a taxation law has not been complied with.'</p>	<p>'16 Validity of assessment' is identical to Vic s 17.</p>	<p>'132 Evidentiary provisions for assessments', sub-s (2), is similar to Vic s 17. It adds the word 'merely' before 'because'.</p>	<p>–</p>	<p>There appears to be no equivalent to Vic s 17. But see s 14(3).</p>	<p>'26 Validity of assessment' is identical to Vic s 17.</p>	<p>'16 Validity of assessment' is identical to Vic s 17 except that it adds the word 'only' before 'because'.</p>	<p>'29 Validity of assessment' is materially the same as Vic s 17.</p>
<p>33. '127 Evidence of assessment'</p> <p>Production of a notice of assessment, or of a document signed by the Commissioner purporting to be a copy of a notice of assessment, is—(a) conclusive evidence of the due making of the assessment; and (b) conclusive evidence that the amount and all particulars of the assessment are correct, except in objection, review or appeal proceedings (in which it is proof in the absence of evidence to the contrary).'</p>	<p>'119 Evidence of assessment' is materially the same as Vic s 127.</p>	<p>'132 Evidentiary provisions for assessments', sub-s (1), is materially the same as Vic s 127.</p>	<p>There is no equivalent to Vic s 127. There are prima facie evidence provisions (ss 119–124 in pt 10). And see s 31.</p>	<p>There is no equivalent to Vic s 127. '115 Evidence' comes closest.</p>	<p>'101 Evidence of assessment' is materially the same as Vic s 127.</p>	<p>'134 Evidence of assessments and determinations', sub-s (1) is materially the same as Vic s 127.</p>	<p>'148 Evidentiary value of notice or certificate'</p> <p>(1) A decision, determination or assessment made by the Commissioner under a taxation law must be accepted in any legal proceedings (other than proceedings by way of objection or appeal under this Act) as valid and correct. ...'</p>
<p>34. '63 General administration of the taxation laws'</p> <p>(1) The Commissioner has the general administration of the taxation laws and may do all things that are necessary or convenient to give effect to the taxation laws. ...'</p>	<p>'61 General administration of the taxation laws'</p> <p>The Chief Commissioner has the general administration of this Act and the other taxation laws and may do all such things as are necessary or convenient to give effect to this Act and the other taxation laws.'</p>	<p>'8 Commissioner's functions'</p> <p>(1) The commissioner is responsible for the administration and enforcement of the tax laws. ...</p> <p>'9 Commissioner's powers'</p> <p>(1) The commissioner has the powers given under the tax laws.</p> <p>(2) In addition, the commissioner has the power</p>	<p>'7 Commissioner's functions as to taxation Acts'</p> <p>(1) The Commissioner has the general administration of the taxation Acts and may do anything necessary or convenient to be done for that purpose.</p> <p>(2) Without limiting subsection (1) the Commissioner may—</p> <p>(a) deal with a taxation matter in any manner; and (b)</p>	<p>'61 Commissioner has general administration of taxation laws'</p> <p>The Commissioner has the general administration of this Act and the other taxation laws.'</p>	<p>'8 Functions and powers of Commissioner'</p> <p>(1) The Commissioner has the following functions: (a) the general administration of the taxation laws; ...</p> <p>(2) The Commissioner may</p>	<p>'74 General administration of the tax laws'</p> <p>The commissioner has the general administration of this Act and the other tax laws and may do all the things that are necessary or convenient to give effect to this Act and the other tax</p>	<p>'11 Role of Commissioner in administration of taxation laws'</p> <p>(1) The Commissioner is responsible for the general administration and enforcement of the taxation laws.</p> <p>(2) The Commissioner may</p>

VIC (TAA 1997)	NSW (TAA 1996)	QLD (TAA 2001)	WA (TAA 2003)	SA (TAA 1996)	TAS (TAA 1997)	ACT (TAA 1999)	NT (TAA)
		to do all things necessary or convenient to be done for performing the commissioner's functions. ...'	exercise in relation to a taxation matter any discretion, that the Commissioner considers appropriate in the interests of good management. (3) In subsection (2)— taxation matter means any matter or thing arising under or in relation to a taxation Act.'		do anything necessary or convenient to give effect to the taxation laws.'	laws.'	do all things necessary or convenient to give effect to the taxation laws.'

2.6 Administrative policies and practices

35. ['Revenue Ruling GEN.014, Assessments – Period of Retrospectivity'](#) and ['Revenue Ruling LTA 007, Land Tax Assessments - Period of Retrospectivity'](#) take the position that, although the Commissioner has the power to assess tax outstanding regardless of how long it has been outstanding, in most cases, the Commissioner will 'limit' tax collection to ensure, firstly, that 'general equivalence is maintained between the refund period and period of assessing tax arrears', and secondly, that 'taxpayers are provided with some certainty on their tax liability.'
- ['Revenue Ruling TAA.002, Refunds'](#) summarises the relevant legislation, being, firstly, part 4, and secondly, ss 115 and 116. As to the distinction between the two refund processes, the ruling states: 'A taxpayer who wishes to pursue a refund in relation to an assessment issued by the Commissioner of State Revenue must use the
- ['Revenue Ruling No. TAA 003, Refund of an Overpayment of Tax – Part 4 of the Taxation Administration Act 1996'](#) deals with four topics relating to refunds under part 4:
- 'Determining the refund mode' (cheque or credit to another liability);
 - 'Refunds by cheque' (refunds paid generally by cheque);
 - 'Refunds after a successful objection or appeal' (refers to ss 104 and 105);
 - 'Refunds when the tax has been passed on' (summarises s 20).
- ['Commissioner's Practice TAA 16.2, Certain Assessment and reassessment Time Limits'](#) provides with regard to reassessments:
- of payroll tax—'In the absence of grounds for suspecting evasion of tax, the Commissioner may make a reassessment of pay-roll tax in relation to any of the five financial years preceding the financial year of the reassessment';
 - of duty—'It is the Commissioner's practice to make a reassessment of any tax liability arising within the five year reassessment period';
 - of land tax—that the Commissioner will in certain cases limit the period of reassessment.
- ['Commissioner's Practice RC-GEN-005: New Taxation Administration Act from 1 January 2008'](#) includes the following statements:
- The five year reassessment limitation period 'is aligned with the entitlement of taxpayers to a refund of tax that has been overpaid and with the record keeping requirements', and 'is consistent with the reassessment periods applied in all other jurisdictions'.
 - '[W]here a refund arises from the reassessment of a tax liability, the

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objection and appeal provisions contained in Part 10 of the TAA.'			<p>TAA 14.1, Applications for Reassessment' states: 'The reassessment provisions are not intended to be a quasi-review process. Where there are matters in dispute as a result of an assessment, the objection provisions of the TAA are available'. But then it states that if a taxpayer does not comply with the requirements for objection, 'the matter may be considered as a request for a reassessment of tax'.</p> <p>See also Commissioner's Practices 'TAA 19.1, Remission of Penalty Tax – Reassessments', 'TAA 15.0, Estimate Assessments', 'TAA 21.0, Compromise Assessments', 'TAA 27.0, Interim Assessments'.</p>				<p>relevant time period will be determined by the period set out for the making of a reassessment.'</p> <p>'Commissioner's Guideline CG-GEN-003: Objections and appeals' includes the following:</p> <ul style="list-style-type: none"> • The objection process 'is considered the most appropriate way to deal with disputes involving taxation decisions, as Courts have been reluctant in the past to become involved in matters that have a legislated dispute resolution mechanism.' • 'Where an objection is allowed in whole or part, TRO will take the necessary steps to adjust the person's liability as quickly as possible, such as by means of a reassessment and refund of any overpaid amount.'

3 Assessments generally

3.1 What is an assessment?

A reassessment (1) contemplates a pre-existing assessment, and (2) is itself a type of assessment.⁴ So what is an assessment?

Justice Kitto in *Batagol v Commissioner of Taxation* (1963) 109 CLR 243 at 251–2,⁵ speaking of a definition of ‘assessment’ that referred to the ‘ascertainment’ of the amount of taxable income and of the tax payable thereon, explained that it was the service of a notice of assessment, levying the tax, that marked the completion of the *process* of assessment – a process by which the provisions of the taxing Act were given concrete application in a particular case. These ideas find reflection to varying degrees in the TAAs with which we are concerned.

All of the TAAs define the word ‘assessment’ as something made ‘under’ the TAA; all speak of an assessment as being of a ‘tax liability’ of a person: see row 1 of the table above.

The WA and NT TAAs define an assessment as a ‘determination’ – a similar word to ‘ascertainment’ – that a particular amount, or no amount, of tax is payable, under a taxation law, in respect of a particular transaction, etc. This reflects the *Batagol* idea of an assessment being the concrete application of the taxation law to a particular case.

The Queensland Act also uses the word ‘determination’.

The definitions in the other TAAs are of the ‘assessment means assessment...’ kind.

Is service of a notice of assessment an essential part of an assessment? Not in all jurisdictions, it seems: see row 11 of the table. For example:

- in Tasmania, the commissioner ‘may’ serve a notice of assessment if he makes an assessment, and ‘must’ do so if requested by the taxpayer (s 24). This apparently contemplates that the commissioner might make an ‘assessment’ without giving notice thereof;
- by contrast, in Victoria, the commissioner is required to serve a notice of assessment if he makes an assessment (s 14). The tax is payable by the day specified in the notice (s 14(3)), and only tax that is payable is a debt due to the State (s 44) and recoverable by the commissioner (s 45). The right of objection is, interestingly, expressed as a right to object to ‘an assessment’ (s 96(1)(a)), but the objection must be lodged within 60 days of service of ‘*the* notice of assessment’ (s 99(1), emphasis added);
- in NSW, the commissioner ‘may’ issue a notice of assessment, showing the amount assessed (s 14(1)), and: ‘If the Chief Commissioner has not issued a notice of assessment of the tax liability of

⁴ The definition of ‘assessment’ expressly includes a ‘reassessment’ in all jurisdictions except WA. In that State it is probably implied that a reassessment is a type of ‘official assessment’ and hence ‘assessment’.

⁵ Applied to the Victorian TAA in *Commissioner of State Revenue (Vic) v Gas Ban Pty Ltd (in liq)* (2011) 31 VR 397 at [48].

a taxpayer, the Chief Commissioner must issue the notice if a request to do so is made by the taxpayer within 5 years after the liability arose' (s 14(2)). Does this mean: 'If the Chief Commissioner has made an assessment but not issued a notice of assessment...'? That interpretation was apparently denied in *Freelance Global Ltd v Chief Commissioner of State Revenue (NSW)* [2014] NSWSC 127 at [32]–[33]. If correct, the consequence appears to be that, notwithstanding the use of the word 'may' in the assessing power in s 8(1), a taxpayer has a right, subject to a time limit, to require the commissioner both to make an assessment (if he has not) and to issue a notice thereof.

Most TAAs do not require a notice of assessment to be in any particular approved form: see row 11 of the table.

Is an assessment something made only by the commissioner? Not in all jurisdictions. For example:

- WA provides expressly for 'self-assessments', which include assessments made by taxpayers in returns (s 14) – see too Queensland ss 14, 14A;
- NSW confers power on the court or tribunal on a review to make an assessment in place of the assessment under review (s 101). The definition of 'assessment' (s 3(1)) includes specifically 'an assessment by the Supreme Court or the Civil and Administrative Tribunal on an application for a review'. See similarly the power given to the SA Supreme Court on an appeal (s 98).

In comparison, at the federal level, the tribunal (AAT) is empowered by its enabling legislation to affirm, vary, etc, the decision under review, being the decision on the objection (usually), but not to make, amend or set aside an assessment; only the commissioner has that power.⁶

3.2 Invalid 'assessments'

A purported assessment that is (1) tentative or provisional (in the recognised sense) or (2) made in bad faith or 'conscious maladministration' of the assessment process will not answer the statutory description of an 'assessment': *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [25]. The High Court so held in respect of federal tax as a result of, primarily, s 175 of the *Income Tax Assessment Act 1936* (Cth) – which is materially the same as s 17 of the Victorian TAA (see row 32 of the table) – read together with the objection procedure.

The Victorian regime is materially the same in this regard as the federal one: *Commissioner of State Revenue v Gas Ban Pty Ltd (in liq)* (2011) 31 VR 397. The other TAAs appear to have provisions in materially the same terms, or, in the case of WA and SA, provisions achieving the same result: see rows 32, 33, 23 of the table.

It has been held that an assessment made in bad faith (say), since it is not an 'assessment' within the meaning of the legislation, will not be capable of objection: *Gashi v Commissioner of Taxation* [2013] FCAFC 30 at [41]–[43]. Nor will it attract the other consequences of an assessment validly made under the legislation.

⁶ *Stevenson v Commissioner of Taxation* (1991) 29 FCR 282 at 299–300.

Allegations of bad faith ought not be made lightly: *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [60].

From time to time a taxpayer argues, unsuccessfully, that the issue of an amended assessment or reassessment creates a conflict with the earlier assessment such that all of the assessments are invalid: *Gashi v Commissioner of Taxation* [2013] FCAFC 30 at [38]–[39], [44]; *Commissioner of State Revenue v Gas Ban Pty Ltd (in liq)* (2011) 31 VR 397 at [38]–[39], [45]–[46]. In the latter case the Victorian Court of Appeal said (at [46]):

it is to be expected that there should be differences between the initial assessments and the reassessments. So far from signifying that the reassessments are invalid, the differences are the logical consequence of the commissioner undertaking a process of reassessment.

Nor will the mere fact that the commissioner indicates a willingness to consider making a second reassessment render the first reassessment ‘tentative or provisional’ and so invalid: *Commissioner of State Revenue v Gas Ban Pty Ltd (in liq)* (2011) 31 VR 397 at [38]–[39], [47]–[49]. Most of the TAAs expressly envisage that the commissioner ‘may make *one or more* reassessments’. The others do so implicitly, it is submitted. It is fair to say of all the TAAs what the Victorian Court of Appeal said of the Victorian TAA (at [48]): a reassessment is contemplated where the commissioner, ‘whether acting unilaterally in exercise of his powers or as the result of an objection or review or appeal, later comes to a different view as to the tax which is due’.

3.3 Is the receipt of tax an assessment?

Because of the time and other constraints on reassessment, amongst other reasons, it may be necessary to determine whether the receipt of tax constitutes an assessment.

All TAAs except that of Queensland expressly address that question: see row 12 of the table. Most answer to the effect of ‘no’, some ‘not necessarily’.

Under the NSW TAA, which is of the ‘not necessarily’ variety, it was held in a recent payroll tax case that each acceptance by the commissioner over many years of payroll tax paid by a taxpayer pursuant to a return lodged was not an assessment by the commissioner: *Freelance Global Ltd v Chief Commissioner of State Revenue* [2014] NSWSC 127 at [30]–[46]. The taxpayer was self-assessing, in the court’s view.

The issue arose because the taxpayer sought to invoke s 9(2), which provided: ‘A reassessment of a tax liability is to be made in accordance with the legal interpretations and assessment practices generally applied by the Chief Commissioner in relation to matters of that kind at the time the tax liability arose...’. The argument was apparently that the commissioner: (1) had implicitly assessed by ‘accepting’ the taxpayer’s returns and money without issuing a notice of assessment under s 14; (2) had therefore made a reassessment when he declined the taxpayer’s subsequent request to refund \$1 million allegedly overpaid on the basis that the correct amount had been paid; but (3) in so deciding had not complied with s 9(2). As stated, the court rejected proposition (1), emphasising s 17. Proposition (2) was therefore also rejected. In any event, it is submitted that it is difficult to characterise a decision declining to reduce a previous assessment (whoever made it) as itself a reassessment. But that issue was apparently not raised.

In *Landrow Properties Pty Ltd v Commissioner of State Revenue* [2008] VSC 590 at [1], [3], [49], [2009] VSC 108 at [3]–[4], the commissioner had, following an investigation, accepted payment of an agreed sum in satisfaction of a purported liability to land rich duty (including reduced penalties), and had ‘stamped’ with the amount received the ‘acquisition statement’ (then s 80 of the *Duties Act 2000* (Vic)). There was no statutory form of notice of assessment. Sometime later, the taxpayer applied for a refund, claiming that it had no liability and that it had been mistaken in agreeing otherwise. Section 16 of the Victorian TAA provided (and still provides): ‘The receipt by the Commissioner of a return or an amount as payment of a tax does not constitute the making of an assessment of tax liability.’ Section 14 provided, relevantly, that the Commissioner must, if he makes an assessment, serve a notice of assessment that is ‘expressed to be an assessment of liability to the tax’ and (implicitly) that specifies a due date for payment. Section 19(2) provided: ‘An application for a refund cannot be made if the Commissioner has previously served a notice of assessment of the tax liability of the taxpayer in respect of the matter in respect of which the payment was made to the Commissioner.’ Section 96 provided, relevantly, that a taxpayer dissatisfied with an assessment could object within 60 days of receiving the notice of assessment, and that otherwise no court had power to consider any question concerning an assessment. Section 100 permitted late objections at the Commissioner’s discretion. Had the Commissioner made an assessment? Had he given a notice of assessment? What if the ‘notice’ given did not comply with s 14? Did s 19(2) apply? Was the taxpayer required to seek permission to lodge a late objection? As it eventuated, these questions were not adjudicated.

3.4 Estimated assessments

All jurisdictions contain a provision allowing the commissioner to assess by way of ‘estimate’ if he has insufficient information to assess exactly: see row 8 in the table above.

The provision is probably better seen as a ‘supporting’ provision rather than as giving rise to a separate category of assessment. In that regard each TAA contains no definition of ‘estimated assessment’, in contrast to the other definitions that are expressly included within the definition of ‘assessment’ (‘reassessment’, ‘compromise assessment’, etc). But in Tasmania see s 9(3)(c).

The provision is capable of supporting a reassessment, at least in theory.

In practice the provision is not often averted to: but see *Conder Tower Pty Ltd v Commissioner of State Revenue* [2012] VSC 107 at [29]–[30].

3.5 Compromise assessments

All jurisdictions allow ‘compromise’ assessments (in the NT called ‘negotiated’ assessments): see row 9 of the table.

The commissioner’s power to compromise is more restricted in some jurisdictions than others:

- In Victoria, Queensland, Tasmania and the ACT, it must be ‘difficult or impracticable for the Commissioner to determine a person’s tax liability under a taxation law without undue delay or expense’.

- In the other jurisdictions the power is wider and includes, for example, the ability to compromise to settle a dispute.

In Victoria the restricted nature of the power has at times been overlooked. An example of that is, it is submitted, *Landrow Properties Pty Ltd v Commissioner of State Revenue* [2009] VSC 108 at [15].

It is sometimes suggested that the power of general administration – see row 34 of the table – allows compromise in any event: eg *Landrow Properties Pty Ltd v Commissioner of State Revenue* [2009] VSC 108 at [13]. In the face of an express power of compromise, that proposition is debateable: see the principle in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

In principle, the power to compromise is capable of being used where an assessment has already been made (see Vic s 12(4), referring to ‘an assessment or reassessment made under this section’). A compromise assessment made to settle a dispute or doubt about an existing assessment is a reassessment in the sense that it follows a previous assessment. But the time limitation applicable to reassessments made under the reassessment power will not apply.

Compromise assessments are final except in the rare cases specified.

3.6 Withdrawal of assessments

All the TAAs except that of Queensland enable the withdrawal of an assessment: see row 10 of the table. The commissioner is seemingly only enabled to withdraw an assessment within five years (three years in the case of Tasmania) of the previous assessment.

In Victoria, one taxpayer attempted to resist recovery proceedings brought on payroll tax reassessments by arguing that, because the Commissioner had not by notice of withdrawal withdrawn the initial assessments, there were two sets of assessments in existence, the initial assessments and the reassessments, which were mutually inconsistent and therefore invalid: *Re Capital Securities (Aust) Pty Ltd* [2009] VSC 262 at [35], [39], upheld on this point, but reversed in result, by *Commissioner of State Revenue v Gas Ban Pty Ltd (in liq)* (2011) 31 VR 397 at [44]–[46]. The argument failed. There was no need to withdraw the previous assessments. The language of s 9(3) (‘even if’) was telling.

Indeed, if a reassessment (eg Vic s 9) depended for its validity on a withdrawal of the previous assessment (s 13), then it is difficult to see how a reassessment could ever be made after five years, a withdrawal being implicitly prevented after five years.

3.7 Objections to assessments

Important to both reassessments and refunds is the objection regime established by each TAA: see row 22 of the table. The interaction between it and the reassessment and refund provisions is discussed later. In this section, a short overview of the objection process is given.

The objection process allows a dissatisfied taxpayer to challenge an assessment (amongst certain other decisions): see row 24 of the table.

In the case of a reassessment, the right of objection is limited to the extent of the reassessment: see row 25 of the table.

The time limit for objection is 60 days from the assessment, subject to extension: see row 26 of the table. In the case of WA and SA, an extension of time is not possible after 12 months.

If not resolved favourably by the commissioner, the taxpayer may pursue its challenge in the relevant tribunal or court.

The taxpayer has the onus of proof (see eg Vic ss 98, 110, 127).

The objection regime is the primary means, and in some cases the only means, by which a taxpayer can call into question an assessment: see rows 23, 32, 33 of the table. For example, in the case of Victoria, it is submitted that the objection regime is the only means by which a taxpayer can call into question an assessment:

- The TAA provides expressly that an assessment can be questioned only in objection proceedings (s 96(2)).
- An assessment is not invalid because a provision of a taxation law has not been complied with (s 17).
- Upon production of a notice of assessment, the assessment is deemed to have been duly made and, except in objection proceedings, correct (s 127).
- Even aside from ss 96(2), 17 and 127, the objection process is a detailed statutory process – with, in particular, strict time limits and the onus of proof placed on the taxpayer – that arguably reveals an intention to cover the field of challenges to assessments rather than afford merely an optional means of challenge.
- Although not free from doubt, particularly given cases such as *Commissioner of Taxes v Tourism Holdings Ltd* [2002] NTCA 10 (discussed below), the better view is that ss 9 (empowering reassessment) and 13 (empowering the withdrawal of an assessment) are enabling provisions and are not intended to create an independent remedy at least insofar as the remedy of objection might be circumvented. In that regard contrast WA ‘Commissioner’s Practice TAA 14.1, Applications for Reassessment’: see row 35 of the table.
- Various other similar tax objection regimes, even without a provision such as s 96(2), have been construed as constituting the only means by which a taxpayer can challenge an assessment—
 - as to part IVC of the *Taxation Administration Act 1953* (Cth), see *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [16]–[24], [45], [62]; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 187, 199, 240; *Hoare Bros Pty Ltd v Federal Commissioner of Taxation* (1996) 62 FCR 302 at 311 (approved in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473);
 - as to the *Stamp Act 1921* (WA), see *Commissioner of State Taxation (WA) v Bayswater Hire Cars Pty Ltd* (1989) 20 ATR 1606 at 1608, 1610;
 - as to the *Stamp Act 1894–1982* (Qld), see *O’Sullivan v Commissioner of Stamp Duties* [1984] 1 Qd R 212 at 213–6, 222, 225–7;

- as to the *Stamp Duties Act 1923 (SA)*, see *Corfu Clothing Co Pty Ltd v Commissioner of Stamps (SA)* (1988) 48 SASR 105 at 113;
- as to the *Payroll Tax Act 1971 (Vic)*, see *Phibbs v Dale* (unreported, 8 June 1978, Supreme Court, Menhennitt J) at pp 29–30.

Queensland and the ACT appear to be the only jurisdictions without a provision such as Vic s 96(2).

4 Reassessments

4.1 The power to reassess

All TAAs confer power on the Commissioner to reassess: see row 4 of the table.

The power is in terms a power to 'reassess' not to 'amend'.

Some TAAs contemplate that the taxpayer might make an 'application' for a reassessment.

Except where a reassessment is required by a specific provision – for example as the consequence of a successful objection – the power is given to the Commissioner in permissive terms: the Commissioner 'may' reassess.

Under all TAAs except that of Tasmania notice of reassessment must be given. The TAAs differ on what the notice must contain; for example, whether it must specify the amount previously assessed: see row 11 of the table.

It is submitted that confirmatory only are the provisions (see row 4 of the table) stating that a reassessment may be made even where (1) a previously assessed amount has been paid, (2) the previously assessed amount was lower, or (3) an objection, review or appeal is pending. As to (3), see *Metricon Qld Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 982 discussed below.

Queensland s 17(4) is interesting and unique to Queensland: 'The commissioner can not [sic] be compelled to make a reassessment under subsection (1) decreasing a taxpayer's liability for tax.' Presumably it is designed to make certain that a taxpayer cannot challenge an assessment by bringing an action for mandamus or the like to compel a reassessment (rather than by way an objection).

The Queensland TAA also provides, as does the SA TAA, that the commissioner's decision not to make a reassessment is not reviewable.

The TAAs differ on the question of whether a reassessment is to be made having regard to the 'legal interpretations and assessment practices' existing at the time of the reassessment, or at the time of the previous assessment, or at the time the tax liability arose: see row 6 of the table.

4.2 Reassessment upon successful objection

An assessment may be shown to be excessive by an objection. The objection may succeed in doing so either before the commissioner at the determination stage or before the tribunal or court on review or appeal. Is a reassessment then required?

Most of the TAAs state expressly that a reassessment must be made to give effect to the successful objection: see row 29–31 of the table.

Some TAAs (NSW s 101, SA s 98) allow the court to make an assessment in place of the existing assessment.

In Victoria—

- if the objection succeeds on review or appeal—s 114 does not in terms require a reassessment (unlike eg Qld s 19). Nor does s 115; it requires a refund. Sections 111 and 112 allow the tribunal or court to ‘reduce’ the assessment. If the orders of the tribunal or court are such that a reassessment is required to give effect to them, then the commissioner is probably required implicitly by s 114 to make such a reassessment within 60 days, presumably before he makes any refund under s 115;
- if the objection succeeds at the determination stage without litigation—s 114 does not address the consequences, whether reassessment or otherwise (see similarly NSW s 102). As a matter of practice, the commissioner would presumably exercise his power to reassess without controversy, again presumably before he makes any refund under s 115.

In all jurisdictions the five/three year reassessment time limit (see next) does not apply to a reassessment made to give effect to the outcome of an objection, review or appeal. In WA that result is achieved in relation to objection decisions (s 17(2)(a) applying only to review proceedings) presumably by reading s 39 as overriding the time limit in s 17. In SA ss 88 and 98 allow the Minister to make an assessment in place of the initial assessment upon a successful objection or appeal.

Refunds upon successful objections are discussed below.

4.3 Time limit on reassessment

Each TAA fixes a different time limit on reassessment, save that NSW s 9(3) and NT s 21(4) fix materially the same time limit: see row 5 of the table.

In all jurisdictions except Tasmania, the time limit is five years after the ‘initial’ or ‘original’ assessment, subject to certain exceptions. In Tasmania it is three years subject to exceptions. Victoria went from three to five years on 1 July 2007⁷ as part of an agreement with NSW to align their payroll tax legislation.

The exceptions to the *prima facie* time limit are different in each jurisdiction (save, as stated, for NSW and NT). For example, whilst each jurisdiction has an exception in the case of what might be described in general terms as misleading conduct by the taxpayer at the time of the previous assessment, the delineation of that conduct varies:

- The Victorian, NSW, Tasmanian, ACT and NT legislation require that ‘all the facts and circumstances affecting the tax liability’ were ‘not fully and truly disclosed’. For an example of the issues that can arise here, see *Conder Tower Pty Ltd v Commissioner of State Revenue* [2012] VSC 107 at [35]–[40]; *Australian Unity Group Services Pty Ltd v Commissioner of State Revenue*

⁷ Tested by reference to date of the transaction or event giving rise to the tax liability: clause 16 of the transitionals in schedule 1 of the TAA.

(Vic) [2011] VCAT 1832 at [22]–[24]. In the former case, the court followed the approach of Menzies J in *Austin Distributors Pty Ltd v Commissioner of Taxation* (1964) 13 ATD 429 at 432–3:

The requirement... is not met by anything less than full disclosure of all the material facts... The matter can be tested in this way. If advice were to have been sought by the taxpayer whether or not the sum in question was a taxable premium, would the person from whom that advice was sought have required more information than this return disclosed to the Commissioner?

In the latter case, the tribunal took a different approach. The tribunal thought that ‘an issue of fairness’ arose in the following sense:

Whether facts and circumstances affecting the tax liability for that year “were not fully and truly disclosed to the Commissioner” should only relate to the matters which either the taxpayer or the Commissioner raised or could be expected to raise with each other at the time.

- The Queensland legislation refers to ‘fraud or evasion of tax’, or the commissioner having been ‘knowingly misled’.
- WA requires the existence of ‘reasonable grounds for suspecting that there has been an evasion of tax, or that the previous assessment was made on the basis of false or misleading information’.
- SA requires there to have been ‘a tax default that wholly or partly consists of or results from a deliberate act or omission by the taxpayer or a person acting on behalf of the taxpayer’, which includes a taxpayer having ‘deliberately misinformed or misled’ the Commissioner.

Other cases where reassessment is permitted after five/three years include the following:

- In NSW (s 9(3)(d)) and Queensland (s 21(2)), the Commissioner may make a decreasing reassessment after the limitation period if the taxpayer has asked for it within the limitation period.
- In Queensland the Commissioner may make an increasing reassessment at any time if he has within the limitation period commenced an investigation by written notice (s 22(2)(b)).
- In Tasmania there is no time limit where ‘the initial assessment was an assessment by way of estimate under section 21(2)’ (s 9(3)(c)).
- In South Australia the Commissioner and the taxpayer may make an ‘agreement’ to effectively renounce the time limit (s 10(4)(a)).

As stated, common to all the jurisdictions is that the five/three year limit does not apply to a reassessment made to give effect to the outcome of an objection, review or appeal in respect of the initial assessment.

In *Harry One Pty Ltd v Commissioner of State Revenue* [2007] VSC 13, the taxpayer argued, unsuccessfully, that the Commissioner, by seeking leave from the Court under s 109 of the Victorian TAA to go beyond his determination of the objection to argue for more duty based on a higher valuation, was effectively seeking to reassess contrary to the (then three year) time limit in s 9(3). It was held, firstly, that reliance on the new ground was not the making of a reassessment (at [19]), and secondly, that if the taxpayer chose to discontinue its appeal, then ‘because the time for administrative reassessment has expired and because s 9(3)(a) could not apply, there would no longer be any mechanism for the Commissioner to seek higher duty than that already paid’ (at [28]).

The case then resolved without judicial decision (after an appeal on the preliminary point was dismissed *ex tempore*: [2007] VSCA 73).

Picked up by s 9(3)(c) of the Victorian TAA (which authorises a reassessment at any time if so provided by another taxation law) is s 51 of the *Land Tax Act 2005* (Vic). That section allows the Commissioner to reassess land tax more than five years after an initial assessment. It is sometimes forgotten: eg *Blumberg v Commissioner of State Revenue* [2012] VCAT 243 at [18]–[21].

The time limit in most TAAs runs from the date of the initial or previous assessment. Hence it may be important to ascertain whether an initial assessment has been made. As stated, all of the TAAs address whether the receipt of tax amounts to, or may amount to, an assessment. In all or most TAAs a determination that an exemption applies is said to be, or to be capable of being, an assessment. Suppose a taxpayer attends the revenue office counter with a transfer of land instrument (and supporting documents) and gets the instrument in the bottom right corner marked or stamped exempt from duty. Is that an assessment? Is the *prima facie* time limit on reassessment ticking? Has notice of assessment been given? Does that matter? Do the answers differ from jurisdiction to jurisdiction?

What is the purpose of a time limit on reassessments? One judge described it as ‘presumably intended to give taxpayers some certainty in the organising of their financial affairs’: *Harry One Pty Ltd v Commissioner of State Revenue* [2007] VSC 13 at [27].

In some cases administrative policy has the practical effect of modifying the legislative time limit: see row 35 of the table and the discussion below.

4.4 The effect of a reassessment

Only two of the TAAs deal expressly with the effect that a reassessment has on the previous assessment (see row 7 of the table):

- In Queensland a reassessment does not ‘replace’ the previous assessment, ‘but merely varies it’ (s 25).
- In WA a reassessment ‘supersedes’ the previous assessment, but without invalidating existing recovery proceedings, which are ‘amended’ so as to take account of the reassessment (s 18).

In Victoria, a state without a provision addressing the effect of a reassessment, in *Re Capital Securities (Aust) Pty Ltd* [2009] VSC 262 at [35], [39] (upheld on this point, but reversed in result, by *Commissioner of State Revenue v Gas Ban Pty Ltd (in liq)* (2011) 31 VR 397 at [44]–[46]), in the course of rejecting an argument that a reassessment was invalid because it was inconsistent with the previous assessment, the court described the effect of a reassessment on the previous assessment as follows: ‘the issue of a reassessment, by implication, replaces or amends the initial or previous assessment’.

In NSW in *Metricon Qld Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 982 at [27] the court cited authorities about ‘amended’ assessments of federal tax to explain the effect of a reassessment:

A reassessment is an amendment of the initial reassessment, not an independent and additional assessment: *Federal Commissioner of Taxation v S Hoffnung & Co Ltd* (1928) 42 CLR 39 at 54; *White Industries Australia Pty Ltd v Federal Commissioner of Taxation* [2003] FCA 599; (2003) 129 FCR 276 at [30], 282–283.

See more recently at the federal level *Chemical Trustee Limited v Deputy Commissioner of Taxation* [2014] FCAFC 27 at [33]–[35] affirming *Deputy Commissioner of Taxation v Chemical Trustee Limited (No 8)* [2013] FCA 494 at [31]–[38].

It is submitted that caution should be exercised in describing a reassessment as ‘replacing’ the previous assessment such that the previous assessment ceases to exist. In most jurisdictions, there is no difficulty in regarding the previous and re-assessment as co-existing, particularly for recovery or objection purposes.

4.5 Can the commissioner reassess whilst the previous assessment is under review?

This question arose in *Metricon Qld Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 982.

The commissioner had assessed land tax on the basis that five parcels of land were exempt and three were not. The taxpayer had objected. The objection had been disallowed. The taxpayer had applied to the tribunal for review. Before the review proceeding was heard, the commissioner changed his mind about the five parcels and decided to tax them by means of reassessment. The taxpayer objected to the reassessment. Seemingly 90 days then passed without the commissioner having determined the objection. The taxpayer sought a review by the court of the reassessment, arguing, amongst other things, that the reassessment was invalid on the ground that there was an implied limitation to the reassessment power in s 9 of the TAA that prevented a reassessment being made whilst the previous assessment is before the tribunal or court on review.

Whether the taxpayer was able to contend on a review proceeding for the invalidity of the thing the subject of the review was not considered: see *Gashi v Commissioner of Taxation* [2013] FCAFC 30 at [41]–[43]. Perhaps the taxpayer did not contend for ‘invalidity’ in the sense of jurisdictional error.

The court held that no such implied limitation was to be found in the reassessment power.

Exercise of the reassessment power whilst review proceedings are pending does not ‘compromise’ those proceedings, the court held. The taxpayer could object to the reassessment and, if dissatisfied with the outcome, bring a second set of review proceedings. The two proceedings could be heard together, albeit that practical difficulties might arise if the taxpayer were to bring the second proceeding in a different forum to the first. Alternatively, because in review proceedings the court or tribunal conducts a *de novo* review and the parties are unconstrained by their grounds of objection/disallowance, the issues raised by the reassessment could be ventilated in the review proceedings in respect of the previous assessment (at [27]):

The decision of the court or tribunal on the review of the original assessment will conclusively determine (subject to appeal) the taxpayer's liability (*W & A McArthur Ltd v Federal Commissioner of Taxation* (1930) 45 CLR 1 at 10).

Accordingly, the decision of the court or tribunal on review of the initial assessment will also determine the matters

arising under a notice of reassessment. The issue of a notice of reassessment will not stultify the proceedings. All that will be required is that the issues raised by the reassessment be dealt with in the review proceedings.

It is submitted that this conclusion applies equally in those jurisdictions where the court's task is not to conduct a *de novo* review or where the parties can raise new grounds only by leave.

The fact that the court or tribunal has the power to make an order increasing the assessment under review was not regarded as meaning that the commissioner lacked the power to do so in the meantime by way of reassessment.

The court distinguished and in part doubted *St George Leagues Club Ltd v Commissioner of Land Tax* [1983] 2 NSWLR 399.

The court concluded (at [60]) that the alleged limitation on the commissioner's reassessment power would be 'unworkable', 'could cause injustice' and 'would serve no useful purpose'.

It was submitted above that Queensland's s 17(3) ('The commissioner may make a reassessment under subsection (1) even if an objection or appeal against, or review of, the assessment of the taxpayer's liability for tax has started but not yet been decided') was included out of an abundance of caution only. See also Queensland s 69A, 'Effect of making reassessment after appeal or review started'.

As a matter of practice, in such cases where the commissioner decides in the course of objection proceedings that he has under-assessed, he may:

- decide to pursue the issue in the existing objection proceeding rather than to issue a reassessment immediately. If he is out of time to reassess immediately, then this will likely be his only option: see *Harry One Pty Ltd v Commissioner of State Revenue* [2007] VSC 13 at [28]; or
- issue a reassessment immediately, but then the parties may agree for convenience to canvass the dispute about it by means of the existing objection proceeding rather than an additional proceeding; or
- issue a reassessment immediately, then the taxpayer object, the commissioner disallow the objection, the taxpayer seek a review or appeal, and then the two objection proceedings, if in the same forum, may be heard together.

4.6 A duty to consider whether to reassess?

In *Commissioner of Taxes v Tourism Holdings Ltd* [2002] NTCA 10, after the commissioner had indicated a view that the time for objection to an assessment of duty had expired (due a mistake by the taxpayer's lawyers), with no possibility of extension, the taxpayer asked the commissioner to amend the assessment pursuant to a power to amend given in the following terms (s 97(1) of the *Taxation (Administration) Act 1978* (NT)):

The Commissioner may, at any time within a period of three years after the date of an assessment by him of duty, amend the assessment by making such alterations or additions to it as he thinks necessary.

A refund flowed if an overpayment was established by the amendment (s 97(3)):

Where, by reason of an amendment to an assessment, a person has overpaid duty or tax, the amount of duty or tax shall be refunded.

The Commissioner took the position that he had no duty to consider whether or not to amend and that he would not do so.

The NT Court of Appeal, overruling the judge at first instance, held that the Commissioner did have a duty to consider whether or not to amend. The court distinguished (at [12], [13]–[14], [52]–[54]) High Court authority suggesting the contrary (*Commonwealth Agricultural Service Engineers Ltd (in liq) v Commissioner of Taxes (SA)* (1926) 38 CLR 289 affirming *R v Commissioner of Taxes* [1926] SASR 168).⁸ The revenue collector was seen as having a duty to collect no more than what was due that outweighed other considerations.

The grounds upon which the High Court authority was distinguished are perhaps open to question. The High Court's reasoning was primarily that the statutory objection process would be undermined if the power of amendment conferred a right on the taxpayer and a correlative duty on the commissioner. To the reassessment power in many of the current TAAs might be applied this reasoning. Much would depend on the terms of each statute. As indicated above, in Victoria for example, a taxpayer might face difficulties in arguing that the commissioner's reassessment power was intended to operate as a stand-alone means of refund. A similar analysis might apply with regard to the commissioner's power to withdraw an assessment: see row 10 of the table.

4.7 A discretion not to tax?

In most of the TAAs, the function of assessing and reassessing is conferred on the Commissioner in discretionary language: the Commissioner 'may' make an assessment or reassessment (eg Vic ss 8(1), 9(1)). Queensland uses the word 'may' in relation to reassessments (s 17) and 'must' in relation to some assessments (s 11(1)). Does the word 'may' give the Commissioner a discretion not to tax an admitted liability?

In *Cusmano v Commissioner of State Revenue* [2010] VCAT 1056, the Victorian Commissioner had discovered that 'a portfolio of residential and commercial properties in metropolitan Melbourne' owned by the Cusmanos had not been properly assessed to land tax. He sought to collect the tax by way of reassessments going back a number of years. The tribunal held that the word 'may' in s 9(1) conferred a discretion, on both the Commissioner and the tribunal standing in his shoes on a review, not to recover the outstanding tax by reassessment. Exercising that discretion, the tribunal decided that some of the reassessments should be varied so as to exclude some of the properties of the portfolio.

In so deciding, the tribunal applied or purported to apply the Commissioner's policy on retrospectivity, 'Revenue Ruling GEN.014, Assessments – Period of Retrospectivity'.⁹ In that policy the Commissioner takes the position that he will 'limit' tax collection for past periods as a matter of

⁸ See also *Cuming Campbell Investments Pty Ltd v Collector of Imposts (Vic)* (1938) 60 CLR 741 at 749–750 per Latham CJ.

⁹ See also: Victorian 'Revenue Ruling LTA 007, Land Tax Assessments - Period of Retrospectivity'; WA 'Commissioner's Practice TAA 16.2, Certain Assessment and reassessment Time Limits', which states also that the Commissioner will in certain cases limit the period of reassessment of land tax; row 35 of the table.

discretion. Two aims are identified: (1) maintaining 'equivalence' between 'the refund period and period of assessing tax arrears'; and (2) providing taxpayers 'with some certainty on their tax liability'. As a matter of law, there is no time limit on reassessments of land tax: s 51 of the *Land Tax Act 2005* (Vic) picked up by s 9(3)(c) of the TAA. The tribunal was prepared to adopt the Commissioner's position that there was a discretion not to tax, but exercised that discretion differently to how the Commissioner's assessor exercised it.

Presumably the legal power not to collect tax charged by the taxing legislation is seen to derive from the word 'may' in s 9(1) of the TAA, perhaps read with the general administration power in s 63(1).

The NSW tribunal has taken a different approach. In *Gunasti v Chief Commissioner of State Revenue (NSW)* [2012] NSWADT 218 at [24]–[49], the tribunal member expressed the view that, despite the use of the word 'may' in ss 8(1) and 9(1), the Commissioner was obliged to assess or reassess a tax liability imposed by the land tax legislation. The primary reason given was that to do otherwise would be to fail 'to give effect to... [a] taxation law' within the meaning of the general administration power in s 61 of the TAA. There was no room for considerations of fairness, in the tribunal's view. See similarly *Brataniec v Chief Commissioner of State Revenue (NSW)* [2013] NSWADT 65 at [23]–[25]. Neither case referred to s 9 of the *Interpretation Act 1987* (NSW).¹⁰

Cases such as these illustrate the competing purposes at play, including in relation to reassessments. On the one hand, there is the purpose of ensuring that the correct amount of tax is collected from those made liable by the taxation law. The 'task' of the Commissioner 'is to ensure that the correct amount of tax is paid, "not a penny more, not a penny less"'.¹¹ On the other hand, there is a need for finality: 'There must be a point in time in which taxation matters are finalised', was how the Victorian Treasurer put it in 1992.¹² The Treasurer had in mind the need for finality from the point of view of the exposure of the State's funds to refund claims, but there is obviously a need for finality from the point of view of the taxpayer too, especially when an assessment has already been made.

¹⁰ **'9 Meaning of may and shall.** (1) In any Act or instrument, the word "may", if used to confer a power, indicates that the power may be exercised or not, at discretion. (2) In any Act or instrument, the word "shall", if used to impose a duty, indicates that the duty must be performed.'

¹¹ *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) 32 FCR 148 at 155

¹² Second Reading, State Taxation (Amendment) Bill (1992), Legislative Assembly, 6 November 1992, *Parliamentary Debates*, p 566.

5 Refunds

5.1 Introduction

Each TAA has a part dealing with refunds: see row 13 of the table. In considering those provisions, it is convenient to consider separately two types of refund claim:

- a refund claim arising where an amount greater than that assessed is paid by mistake;
- a refund claim arising where an amount assessed and paid is said to be excessive.

5.2 Refunds where an amount greater than that assessed is paid by mistake

Suppose a taxpayer by mistake pays say \$9000 in response to a \$900 assessment. What do the TAAs say about a refund of the overpaid amount (\$8100)?

See generally rows 13–21 of the table.

In summary:

- Pursuant to each TAA, except possibly that of SA, a refund of the overpaid amount will be payable, subject to certain conditions.
- Interest is payable only in Tasmania.
- Tasmania has the shortest statutory time limit, namely three years.
- In most jurisdictions a common law restitutionary action is excluded.

In more detail, in Victoria, part 4 will regulate any refund as follows:

- The amount overpaid will constitute 'tax paid or purportedly paid under a taxation law' within the meaning of ss 18(1) and 19(1), 'tax' including 'an amount by which tax is overpaid' (s 18(5)). Accordingly: a refund application under part 4 will be available (s 19(1)); and part 4 will be the taxpayer's only remedy (s 18(1)), meaning that a common law restitutionary action will not be available.¹³

¹³ Such a conclusion is more easily drawn when the statute expressly or 'emphatically' excludes other remedies: see eg *Thiess v Collector of Customs* [2014] HCA 12 at [24]. Where the question is whether the statute excludes common law remedies implicitly, such as by the presence of a detailed statutory remedy, see: *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347 at 348–9, 358–9, 367 (followed in *Qantas Airways Ltd v Commissioner of Taxation* (2001) 115 FCR 288 at [71]); *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 2)* (1991) 32 FCR 243 at 263; *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 at [87(i)], [100]–[107].

- The refund application must be made within five years of the payment (s 19(1)). Otherwise the commissioner will not be empowered to refund (ss 20, 121). The taxpayer may not realise its mistake until more than five years after the payment. But there is no extension of time mechanism in the TAA. It is to be doubted that s 27 of the *Limitation of Actions Act 1958* (Vic) (read with s 20A) is capable of applying so as to extend the five year refund application period.
- If the commissioner refuses to refund, the taxpayer has a right to bring court proceedings within three months (s 21(1)). There is no extension of time mechanism here either.
- The commissioner can make an offset instead of a refund (s 20(1)(d)).
- The commissioner (s 22(1)) or the court (s 23) must not refund if there would be a 'windfall' to the taxpayer in the defined sense.
- There is no general discretion to refuse to refund an amount found to be 'overpaid' (s 20).
- The commissioner is not authorised to pay interest on the refund. That stands in contrast to the case of a successful objection, review or appeal (discussed below). The rationale for the difference is not immediately apparent. If the matter proceeds to court and the taxpayer succeeds in getting a refund, then the court's general powers may arguably be used to order the commissioner to pay interest: eg *Landrow Properties Pty Ltd v Commissioner of State Revenue* [2009] VSC 108 at [5]–[6].

In NSW, the commissioner will also be obliged to refund, subject to the provisions of part 4 (s 18(1)). The taxpayer will have 'paid a greater amount of tax in relation to a tax liability than the amount assessed' (s 18(1)). There are provisions dealing with offsets (s 19) and windfalls (s 20). Interest is not payable under part 4. Unlike Victoria, there does not appear to be: any time limit (in the TAA) on the making of a refund under part 4; or any provision excluding common law remedies.

Interestingly, a refund is not contemplated by NSW s 18 where no assessment has been made. It will be recalled that the receipt of money is not necessarily an assessment (s 17).

In Queensland, the refund provisions in part 4 purport to be a code in respect of 'a refund of any amount paid, or purportedly paid, under a tax law' (s 36). An entitlement to a refund arises in respect of an amount paid that is greater than the amount said to be payable in 'any notice' (s 37(1)(b)). In such a case there is a five year time limit, which, interestingly, is counted from the making of the payment to the making of the refund, not to the taxpayer's request for the refund (s 37(3)). There are provisions dealing with offsets (s 38) and windfalls (s 39). Interest is not payable.

In WA, the commissioner must refund if, relevantly, an overpayment of tax is established on a refund application brought, within five years of the overpayment or any other prescribed period, on a ground authorised by any taxation Act or 'on the ground that the amount paid by the taxpayer exceeds the amount of tax payable in accordance with the relevant assessment' (ss 54(1)(b), (3), (4)). Interest is not payable. See ss 54(2) (credit) and 55 (passing on). There is no provision purporting to make the statutory refund provisions a code in the situation under consideration; s 31 does not address that situation. So if the taxpayer were to realise its mistake after more than five years, a common law restitutionary action would seem not to be excluded by the TAA. The WA limitation statute may have something to say with regard to a time limit in that situation.

In SA, the taxpayer may make an application for a refund 'of tax that has been overpaid' (s 18(1)), and other proceedings for recovery of the amount paid to the commissioner 'as tax' are excluded (s 100(2)). 'Tax' means 'a tax or duty under a taxation law', including 'any other amount paid or payable by a taxpayer to the Commissioner under a taxation law' (s 3). If the \$8100 overpayment in the scenario under consideration cannot be characterised as 'tax',¹⁴ then the refund provisions (part 4), together with their five year time limit (s 18(2)(a)) and other limitations, particularly ss 22 (offset) and 23 (windfalls), will not apply, leaving the common law.

The Tasmania Act is very similar to the Victorian Act. Two differences may be noted:

- The relevant time limit is three not five years (s 28).
- Interest is payable (s 29A).

In the ACT the position is similar to that in NSW, except that there is an additional provision allowing the making within five years of an application for a refund of 'tax paid under a tax law': s 19A (see row 15 of the table). Like in SA, it is to be doubted that the \$8100 overpayment under consideration falls within that description.

In the NT the commissioner 'must' (s 32) 'refund' – defined to include 'a credit given to the taxpayer against present or future liabilities for tax' (s 3(1)) – an 'overpayment of tax' – which means 'a payment made to the Commissioner by a taxpayer in excess of the taxpayer's tax liability and includes a payment made in purported satisfaction of a tax liability that does not actually exist' (s 3(1)) – subject to the (three) sections of part 4, including the following time limitation: 'a refund cannot be made more than 5 years after the overpayment was made except to give effect to a reassessment of the relevant tax liability' (s 32(2)(b)). The exclusionary provision (s 31) excludes other means of recovery of 'any amount paid, or purportedly paid, under a taxation law'.

5.3 Refunds where an amount assessed and paid is said to be excessive

Suppose a taxpayer pays an amount assessed, claims that the assessment is excessive, and so seeks a refund of the excessive amount.

If an objection succeeds in establishing that the assessment paid is excessive, then an overpayment will have been established, at least after a decreasing reassessment is made to give effect to the objection (see above). A refund of the overpaid amount must then be made: see primarily row 30 of the table. The following observations may be added:

- In Victoria, s 115 is the relevant provision, it is submitted. It obliges a 'refund' of 'any amount paid under the assessment that is in excess of a requirement for payment under the relevant taxation law'. A refund application under part 4 is not needed or permitted (s 19(2)); but in the case of land tax see s 19(2A), discussed below. So it will be no obstacle if the objection process took more than five years from the payment to establish the overpayment (contrast s 19(1)). Section 115

¹⁴ See *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 91–2 per Brennan J, 102–3 per Dawson J.

does not expressly pick up any of the provisions of part 4, such as s 20 (which allows the Commissioner to offset instead of refund) or s 22 (allowing the commissioner to refuse to refund if there would be a windfall). In that regard the position in Victoria differs from most of the other jurisdictions. If a dispute were to arise about the exercise of the refund obligation in s 115 (perhaps unlikely), then query whether s 18(1) would oust judicial review. The dispute could not be the subject of an objection under part 10.

- In NSW, the relevant refund obligation is contained in s 104. It operates subject to s 19, allowing an offset instead of a refund. It is interesting that s 104 is expressed to be subject only to s 19, not also to s 20 (windfalls).
- In Queensland, see primarily s 37(1)(a) (read with s 19). The refund obligation is subject to ss 38 (offsets) and 39 (windfalls).
- In Western Australia, the refund part of the Act comes after the objection part; more appropriately, it is suggested. The commissioner must reassess and refund if the objection is allowed (ss 39(1), 54(1)(a)) including at the review stage (ss 16(1)(b), 43(3), 54(1)(a)). The refund obligation is subject to ss 54(2) (offsets) and 55 (refunds to be passed on to third parties).
- In South Australia, see s 16, 'Refund resulting from assessment' (read with ss 88(4), 98, 90 and 99). Section 16 is expressed to be subject to part 4. Hence it picks up ss 22 (offsets) and 23 (windfalls). A refund application under part 4 need not and cannot be brought if the Commissioner has previously made an assessment (s 18(2)(b)).
- The Tasmania Act is materially the same as the Victorian Act in this regard.
- The ACT Act is similar to the NSW Act in this regard. One point of difference is that the windfall limitation certainly applies (s 21, picked up by s 19). The question arises whether, unlike NSW and indeed unlike most or all of the other jurisdictions too, an application for a refund must be made within five years of the overpayment. Section 19A, 'Application for refund', is expressed in permissive terms: the taxpayer 'may' apply for a refund. There is no exclusionary provision stating that an application is the *only* way to go (such as eg Vic s 18(1)). Indeed see s 19A(3). The better view is, it is submitted, that a taxpayer whose objection takes more than five years to establish the overpayment is not ousted from being reunited with his money, and that the refund obligation in s 19(1) applies.
- In NT see ss 129, 31–33, which include provisions dealing with offsets and windfalls.

In all jurisdictions except Queensland, interest must be paid on the overpaid amount: see row 31 of the table. In Queensland:

- there is no provision obliging or permitting the award of interest where the objection succeeds before the Commissioner; whereas
- if the objection succeeds in the court or tribunal, there is a power to award interest (s 61(2)). Presumably that power is exercised by the court or tribunal as a matter of course without opposition from the Commissioner.

Can a taxpayer seeking to establish that an amount assessed and paid is excessive bring a refund claim without lodging an objection?

In Victoria, it was submitted above that the only means by which a taxpayer can establish that an assessment is excessive is to bring an objection under part 10 of the TAA. If that is correct, then payment of the amount assessed cannot otherwise be proved to be an overpayment. In particular:

- a common law restitutionary action is prevented or ousted. Section 96(2) and the other provisions discussed above probably achieve that result without s 18;
- a refund proceeding under part 4 is prevented, at least in most cases. A refund proceeding cannot be brought except if a refund application is made to the commissioner within five years (ss 18, 19(1)). But a refund application is expressly prevented where a notice of assessment has been issued, except in respect of land tax (and GAIC) (ss 19(2), (2A)). The remedy is an objection. In the case of land tax, despite s 19(2) not applying,¹⁵ it is debateable whether the taxpayer is permitted to bring a refund application under part 4 instead of objecting under part 10. Would not that undermine the objection process? In court how would s 96(2) (amongst the other provisions discussed above) be overcome? Is the correct position instead that a land tax-payer must *first* use the objection process to establish an overpayment *and then* apply for a refund under part 4? But what if five years go by in the meantime? Conversely, what if there would be a windfall (s 22 arguably applying only if an application is made under s 19)? What would be the rationale for treating land tax-payers differently?

A similar analysis would need to be made of the other TAAs in order to determine whether the objection regime is merely an optional remedy for a taxpayer who seeks a refund arising from payment of an allegedly excessive assessment. The exclusionary provisions differ. For example:

- in NSW it would appear that the taxpayer will be confined to the objection process, despite the absence of provisions like Vic ss 18 and 19(2): see NSW ss 16, 119, 113A;
- the Queensland Act does not have a provision like Vic s 96(2), but it has s 36, 'Refunds made only under this division', and a conclusive evidence provision;
- if the same result were to follow in SA (see s 100(2)) and WA (see s 31), then, given that in those states, in contrast to the other jurisdictions, the time limit on objection cannot be extended beyond 12 months, the taxpayer who after say two years without having objected realises an error in an assessment will not have a right to compel a refund. The WA commissioner might in that situation nevertheless be inclined to reassess as a means to a refund (see s 16(2)(a) and CP TAA 14.1), and in the two WA tribunal cases discussed next it was assumed the commissioner's reassessment power was so available.

¹⁵ Historically, under the *Land Tax Act 1958* (Vic), there was no provision such as s 19(2) of the TAA that expressly excluded the operation of the 'general' refund provisions (then found in ss 90AA, 90A and 90B) in respect of an assessment otherwise capable of objection, amendment and refund (ss 24A, 38(2)). Perhaps the rewrite was intended simply to replicate that position without stating one way or the other whether part 4 was to apply to any or all land tax refunds.

5.4 Illustration: the importance of the reassessment time limit in WA

In two WA tribunal decisions, the taxpayer was refused a refund of tax paid under assessments where the refund was sought more than five years after the assessments, because of the time limit on reassessments imposed by s 17 of the TAA, which provides:

17 Time limits on reassessments

- (1) A taxpayer is not entitled to apply for a reassessment more than 5 years after the original assessment was made.
- (2) The Commissioner may make a reassessment at any time after the previous assessment was made if —(a) the Commissioner has been directed, in the course of review proceedings, to make the reassessment;
- (4) However, in any other circumstances the Commissioner may only make a reassessment within 5 years after the date of the original assessment or on an application made within 5 years after the date of the original assessment.'

In the first case, *Kosonen v Commissioner of State Revenue* [2009] WASAT 135, the taxpayer sought a reassessment and refund of four years of over-assessed land tax. The taxpayer did so more than five years after the last assessment. The commissioner said it was too late, pointing to s 17, and the tribunal agreed. The tribunal member ended with the comment:

[47] This case therefore highlights the need for taxpayers to carefully check assessments from the Commissioner, to ensure that the information upon which it is based is correct.

[48] Taxpayers are reminded of the need to do so in the land tax brochures that accompany such assessments. If the Kosonens had drawn this error to the Commissioner's attention within the relevant time period, it is more than likely that the reassessment would have been allowed. However, as they did not, and as the TA Act does not give the Commissioner a general discretion to waive the time limits imposed under s 17 of the TA Act, a reassessment in this case is unable to be made.

In the second case, *Hanson v Commissioner of State Revenue* [2013] WASAT 32, the taxpayer paid stamp duty on a contract for the purchase of property. More than five years later, the contract was terminated. The taxpayer immediately applied for a refund. The commissioner said it was too late, pointing to s 17, and the tribunal agreed. The (same) tribunal member began with the comment:

[3] This is a case where the operation of the legislative provisions results in a harsh and unfortunate outcome for an ordinary citizen of the State caught up as an innocent investor in a failed property development which has already caused him financial loss and apparent hardship. Had the applicant, Mr Hanson, lodged his application for a reassessment one month earlier, (if he been in a position to do so which he was not), he would clearly have been entitled to a refund of the \$19,200 stamp duty he paid in 2007. It can be readily accepted, as counsel for the Commissioner submitted, that the five year time limit upon reassessment provides the respondent, and therefore the State of Western Australia, with certainty of revenue. That is doubtless cold comfort for Mr Hanson in the quite unusual circumstances of this case.

In South Australia, as noted, the TAA (s 10(4)(a)) gives the commissioner with the agreement of the taxpayer the power to waive the time limit, which he presumably would in a case like *Hanson*.

In both of the WA cases mentioned, the taxpayer was self-represented. There was no discussion of the refund provisions in part 5 of the TAA. There was no occasion to consider whether a refund might have been available pursuant to the common law of restitution (see s 31). Conversely, there was no mention by the commissioner of the objection procedure and the failure to object.

5.5 Illustration: changing Victorian policy on land tax refund time limits

The policy of the Victorian government with respect to time limits on refunds of land tax (and other taxes) has changed over time, reflecting the competing considerations at play. Argument about the effectiveness of the amendments has not been avoided.

Before 1974, there was a specific time limit on refunds of land tax:¹⁶

No application for a refund of any overpayment shall be entertained by the Commissioner unless made within three years after such overpayment was made, or if there has been an objection then within three months after the date of the decision on such objection.

In 1974, the government of the time decided to introduce legislation removing the time limit.¹⁷ The reason it gave for the change is interesting:¹⁸

This is a small Bill which tidies up two technical matters relating to land tax. Section 90 of the Land Tax Act 1958 contains a provision which enables a refund to be made of an overpayment of land tax. However, sub-section (3) of section 90 limits the time for the application by a taxpayer to the commissioner for a refund to within three years after the overpayment was made. The time limit has on occasions led to the unfortunate situation in which a taxpayer has overpaid land tax, not discovered the overpayment until some time afterwards, and been subsequently debarred by sub-section (3) of section 90 from obtaining a refund.

The Premier went on to give a specific example of such an 'unfortunate situation':¹⁹

The matter arose recently as result of an application to the Ombudsman by a company which had been paying land tax on land it had not owned for six years. It does not say much for the company's accounting procedures because it did not discover this until some time had elapsed. Under sub-section (3) of section 90 of the Act, the company was entitled to a refund for only three years. ... The Government has made an *ex gratia* repayment to the company. The Government believes the current position is entirely unsatisfactory.

In 1992 the policy reverted. The government of that time regarded it as entirely unsatisfactory that the State was 'obliged to refund amounts overpaid no matter how long ago the overpayment occurred'.²⁰

¹⁶ *Land Tax Act 1958* (Vic), s 90(3).

¹⁷ *Land Tax (Amendment) Act 1974* (Vic), s 2, substituting in place of sub-ss (2)–(4) of s 90 of the *Land Tax Act 1958* (Vic) the following new sub-s (2): 'Where the Commissioner finds in any case that tax has been overpaid he may refund to the taxpayer who paid the tax the amount of tax found to be overpaid.' Presumably the twelve month time limit in s 20A of the *Limitation of Actions Act 1958* (Vic), inserted in 1961, did not override the specific provision made by s 90 of the *Land Tax Act 1958* (Vic).

¹⁸ Second reading, Land Tax (Amendment) Bill, Legislative Assembly, 6 March 1974, *Parliamentary Debates*, pp 3743–4.

¹⁹ *Ibid* at 3744.

²⁰ Second Reading, State Taxation (Amendment) Bill (1992), Legislative Assembly, 6 November 1992, *Parliamentary Debates*, p 566.

Whilst 'taxpayers who have overpaid tax or duty are entitled to a refund of that tax or duty', that right was considered not to be absolute.²¹ 'There must be a point in time in which taxation matters are finalised', was how the Treasurer put it.²² The change in policy was prompted by litigation concerning an insurance company which had overpaid \$2 million mistakenly thinking it to be due as duty on premiums under the *Stamps Act 1958 (Vic)*.²³ The company had, firstly, made the payments some years before realising its mistake, and secondly, already charged the overpaid duty to its insured, such that any refund to it would result in a windfall, at least in the first instance. The commissioner was nonetheless ordered to refund. The government introduced amendments, across the revenue lines, designed to overcome both aspects of the decision. Insofar as the 'point in time in which taxation matters are finalised' was concerned, the amendment was in the following terms:²⁴

If the Commissioner—

- (a) receives an application for a refund of overpaid tax not more than 3 years after the overpayment;
- (b) finds that the tax has been overpaid by the applicant—

the Commissioner must—

- (c) refund the amount of the overpaid tax; or
- (d) apply the amount of the overpaid tax against any liability of the applicant to the Crown, being a liability arising under, or by virtue of, an Act of which the Commissioner has the general administration, and refund any part of the amount that is not so applied.

This provision was said to be intended to 'ensure that taxpayers are entitled to refunds of tax or duty overpaid up to three years before the date the application for a refund is lodged',²⁵ and 'to provide certainty and finality to Victoria's revenue collections'.²⁶

Insofar as windfalls were concerned, provisions were introduced obliging a taxpayer who had passed on overpaid tax to a third party to forward any refund from the State to that third party.²⁷

'Some members of the legal community' had apparently argued that the 1992 amendments were ineffective to achieve their objective, because taxpayers could bring actions at common law to recover overpaid taxes dating back more than three years.²⁸ Such an argument was run to trial by one

²¹ Ibid.

²² Ibid.

²³ The amendments were introduced following the decision of the Full Court of the Supreme Court of Victoria in *Royal Insurance Australia Ltd v Commissioner of State Revenue* (1992) 23 ATR 528, whilst the Commissioner's appeal to the High Court was pending. Later, on 7 December 1994, the High Court dismissed that appeal: *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51.

²⁴ *Land Tax Act 1958 (Vic)*, s 90(2), as substituted by the *State Taxation (Amendment) Act 1992*, s 16.

²⁵ Second Reading, State Taxation (Amendment) Bill (1992), Legislative Assembly, 6 November 1992, *Parliamentary Debates*, p 566.

²⁶ Second Reading, State Taxation (Further Amendment) Bill (1993), Legislative Assembly, 21 October 1993, *Parliamentary Debates*, pages 1254.

²⁷ See for example *Land Tax Act 1958 (Vic)*, s 90A, introduced by the *State Taxation (Amendment) Act 1992*, s 17.

²⁸ Second Reading, State Taxation (Further Amendment) Bill (1993), Legislative Assembly, 21 October 1993, *Parliamentary Debates*, pages 1254.

taxpayer, and rejected.²⁹ The judge acknowledged the 'obvious reluctance to conclude that a taxing authority should be permitted to retain moneys paid otherwise than in payment of a duty imposed by the legislation', but concluded that it was 'crystal clear what the legislature was in fact attempting to achieve'.³⁰ Before that decision was handed down, 'tightening' amendments were made in 1993, across the revenue lines, in the following terms:³¹

90AA Refund of tax

- (1) Proceedings for the refund or recovery of tax paid under, or purportedly paid under, this Act, whether before or after the commencement of section 22 of the *State Taxation (Further Amendment) Act 1993*, must not be brought, whether against the Commissioner or otherwise, except as provided in this section.
- (2) If a person claims to be entitled to receive a refund of or to recover tax paid under, or purportedly paid under, this Act, the person must lodge with the Commissioner within 3 years after the payment was made an application in the prescribed form for the refund of the payment.
- (3) If—
 - (a) person has lodged an application for the refund of an amount in accordance with sub-section (2); and
 - (b) the Commissioner has not, within the period of 3 months after the application was lodged—
 - (i) refunded the amount; or
 - (ii) applied the amount in accordance with sub-section (6)(d); or
 - (iii) refunded part of the amount and applied the remainder in accordance with sub-section (6)(d)—

or has, in writing given to the person within that period, refused to make a refund, the person may, within 3 months after the end of that period or after that refusal, whichever first occurs, bring proceedings for the recovery of the amount, or, if the Commissioner has refunded or applied part, the remainder of the amount.
- (4) Sub-section (3) applies whether or not the period for bringing proceedings for the refund or recovery of the amount prescribed by section 20A(1) of the *Limitation of Actions Act 1958* has expired.
- (5) Sub-sections (1) and (2) do not apply to a person if the person claims to be entitled to receive a refund or to recover tax paid under, or purportedly paid under, this Act by reason of the invalidity of a provision of this Act.
- (6) If—
 - (a) an application for a refund is lodged with the Commissioner in accordance with sub-section (2); and
 - (b) the Commissioner finds that an amount has been overpaid by the applicant—
the Commissioner—
 - (c) must refund the overpaid amount; or

²⁹ *Common Equity Housing Ltd v Commissioner of State Revenue* (1996) 33 ATR 77 (Ashley J).

³⁰ *Common Equity Housing Ltd v Commissioner of State Revenue* (1996) 33 ATR 77 at 85.

³¹ *Land Tax Act 1958* (Vic), s 90AA, considered by way of example.

- (d) must—
- (i) apply the overpaid amount against any liability of the applicant to the State, being a liability arising under, or by reason of, an Act of which the Commissioner has the general administration; and
 - (ii) refund any part of the overpayment that is not so applied.
- (7) If, under this section, the Commissioner determines to refund an amount, the amount is payable from the Consolidated Fund which is to the necessary extent appropriated accordingly.
- (8) In this section, “**proceedings**” includes—
- (a) seeking the grant of any relief or remedy in the nature of certiorari, prohibition, mandamus or quo warranto, or the grant of a declaration of right or an injunction; or
 - (b) seeking any order under the *Administrative Law Act 1978*.

The amendments were evidently intended to codify the tax refund process by excluding all proceedings for tax refunds, including ‘proceedings which seek to use administrative law procedures to require things to be done which may result in a refund’,³² except those proceedings brought in accordance with the prescribed process. The prescribed process began with the making of a refund application to the commissioner within three years of the alleged overpayment.

Amendments were at the same time made to s 20A of the *Limitation of Actions Act 1993 (Vic)*, titled ‘Limitation on proceeding for recovery of tax’.³³ Before those amendments, the section imposed a twelve month time limit, subject to the operation of any other more specific provision in another Act, in the following terms:

- (1) No action shall be brought to recover... any tax, fee, charge or other impost paid *under the authority or purported authority of any Act*, after the expiration of twelve months after the date of payment.
- (2) Sub-section (1) of this section shall not apply to any action or proceeding brought pursuant to any specific provision of any Act...

The drafting of the section, particularly the words emphasised, had been revealed to be ineffective by the case of the insurance company mentioned above.³⁴ The company had self-assessed and overpaid, and managed to avoid the operation of the words emphasised. The section was amended to read as follows:³⁵

- (1) ... [A] proceeding for the recovery of money paid by way of tax or purported tax under a mistake (either of law or of fact) must be commenced—
 - (a) within 12 months after the date of payment; or

³² Second Reading, State Taxation (Further Amendment) Bill (1993), Legislative Assembly, 21 October 1993, *Parliamentary Debates*, pages 1254.

³³ By the *Limitation of Actions (Amendment) Act 1993 (Vic)*, s 4.

³⁴ *Royal Insurance Australia Ltd v Commissioner of State Revenue* (1992) 23 ATR 528; *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51.

³⁵ *Limitation of Actions Act 1958 (Vic)*, s 20A(1), as it was immediately after the amendments made by the *Limitation of Actions (Amendment) Act 1993 (Vic)*, s 4. And see s 27, ‘Postponement of limitation periods in case of fraud or mistake’.

- (b) in the case of a proceeding in accordance with another Act that provides for the refund or recovery of the money within a longer period, within that longer period.

Section 20A(1) of the *Limitation of Actions Act 1993* (Vic) now refers to 'money paid by way of tax or purported tax or by way of an amount that is attributable to tax or purported tax'. It is interesting to contrast that description with descriptions such as 'tax paid under, or purportedly paid under, this Act' (s 90AA(1) above), 'tax paid or purportedly paid under a taxation law' (Vic s 18), 'any amount paid, or purportedly paid, under a tax law' (Qld s 36), 'tax that has been overpaid' (SA s 18(1)), and 'a payment made... in excess of the taxpayer's tax liability' including 'a payment made in purported satisfaction of a tax liability that does not actually exist' (WA s 3(1) definition of 'overpayment').

A case considering the terms of s 90AA(1) of the *Land Tax Act 1958* (Vic) and s 20A(1) of the *Limitation of Actions Act 1993* (Vic) in respect of a refund claim for land tax assessed and paid 22 years ago has been heard by the Supreme Court of Victoria but not decided at the time of writing.

6 Conclusion

It is perhaps no surprise that the analysis above has shown up significant differences in the operation of the TAAs with regard to reassessments and refunds. The differences travel beyond Tasmania's unique general limitation period of three years for reassessments and refunds.

The policy balance between finality and accuracy in revenue collection is struck differently in each jurisdiction.

Within each TAA, uncertainty arises in part from the discretionary nature of some of the commissioner's powers. Few of the commissioners have published views outlining how the relevant discretions are exercised.

It is also unclear under many of the TAAs whether a taxpayer can seek a reassessment and refund instead of objecting, and whether common law remedies are excluded.

The question 'is a refund available?' is not necessarily a straight-forward one.