



**Australian Government**  

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**Inspector-General of Taxation**  

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**Taxation Ombudsman**

## THE EXERCISE OF THE COMMISSIONER'S REMEDIAL POWERS

### Introduction

The Australian taxation system (including the superannuation system) has been described as being amongst the most complex in the world<sup>1</sup> with over 14,000 pages of legislation, intended to deliver different policy outcomes for different taxpayers in different situations<sup>2</sup>. The Commissioner of Taxation has administration, or partial administration, of 34 primary pieces of legislation (not counting delegated legislation).<sup>3</sup> The Commissioner has been granted certain discretionary powers to assist in administering these laws. This review investigation examines the power of the Commissioner's Remedial Power. The IGTO is also undertaking another review investigation examining the General Powers of Administration<sup>4</sup> (GPA).

### The Commissioner's Remedial Power

Section 370-5 of Schedule 1 of the *Taxation Administration Act 1953* allows the Commissioner to modify the operation of enacted laws that are not operating as intended.

Specifically, the section provides:

370-5(1) The Commissioner may, by legislative instrument, determine a modification of the operation of a provision of a \*taxation law if:

(a) the modification is not inconsistent with the intended purpose or object of the provision; and

(b) the Commissioner considers the modification to be reasonable, having regard to:

(i) the intended purpose or object of the provision; and

(ii) whether the cost of complying with the provision is disproportionate to that intended purpose or object; and

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<sup>1</sup> See, for example: Joint Committee of Public Accounts and Audit, *Report 410: Tax Administration* (2008); Richard Krever, "Taming Complexity in Australian Income Tax" (2003) 25(4) *Sydney Law Review* 467.

<sup>2</sup> The Treasury, *Complexity – a sketch in five slides* (2015) <<https://treasury.gov.au/review/tax-white-paper/in-five-slides>>.

<sup>3</sup> Inspector-General of Taxation and Taxation Ombudsman, *Corporate Plan 2021-22* (2021) p 44.

<sup>4</sup> Note: Although legislation provides the Commissioner with the power of 'general administration' of the relevant act, these powers are more commonly known as 'general powers of administration'.

(c) any of the following persons advises the Commissioner that any impact of the modification on the Commonwealth budget would be negligible:

- (i) the Secretary of the Department, or an APS employee in the Department who is authorised by the Secretary for the purposes of this paragraph;
- (ii) the \*Finance Secretary, or an APS employee in the \*Finance Department who is authorised by the Finance Secretary for the purposes of this paragraph.

The Treasury Consultation Paper in relation to the CRP noted the following objectives for the CRP:<sup>5</sup>

#### Administrative framework

The Commissioner will establish an administrative process to ensure that the Remedial Power will operate in a transparent and efficient manner. This process will also provide stakeholders with the opportunity to provide input on the proposed exercise of the power. The process will be subject to monitoring and ongoing review (including consultation with ATO consultation groups and other stakeholders) to ensure that it is enabling an effective and fit for purpose operation of the Remedial Power.

In particular, it is proposed that this administrative process operate under the following principles:

- designed to cut red tape;
- more timely resolution of certain legislative tax issues;
- consolidate all tax and superannuation issues into a single database;
- transparent and accountable;
- consultation in accordance with legislative requirements;
- consistency in exercising or not exercising discretionary power;
- compliance with relevant Commonwealth standards, procedures and delegations;
- triaging tax and superannuation issues into relevant streams; that is, law or advocacy, administrative or Commissioner's remedial power; and
- streamlined and in accordance with Reinventing the ATO strategic programs

The Explanatory memorandum to the Bill which enacted the CRP notes the following:<sup>6</sup>

Before exercising the power, the Commissioner must be satisfied that any appropriate and reasonably practicable consultation has been undertaken. This is consistent with section 17 of the Legislation Act 2003. This allows an opportunity to identify and consider all implications from the exercise of the power and to ensure that the exercise of the power is appropriate in the circumstances. This is consistent with the approach to amendments of primary legislation, which are subject to public consultation. In addition, the Commissioner will consult with a technical advisory group (which will include private sector experts) and the Board of Taxation prior to any exercise of the power.

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<sup>5</sup> The Treasury, *Consultation Draft – Information Paper on Commissioner's Remedial Power and Related Issues* <<https://www.bing.com/search?q=treasury+consultation+paper+commissioner%27s+remedial+power&cvid=36b93bf193ff47ba8e012db1aee8a658&aqs=edge..69i57j69i64.11223j0j4&FORM=ANAB01&PC=HCTS>>.

<sup>6</sup> Explanatory Memorandum to the Tax and Superannuation laws Amendment (2016 Measures No. 2) Bill 2016, para 1.12.

Furthermore, the Explanatory Memorandum makes clear that the CRP is a power of last resort and notes:<sup>7</sup>

The Remedial Power does not change the requirement for the Commissioner to pursue an interpretation of the law which can achieve the purpose or object of the law in the first instance or to seek to use his or her general powers of administration. The Remedial Power is to be exercised as a power of last resort where the other options available to the Commissioner (such as applying purposive principles to the interpretation of the relevant taxation law or using the general powers of administration) have been considered and found not to provide a suitable solution. In some cases, it may be more appropriate for the Commissioner to seek an amendment to the primary legislation, rather than to use the Remedial Power.

### A purposive interpretation of the law

The Explanatory memorandum contemplates the Commissioner considering other options to give effect to the legislation, including by adopting a purposive approach to interpreting the law, before relying on the CRP. Whilst there may be different opinions as to what a purposive approach to interpretation entails, the High Court of Australia has stated that:<sup>8</sup>

...the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision in particular the mischief it is seeking to remedy.

Accordingly, the ATO's understanding and application of principles of purposive statutory interpretation, particularly where the text is ambiguous or is open to more than one interpretation, will be a relevant area for consideration in this investigation.

### When the CRP has been exercised and not exercised

The ATO publishes a list of circumstances in which the CRP has been exercised. Since 2017, the CRP has been exercised five times in the following areas:

- Foreign resident capital gains withholding<sup>9</sup>
- Small business restructure roll-over<sup>10</sup>
- Disclosure of Protected Information by Taxation Officers<sup>11</sup>
- Certificate for GST-free supplies of Cars for Disabled People<sup>12</sup>
- Seasonal Labour Mobility Program<sup>13</sup>

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<sup>7</sup> Ibid, para 1.13.

<sup>8</sup> *Alcan (NT) Alumina Pty Ltd V Commissioner of Territory Revenue (NT)* [2009] HCA 41 at [47].

<sup>9</sup> *Taxation Administration (Remedial Power-Foreign Resident Capital Gains Withholding) Determination 2017*.

<sup>10</sup> *Taxation Administration (Remedial Power - Small Business Restructure Roll-over) Determination 2017*.

<sup>11</sup> *Taxation Administration (Remedial Power - Disclosure of Protected Information by Taxation Officers) Determination 2020*.

<sup>12</sup> *Taxation Administration (Remedial Power - Certificate for GST-free supplies of Cars for Disabled People) Determination 2020*.

<sup>13</sup> *Taxation Administration (Remedial Power - Seasonal Labour Mobility Program) Determination 2020*.

The ATO also publishes a list of areas in which it has not exercised the CRP and provides some details as to how the issue may have otherwise been addressed, including through the minor and technical legislative amendments process.<sup>14</sup>

## TERMS OF REFERENCE

Through the IGTO's tax complaint investigation service, it has been observed that there appears to be a lack of clarity about how issues are raised for CRP consideration and whether the processes underlying consideration of these matters are sufficiently robust to take into account consideration of relevant factors and expert stakeholder views. This is important as decisions of the Commissioner in relation to the CRP are not subject to external merits or judicial review.<sup>15</sup>

The IGTO's investigation will examine:

1. the processes by which (potential) CRP matters are identified, including the processes by which the ATO assures itself that it has sought to adopt a purposive interpretation of the law;
2. the processes by which (potential) CRP matters are considered, including the application of the criteria in Division 370 of Schedule 1 to the *Taxation Administration Act 1953*;
3. the regulatory and compliance impact (including the frequency and circumstances) of the use of the CRP<sup>16</sup>;
4. whether the ATO's systems and processes to receive, consider and determine CRPs are operating effectively, efficiently and with timeliness and transparency taking into account all relevant factors and stakeholder feedback;
5. how consideration and decisions in relation to the CRP are recorded and communicated, both internally and externally;
6. whether processes in relation to the CRP are well-known and well-understood across the tax practitioner community and within the ATO;
7. how the ATO engages with stakeholders as part of its CRP consideration; and
8. any other relevant matters that arise during the course of the IGTO investigation or as identified by stakeholders in submissions.

The IGTO welcomes feedback from stakeholders – including professional and industry bodies, tax practitioners and taxpayers – on any concerns they have in relation to the CRP processes and potential improvements that may be implemented.

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<sup>14</sup> Australian Taxation Office, *When the Commissioner's remedial power has been considered but not applied* (19 August 2021) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-has-been-considered-but-not-applied/>>.

<sup>15</sup> Exercises of the CRP are effected by way of disallowable legislative instruments which must be tabled for a set period of time in Parliament and is subject to veto or disallowance.

<sup>16</sup> For example, Is the CRP providing greater certainty, reducing risks for entities and promoting confidence in the taxation system – as per the Regulation impact on business statement? The Remedial Power was also noted to deliver regulatory costs, including small costs for entities and advisers to familiarise themselves with the power and instruments made under it.

## HOW TO LODGE A SUBMISSION

The closing date for submissions is **28 February 2022**. Submissions may be lodged by telephone (02 8239 2111) or be sent by:

Post to: Inspector-General of Taxation and Taxation Ombudsman

GPO Box 551

Sydney NSW 2001

Fax: (02) 8088 7815

Email to: [crp@igt.gov.au](mailto:crp@igt.gov.au)

## CONFIDENTIALITY

Submissions provided to the IGTO are maintained in strict confidence (unless you specify otherwise). This means that the identity of the taxpayer, the identity of the adviser and any information contained in such submissions will not be made available to any other person, including the ATO. Section 37 of the *Inspector-General of Taxation Act 2003* safeguards the confidentiality and secrecy of such information provided to the IGTO – for example, the IGTO cannot disclose the information as a result of a Freedom of Information (FOI) request, or as a result of a court order generally. Furthermore, if such information is the subject of client legal privilege (also referred to as a legal professional privilege), disclosing that information to the IGTO will not result in a waiver of that privilege.

Professional bodies and others (e.g. advisers) who wish to have their contribution to the IGTO investigation formally acknowledged should accordingly expressly waive confidentiality for these purposes.