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Inspector-General of Taxation
Taxation Ombudsman

The Administration of the Commissioner's Remedial Power

Final Report

By the Inspector-General of Taxation

December 2023

Acknowledgement of country

In the spirit of reconciliation the Australian Government Inspector-General of Taxation acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

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Acknowledgment of contributors

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) is pleased to present this report of our investigation – *The Administration of the Commissioner’s Remedial Power*. The IGTO acknowledges and thanks officers of the Australian Taxation Office (**ATO**) for their professionalism, assistance and insights during the conduct of this investigation. The IGTO also thanks the Treasury for their assistance and insights which informed aspects of this report.

This report has also benefited from insights provided by a range of professionals (tax, accounting and legal) and their respective representative bodies, as well as our colleagues in other government organisations.

The IGTO gratefully acknowledges the contributions of the following stakeholders:

- Chartered Accountants Australia and New Zealand
- Corporate Tax Association
- CPA Australia
- Law Council of Australia
- SMSF Association
- The Tax Institute

The IGTO is also grateful for the time and insights provided by members of the Commissioner’s Remedial Power (**CRP**) Advisory Panel.

Table of Contents

Acknowledgment of contributors	iii
Table of Contents	iv
Executive summary	vi
Key Observations.....	vi
Recommendations.....	xii
List of Recommendations.....	xiii
1. Introduction	1
1.1. Purpose and scope of the investigation.....	1
1.2. Review Investigation Methodology	2
1.3. The ATO's broader process for resolving issues caused by the unintended operation of taxation laws	4
1.4. Statistics on CRP usage	6
1.5. Structure of this report	12
2. Introduction to the Commissioner's Remedial Power	14
2.1. Historical background and context to the enactment of the CRP	15
2.2. The CRP provisions and criteria	21
2.3. What is a Legislative Instrument.....	27
3. Identification and receipt of issues for CRP consideration	29
3.1. The ATO's CRP process: Step 1 – intake and receipt of CRP candidates (based on ATO information)	29
3.2. Awareness of the existence and process for CRP	31
3.3. ATO training and guidance to its officers about the CRP and its process.....	40
3.4. Information systems and processes to capture and manage issues for CRP consideration	50
3.5. Transparency about when and how issues for CRP consideration are identified and recorded for consideration	53
4. Assessment of issues for CRP consideration	58
4.1. The ATO's CRP process: Assessment of CRP candidates (based on ATO information).....	58
4.2. Potential CRP candidates are rejected by the ATO if they only affect one taxpayer	67
4.3. Inconsistency with the intended policy objective is a primary reason many candidates are found unsuitable for the CRP	72

4.4.	Lack of clarity about the ‘negligible’ budget impact requirement and the ATO’s engagement with the Treasury in this area.....	84
4.5.	Uncertainty about the ATO CRP consultation process and perception of insufficient CRP consultation (<i>prior</i> to a CRP decision being made)	99
4.6.	Refreshing or broadening of CRP Advisory Panel membership.....	111
4.7.	Timeframes for CRP decisions to be made and actioned	112
5.	The interaction between the CRP process and law change	117
5.1.	The ATO’s CRP Process: Interaction with law change.....	117
5.2.	Managing issues that are not addressed by the CRP	117
5.3.	Sunsetting of CRP determinations and further actions to amend legislation	133
6.	Parliamentary oversight and international approaches.....	136
6.1.	Parliamentary Committee views and scrutiny of CRP Determinations	136
6.2.	International comparisons	142
7.	Concluding remarks	149
	Appendix A — Terms of reference.....	154
	THE EXERCISE OF THE COMMISSIONER’S REMEDIAL POWERS.....	154
	TERMS OF REFERENCE.....	157
	How to lodge a submission	158
	Confidentiality	158
	Appendix B — ATO response	159
	Appendix C — IGTO case sampling review of candidates assessed by the ATO through their CRP process pathway	168
	Appendix D — CRP candidates assessed by the ATO as at 30 September 2023	171
	Appendix E — ATO CRP process pathway.....	179
	Appendix F — Internal ATO CRP application form.....	181
	Appendix G — External CRP application form	184
	Appendix H — ATO Internal CRP Guide	190
	Appendix I — Charter of Budget Honesty Policy Costing Guidelines – Part 2.....	211
	Appendix J — Summary of Candidates 45, 54, and 60	219
	Appendix K — Glossary and defined terms	222

Executive summary

The Australian taxation and superannuation system is one of the most complex in the world, with over 14,000 pages of legislation. The nature and volume of taxation law and its evolution over time has produced and continues to produce unintended, unforeseen or inadvertent outcomes and consequences in its application. In many cases, these outcomes cannot be corrected via legislative amendment in a timely manner, given there are many competing priorities for the Australian Parliament and the legislative reform agenda.

Since 1 March 2017, the tax laws have provided the Commissioner with a discretionary power, referred to as the Commissioner's Remedial Power (**the CRP**) to modify the operation of a provision of a taxation law if certain criteria are met. The CRP was introduced to provide the Commissioner with the means to provide a swift but temporary (or interim) solution to unforeseen or unintended outcomes in enacted taxation laws, at least until a legislative solution can be introduced. It was intended that the exercise of the CRP would address unintended consequences in a timely manner and facilitate a more efficient use of limited legislative time and resources (by allowing these individual CRP amendments to be deferred for consideration and introduced as part of a programme of law change).

In the Regulatory Impact Statement to the Bill introducing the CRP, the Treasury '*estimated that the Commissioner may use the Remedial Power to modify the operation of the law up to ten times per annum*'.¹ This estimate proved to be inaccurate as the discretionary power has only been exercised seven (7) times since its introduction more than 6 years ago.

One question that the IGTO has sought to answer is why the actual usage of the CRP is so much lower than initial predictions. As part of this review, the IGTO consulted with leading tax practitioners and professional bodies as well as with external members of the CRP Advisory Panel. Furthermore, the IGTO performed a deep dive on a sample of seven (7) CRP candidates to analyse how each candidate was assessed by the Australian Taxation Office (**ATO**) against the CRP criteria.

Key Observations

The IGTO has made a number of key observations in the report which are set out below in summary form.

There remains a preference for the law to expressly state everything ... which is good in theory but codification of tax law is impractical

The ATO has demonstrated in several cases a preference for law change over exercising the CRP, which appears contrary to the CRP objectives and which can delay certainty of outcomes for taxpayers. Whilst

¹ Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 2) Bill 2016, para 1.152.

a preference for the law to expressly state everything would be ideal in a perfect world, codification is impractical, unrealistic and unhelpful, especially given the express statutory objectives of the CRP.

Our investigation of CRP decisions again surfaced examples where unless the statute expressly provides that a taxpayer can amend, revoke or modify a choice that is provided under the relevant legislation, then the ATO is unwilling to allow any revision, amendment or modification. These issues of statutory interpretation were recently raised in the IGTO review investigation report – *The exercise of the Commissioner's General Powers of Administration*.

For Example – A request to modify a choice to carry losses back was refused because the law did not say exactly how you would allow the amendment of the choice

For example, a request for CRP to be exercised to ensure a choice to carry losses back (which was a choice that was made available in the context of COVID-19 support measures²) could be revised, amended or modified in certain circumstances was rejected by the ATO (discussed in the report as Candidate 55). The Explanatory Memorandum to the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020 suggested that a loss carry back choice could be changed in certain circumstances. Whilst the ATO considered the CRP request for the loss carry back choice to be modified would not be inconsistent with the intended purpose or object of the provision; the fact that the legislation did not expressly describe or enable that modification ultimately led to a determination that exercising the CRP would be inconsistent with the intended purpose or object of the provision. In May 2021, less than 2 months after the issue was considered for exercise of the CRP, the Treasury published an exposure draft and explanatory statement for the Miscellaneous Tax Amendments (MTA) for public consultation – an omnibus of minor technical amendments. The MTA was introduced to Parliament on 24 June 2021 and passed by both Houses of Parliament on 1 December 2021.

The ATO's preference for law change over exercising the CRP means that the power was not exercised in all cases where it potentially could have been. In some cases, the ATO chose not to exercise the CRP despite the candidates satisfying all relevant criteria. In other cases, consideration of the CRP was abandoned midway to pursue law change through the MTA process.

This is ultimately inconsistent with the purpose for which the CRP was introduced, which was to provide a swift alternative to legislative change and facilitate a more efficient use of limited legislative time and resources. The IGTO's recommendation in Chapter 5 is aimed at addressing this issue.

There is low community and ATO awareness of the CRP but the ATO relies on issues to be brought to it for consideration

The IGTO's case sampling does not suggest that the ATO has been interpreting the CRP criteria in an overly narrow or conservative manner. However, there are elements of the overall process which can be improved.

² Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020 s

Executive summary

The ATO's process for assessing CRP candidates is, for the most part, passive rather than proactive. That is, the ATO relies upon taxpayers, tax practitioners and ATO officers themselves to identify potential issues and submit them for CRP consideration.

A critical element to the success of the CRP process which relies upon stakeholders identifying and submitting candidates for consideration is the quantity and quality of the candidates received for consideration. This, in turn, will depend on the general awareness of the CRP and its criteria, both within the ATO and outside it. Accordingly, the IGTO's observations and recommendations in Chapter 3 are geared towards raising awareness and understanding of the CRP and how it operates.

There are opportunities to improve the CRP process, including the use of the CRP Advisory Panel

Stakeholders have hypothesised that the lower-than-expected usage of the CRP may be due to the ATO adopting an overly narrow or conservative interpretation of the CRP criteria. While the case sampling undertaken by the IGTO did not support this, we have identified opportunities in Chapters 3 and 4 for the ATO to improve its systems and to make the process for considering candidates more robust. A recommendation for the ATO to include a mechanism that would allow CRP candidates to be reconsidered in certain circumstances could effectively rectify shortcomings in proposed modifications, thereby encouraging increased utilisation of the CRP.

The impact on the Commonwealth Budget does not appear to be determinative in ruling out candidates but it is nevertheless important to improve the community's understanding of this requirement

Many stakeholders consulted as part of this investigation considered that a failure to meet the negligible impact on the Commonwealth budget criterion may have been the core reason for CRP candidates being found unsuitable.

According to the ATO data, formal costings were only sought for 14 CRP candidates. An additional two (2) CRP candidates were informally assessed by the ATO (Revenue Analysis Branch – RAB). The budget impact of the CRP modification was assessed to be negligible for 10 (i.e. 62.5% or 10/16) of these candidates.

Unintended impacts and consequences are best identified early (within the forward estimates period) for the Commonwealth Budget impact to be negligible – a core CRP requirement

Timing is critical in applying the Budget impact criteria. This is because the question of whether the ‘Commonwealth Budget’ (against which impact is measured) does or does not contain amounts collected as a result of the unintended operation of the provision actually depends on whether the CRP candidate is identified and considered within the four year forward estimates period or beyond this timeframe.

The Budget impact requirement does not allow for imperfect data and a lack of reliable data may be a barrier to the exercise of the CRP discretion

A statutory obligation to provide a positive assertion that the impact on the Commonwealth budget is negligible implies that there will be reliable data to support the assessment, whereas in practice this is often not the case. The lack of available data and limitations in relation to existing data may make it difficult to reliably assess whether the negligible budget impact criterion is met. The inability to positively advise the ATO that the impact of the modification is ‘negligible’ when the impact is ‘unquantifiable’ could potentially rule out a lot of CRP candidates.

The responsibility for providing costing advice is ultimately a matter for the Treasury or Department of Finance but stakeholders should be aware that a lack of reliable data about the industry or impact of the measure can result in the CRP being unavailable. A positive obligation to confirm the impact is negligible is different from an obligation to assess if the impact is material or indeed that the impact is not negligible. The IGTO investigation identified instances where the CRP appears to have failed because of a lack of reliable data.

While it may be possible in theory for the impact of the modification to be both ‘unquantifiable’ and ‘negligible,’ the IGTO has not observed any exercise of the CRP where the modification was assessed to be ‘unquantifiable.’ The ATO has explained that this is because the Commissioner has never received advice from the Treasury that a CRP modification would be both unquantifiable and negligible.

The lack of available data and limitations in relation to data where it is available may make it difficult to reliably assess whether the negligible budget impact criterion is met. As the data that is collected by the ATO in income tax returns and business activity statements are typically not broken down to the required level of specificity, it can be extremely difficult for RAB (and, in turn, the Treasury’s Tax Analysis Division – TAD, which relies on data provided by RAB, amongst other sources) to quantify the impact of a proposed modification.

For the reasons set out above, the positive statutory test may be difficult to apply where there is imperfect information. A negative test may be more appropriate. This is an area that requires further monitoring, not just by the IGTO but also by stakeholders.

Executive summary

Even where the lack of data is known there is no opportunity to revisit the scope of the CRP to address this deficiency even though the tax law contemplates this

There is currently no opportunity in the ATO process to consider whether the proposed CRP modification could be altered, reframed, or have its scope limited in a way so that the impact on the Commonwealth Budget becomes either smaller or easier to quantify. This is despite the fact that a modification in this manner is clearly outlined in the tax law³ and available to the Commissioner.

For example, if the Treasury is unable to advise the Commissioner that the impact of the modification on the Commonwealth Budget is negligible (including because the impact is ‘unquantifiable’) then the CRP assessment process effectively ends. There is currently no mechanism in place to consider whether the proposed CRP modification could be altered, reframed, or have its scope limited in a way so that the impact on the Commonwealth Budget becomes either smaller or easier to quantify.

Law change was preferred in around 30% of the CRP cases reviewed but can take years to resolve

The IGTO notes that legislative change was pursued (instead of the CRP) in 20 of the 68 potential CRP cases. This represents approximately 30% of the CRP candidates. A review by the IGTO of the time taken to resolve these unintended consequences via legislative change suggests that the range of time taken is between 8 months and 3 years and 5 months – see Tables 5.2 and 5.3

As timeframes for legislative change can often be unpredictable, a decision not to exercise the CRP can leave taxpayers without relief for extended periods of time. Some CRP issues are clearly time critical for taxpayers – including Candidate 58, which was referred to the ATO by the IGTO in the context of at least two dispute investigations (unresolved complaint cases) being investigated by the IGTO.

This case also demonstrates how reliance on legislative reform can delay delivery of sensible and pragmatic outcomes for taxpayers, consistent with the intended purpose of the law.

The First Home Super Saver Scheme (FHSSS) allows first home buyers to save for their home through the superannuation system. Individuals who make errors on their FHSSS applications are unable to correct their errors. In many instances, this has resulted in FHSSS applicants accessing less money than what they are eligible to receive under the scheme to buy or construct their first home.

A Case summary

The complainant requested a FHSSS release of \$26,000 from an industry super fund account that he had opened specifically to save for his first home. This amount of \$26,000 was the maximum FHSSS release amount stated on the FHSSS determination that he had received from the Commissioner. The complainant experienced certain issues when completing the online FHSSS release request form, so he attempted to investigate the issues. He inputted \$1 for release on the form and selected a constitutionally protected superannuation fund, which he knew was not able to release amounts under the FHSSS, to test for the error.

³ subsection 370-5(3) of Schedule 1 to the TAA

Unfortunately for him, this test application was successfully submitted. Although the constitutionally protected superannuation fund could not release any amounts under the FHSSS, the ATO would not permit the complainant to amend their release request or to submit another one nominating the \$26,000 from the industry super fund.

The ATO explained that they would only issue a release authority for up to \$1 to the relevant industry superannuation fund, because of the erroneous ‘test’ request (for \$1) that the complainant had lodged. The ATO explained to the IGTO that under the current FHSSS legislation, it was not possible for the complainant or the Commissioner to correct the error.

As part of the 2021-22 Federal Budget, the Government announced on 11 May 2021, four technical changes to the FHSSS legislation to ‘improve its operation as well as the experience of first home buyers using the scheme’. Those changes were aimed at assisting FHSSS applicants who make errors on their FHSSS release applications by:

- Increasing the discretion of the Commissioner to amend and revoke FHSSS applications
- Allowing individuals to withdraw or amend their applications prior to them receiving FHSSS amounts, and allow those who withdraw to re-apply for FHSSS releases in the future.
- Allowing the Commissioner of taxation to return any released FHSSS money to superannuation funds, provided that the money has not yet been released to the individual.
- Clarifying that the money returned by the Commissioner to superannuation funds is treated as funds’ non-assessable non-exempt income and does not count towards the individual’s contributions caps.

Although the CRP Candidate was assessed as meeting the CRP legislative criteria:

... the Commissioner decided it would not be appropriate to exercise the CRP given law change implementing the proposed modification had recently been announced in the 2021-22 Federal Budget, and the complex legislative drafting required to implement the proposed modification meant a legislative amendment to the FHSSS legislation was more appropriate than exercising the CRP. ...

On 1 July 2021, the CRP Advisory Panel confirmed the decision that the candidate was not suitable for the CRP, considering the Government’s recent announcement in the 2021-22 Budget.

On 6 August 2021, the Treasury expressed the view that the candidate would have a negligible budget impact.

Following the ATO’s decision not to exercise the CRP on 10 August 2021, an MTA addressing the issues raised in this candidate was scheduled to be included in an omnibus Treasury bill in late 2022. However due to limited drafting resources, the expected timing was delayed. The Bill (i.e. Treasury Laws Amendment (2023 Measures No. 3) Bill 2023) was then introduced into Parliament in June 2023 and passed both Houses in September 2023.

The Bill subsequently passed both Houses of Parliament on 6 September 2023 and received Royal Assent on 20 September 2023. For over two (2) years since the announcement of the FHSSS technical changes, there was no relief for impacted first home buyers because the CRP which was eligible was not exercised.

Executive summary

This was 2 years of delay in accessing funds to acquire their first home, consistent with the intended purpose and object of the FHSSS.

Reliance on law change (to the exclusion of the CRP) can delay the delivery of sensible and pragmatic outcomes for taxpayers. That is, in circumstances where the solution is consistent with the intended purpose of the law.

Further Post-implementation reviews of the CRP

Following the Minister's consideration of this IGTO report, if the Minister wishes to direct any further review to be undertaken to examine whether the policy considerations and framework for implementation of the CRP are operating effectively, the operation of the budget impact criterion may be an area that deserves thorough examination.

Recommendations

The IGTO has made 9 recommendations for improvement. The ATO has agreed in full, in part or in principle with all recommendations save for one part of one recommendation with which it disagreed.

The IGTO believes that implementing the recommendations set out in this report will improve the administration of the CRP, transforming it into a more effective tool for the Commissioner. Unintended outcomes in the tax laws can generate unfair tax consequences for taxpayers or subject them to unnecessary record keeping or other compliance requirements. Where these outcomes remain unresolved for lengthy periods, the cost and uncertainty experienced by taxpayers can be quite substantial. Exercising the CRP quickly to resolve these issues will result in timely and fair outcomes for taxpayers and tax practitioners in a manner that is consistent with the intended purpose of legislation as enacted by Parliament. Improved administration of the CRP will ultimately result in a better tax system.

List of Recommendations

Recommendation 3.1

The IGTO recommends that the ATO consider additional channels and opportunities to:

- (a) communicate with stakeholders about the existence of the CRP, the process to request an exercise of the CRP, its purpose and how it can be utilised to address unintended consequences; and
- (b) bolster community awareness through guidance and information, including that which is already published and available on the ATO website.

Recommendation 3.2

The IGTO recommends that the ATO consider strategies to improve the level of staff awareness and understanding of the CRP and how it operates within the broader 3-step process for resolving unforeseen issues that may arise in the administration of tax law, particularly for ATO officers in CEG and LDP who engage frequently with taxpayers and tax practitioners.

Recommendation 3.3

The IGTO recommends that the ATO consolidate and improve its system for capturing, tracking and reporting on the progress of CRP candidates, to reduce duplications and minimise the need for manual inputs and ensure that there is a complete record of relevant communications and deliberations for all CRP candidates.

Recommendation 3.4

The IGTO recommends that the ATO:

- (a) develop guidelines or a set of criteria that clearly define the circumstances in which an approach or enquiry made to the CRP team is formally recorded as a CRP candidate for consideration and ensure there is a consistent treatment of all approaches made to the CRP team; and
- (b) provide periodic progress updates to CRP applicants, or alternatively, clearly inform CRP applicants that they can contact the ATO to receive progress updates if the ATO does not provide updates to CRP applicants automatically.

List of Recommendations

Recommendation 4.1

The IGTO recommends that:

- (a) unless there are clear reasons why it would be inappropriate to do so, the ATO consult with the CRP Advisory Panel on each CRP candidate, providing a full analysis of the reasons for its view in each case, before a final decision as to the suitability of the candidate for exercising the CRP is made;
- (b) where the ATO determines that it would be inappropriate to consult on a particular CRP Candidate, ensure that the decision is carefully considered, approved and documented; and
- (c) when documenting the ATO's consideration of whether a proposed CRP modification is 'not inconsistent with the intended purpose or object of the provision'⁴, for consultation with the CRP Advisory Panel, the ATO document its conclusion of the policy intent before explaining its decision on whether the proposed CRP modification is or is not inconsistent with the intended policy intent.

Recommendation 4.2

The IGTO recommends that:

- (a) the ATO CRP assessment processes are reviewed and revised, as necessary, to ensure that in scoping a CRP candidate there is a fulsome consideration of the potential scope of application and legislative parameters by the Secretariat with input from the Advisory Panel at the outset in accordance with section 370-5(3), including identifying opportunities for the Secretariat and the Advisory Panel to revisit and review the scope of a candidate which may fail the budget impact criterion, but otherwise satisfy all the other criteria for the exercise of the CRP; and
- (b) the ATO, in consultation with the Treasury and the Department of Finance, consider what further information may be published about the CRP costing process generally as well as the costings of CRP candidates, both successful and unsuccessful, where the negligible budget impact criterion is considered.

Recommendation 4.3

The IGTO recommends that the ATO enhance its consultation in relation to the CRP by:

- (a) developing guiding documents, protocols or charters to inform its consultation with the CRP Advisory Panel (including processes for refreshing or expanding the Panel), the Board of Taxation, other Government organisations and specific stakeholders;
- (b) leveraging its existing consultation and stewardship forums to consult on potential CRP candidates that are under consideration; and
- (c) publishing information about the consultation that the ATO undertakes in relation to each CRP matter published on the ATO website.

⁴ *Taxation Administration Act 1953* sch 1 s 370-5(1)(a).

Recommendation 4.4

The IGTO recommends that the ATO develop internal service standards for each main stage of the CRP process pathway and measure its performance against these service standards.

Recommendation 5.1

The IGTO recommends that:

- (a) the ATO update its policy to ensure that the CRP process is not to be suspended in favour of a law change process, such as the MTA, except in very limited circumstances, such as where the ATO has received advice from Treasury that the law change is likely to occur before the CRP process can be finalised; and
- (b) where the CRP process is suspended or not pursued, so that processes such as the MTA or legislative change can run their course, the ATO should implement procedures to monitor the progress of the relevant legislative change and, in consultation with the CRP Advisory Panel, reconsider the candidate for CRP actions where appropriate (that is, the initial time expectations are no longer realistic).

1

INTRODUCTION

This chapter sets out the purpose and scope of the investigation and provides general background to the matters discussed later in the report

1. Introduction

1.1. Purpose and scope of the investigation

The Australian taxation system (including superannuation) has been described as amongst the most complex in the world with over 14,000 pages of legislation, intended to deliver different policy outcomes for different taxpayers in different situations.⁵ The Commissioner has administration, or partial administration, of some 34⁶ primary pieces of legislation (not counting delegated legislation). The CRP is available to assist with practical administration of these taxation and superannuation laws.

The Australian Parliament granted the Commissioner of Taxation (**Commissioner**) a discretionary power to modify the operation of a provision of a taxation law, in limited circumstances, with effect from 1 March 2017. This is referred to as the CRP. The discretionary power was introduced to provide the Commissioner with the means to address unforeseen or unintended outcomes of enacted taxation laws without delay and without the need for immediate legislative change, noting there are many competing priorities for the Australian Parliament and the legislative agenda. This was to ensure practical and pragmatic administration, consistent with the *intended* purpose and objective of the Parliament.

Since its introduction, the discretionary power has been exercised seven (7) times, despite suggestions for its use exceeding 60 times and despite many years of stakeholder debate and advocacy about the need for appropriate care and maintenance of the tax system – especially around unintended outcomes.

The IGTO has observed through our tax dispute investigation service 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 consider relevant factors and expert stakeholder views.

In response to stakeholders' concerns observed through our tax dispute investigation service, the IGTO has conducted a review investigation to examine the ATO's administration of the CRP. The IGTO commenced this review investigation on 9 December 2021 pursuant to section 7(1)(b) of the *Inspector-General of Taxation Act 2003 (IGT Act)*.

This is the report of the IGTO's review into the ATO's administration of the CRP. This report is produced pursuant to section 7(1)(f) of the IGT Act. The Terms of reference and the ATO Response to the recommendations made in this report are set out in Appendix A and Appendix B respectively.

⁵ The Treasury, 'Complexity – a sketch in five slides' (2015) <<https://treasury.gov.au/review/tax-white-paper/in-five-slides>>.

⁶ Inspector-General of Taxation and Taxation Ombudsman, *Corporate Plan FY22 – FY25* (2021) p 44

<<https://www.igt.gov.au/corporate-plan-reports/corporate-plan-fy22-fy25/>>.

1.2. Review Investigation Methodology

As part of this review investigation, the IGTO:

- selected a sample of seven (7) candidates (from the 68 CRP candidates assessed by the ATO (as at 21 April 2023)) and analysed their treatment through their CRP process pathway;
- identified a further forty five (45) other CRP candidates for specific investigation as noted below;
- received supporting documents for a further nine (9) candidates.

Each of the 7 cases was examined by the IGTO to consider the following:

- the source of the candidate and how it was received by the ATO's Policy, Analysis and Legislation (PAL) CRP Team;
- whether the documented CRP process pathway was appropriately followed, including if (and when) the CRP Advisory Panel was consulted;
- the length of time taken for the candidates to progress through each stage of the CRP process; and
- whether the ATO took into consideration relevant materials and considerations as required in making its CRP decision.

Table 1.1 below outlines at a high-level the key stages in the CRP process that the seven (7) sample candidates have gone through. A more detailed table is included at Appendix C of this report.

Table 1.1: Summary of the sample CRP candidates against the key CRP stages

Candidates	CRP assessment				Other resolution
	CRP Secretariat	Budget assessment	CRP Panel	CRP Outcome	
16. Accessing Managed Investment Trusts (MIT) withholding rate for a chain of entities simplified reporting ⁷	No assessment	No assessment	No assessment	No CRP	Early engagement discussion
33. Debit value for certain capped defined benefit income streams ⁸	Yes	By ATO only	No assessment	No CRP	Instead resolved via <i>Treasury Laws</i>

⁷ This candidate was raised with the ATO on 22 May 2017, shortly after the commencement of the CRP. At that time, it was not customary for the CRP Secretariat to be involved in assessing all candidates, and this candidate was deemed unsuitable after it was considered by members of the PAL CRP Team. Consideration by both the CRP Secretariat and CRP Advisory Panel was not mandatory until the commencement of the current CRP process in June 2019. Refer to Chapter 4 for discussion on the ATO's CRP assessment process.

⁸ The candidate was received on 9 February 2018. On 26 November 2018, Treasury informed the ATO that a "legislative fix for the issue" would be pursued and, as a result, the ATO put the CRP process on hold. No formal CRP costing was undertaken by Treasury and the CRP Advisory Panel did not consider the candidate.

Candidates	CRP assessment				Other resolution
	CRP Secretariat	Budget assessment	CRP Panel	CRP Outcome	
					<i>Amendment (2019 Measures No. 3) Act 2020</i>
35. GST - ensuring the supply of cars for use by disabled people remains GST-free	Yes	Yes – by Treasury	Yes	CRP exercised	Subsequently legislated via <i>Treasury Laws Amendment (2021 Measures No. 5) Act 2021</i>
44. Deceased estates - covered entity	Yes	Yes – by Treasury	Yes	CRP exercised	Subsequently legislated via <i>Treasury Laws Amendment (2021 Measures No. 5) Act 2021</i>
50. Veteran payment issues	Yes	No assessment ⁹	No ¹⁰	No CRP	Administrative solution
55. Loss carry back tax offset	Yes	No assessment ¹¹	Yes	No CRP	Instead resolved via <i>Treasury Laws Amendment (2021 Measures No. 5) Act 2021</i>
58. First home super saver superannuation scheme	Yes	Yes – by Treasury	Yes	No CRP	Instead resolved via <i>Treasury Laws Amendment (2023 Measures No. 3) Act 2023</i>

The IGTO sought clarification regarding 45 other CRP candidates on one or more of the following specific matters:

- Resolution of the issues raised, where the CRP was not used;

⁹ There was no budget assessment as the CRP Secretariat had assessed the candidate as otherwise unsuitable.

¹⁰ The CRP Advisory Panel was provided with a summary of the candidate on 7 September 2022 before its publication on the ATO website. The Panel was not consulted as part of the CRP assessment.

¹¹ There was no budget assessment as the CRP Secretariat had assessed the candidate as otherwise unsuitable.

- The budget impact assessment for the candidates;
- The ATO's CRP decision – whether the CRP was not used solely because the proposed modification only benefitted one taxpayer;
- ATO consultation with the CRP Advisory Panel;
- ATO's acknowledgement of receipt of CRP application; and
- ATO consultation with stakeholders and the Board of Taxation.

The IGTO also received supporting documents for nine (9) candidates:

- Candidate 23: copy of the ATO's written acknowledgement provided to the CRP applicant;
- Candidate 25: copy of correspondence between the ATO and the Treasury regarding budget impact assessment;
- Candidate 35: evidence of the ATO's consultation with the Motor Trades Association of Australia, copy of the ATO's written acknowledgement provided to the CRP applicant and evidence of budget impact assessment; and
- Candidate 52: evidence of the ATO's consultation with Treasury, other impacted Government agencies and the Board of Taxation, and evidence of budget impact assessment.
- Candidates 3, 6, 44, 63 and 68: evidence of budget impact assessment.

A summary of all 68 CRP candidates is included at Appendix D of this report. The IGTO has prepared this summary based on information provided by the ATO, however noting that the ATO has not verified the accuracy of the IGTO's summary.

1.3. The ATO's broader process for resolving issues caused by the unintended operation of taxation laws

The CRP is not a power that operates in isolation but is best understood as part of a broader 3-step process for resolving issues caused by the unintended operation of taxation laws.

The ATO provides the following instructions to its officers in the ATO internal CRP application form¹²:

The CRP is a discretionary power with limitations on when it can be used. It is used as a last resort, short of amending the law, and is to be considered after we have exhausted

¹² Australian Taxation Office, 'Internal CRP application form' (reproduced in Appendix F).

opportunities to resolve a matter using the general powers of administration and purposive interpretation of the relevant law.

Figure 1.1: IGTO visualisation of the ATO's process for resolving issues caused by the unintended operation of tax laws



In the course of administering taxation laws, the ATO's *'primary focus should be on interpreting the law in a manner which supports that law's purpose... where the law is open to more than one interpretation the alternative interpretations of the law should be explored'* before considering other options.¹³ In the *'rare circumstance where the operation of the law is unclear or leads to unforeseen or unexpected consequences'* the ATO may *'consider whether the issue can be resolved using the Commissioner's GPA'*, or other statutory discretions available to the Commissioner under the tax legislation.¹⁴

For a detailed examination of the ATO's requirement to adopt a purposive interpretation of the law, as well as the manner in which ATO exercises the GPA, refer to the IGTO's Review Investigation into *The Exercise of the General Powers of Administration*.

Exercising the CRP will only be considered by the Commissioner if the underlying issue cannot be resolved by either interpreting the law purposively or by adopting an administrative solution. As the CRP is the option of last resort, it might be intuitive to expect the number of issues that require consideration of the CRP would be relatively small. Most issues will (or should) be resolved at either Step 1 or Step 2, as per the Commissioner's instructions.

¹³ Australian Taxation Office, *Law Administration Practice Statement PS LA 2009/4: When a proposal requires an exercise of the Commissioner's general powers of administration*.

¹⁴ Ibid.

1.3.1. Overview of the ATO CRP Process

The ATO's PAL business line is responsible for receiving potential CRP candidates and managing the CRP assessment process. The Deputy Commissioner of PAL, as the Commissioner's delegate, is ordinarily responsible¹⁵ for making the decision as to whether the CRP should be exercised.

The ATO's 'PAL Staff and Teams' intranet page¹⁶ explains the following in relation to the PAL business line:

The role of PAL business line

PAL works with internal and external stakeholders, including Treasury and other Government agencies, to design and shape improvements to the tax and superannuation systems; making them easier to comply with, and improving the client experience.

Team structure

PAL is made up to two branches: Revenue Analysis (RAB), and Law & Policy Design (LAPD). These branches are then made up of streams and client accountability groups, as well as special teams and roles. Each team has a responsible SES, and team leader. ...

The CRP team sits within PAL's Law & Policy Design branch.

Chapter 3 examines the ATO process for receiving issues for CRP consideration. Chapter 4 examines the ATO CRP assessment process. A high-level CRP process map is included at Appendix E of this report.

1.4. Statistics on CRP usage

As at 30 September 2023, the ATO has formally considered whether the CRP should be exercised to resolve 68 separate issues. A summary of the 68 CRP candidates is provided at Appendix D.¹⁷ The Commissioner has exercised the discretionary power on seven (7) occasions (i.e. the CRP was used once per annum, on average). The seven (7) CRP determinations that have been made are as follows:

¹⁵ While the Commissioner or a Second Commissioner could also make this decision in a particular case, this has not happened to date in practice.

¹⁶ Australian Taxation Office, *Policy, Analysis and Legislation – Our Staff and Teams* (20 March 2023).

¹⁷ The IGTO has prepared this summary based on information provided by the ATO, however noting that the ATO has not verified the accuracy of the IGTO's summary.

Table 1.2: CRP determinations made by the Commissioner

CRP modification	Date of effect	Ceases/ceased to be in effect	CRP issue resolved via legislation
Taxation Administration (Remedial Power – Foreign Resident Capital Gains Withholding) Determination 2017	17/10/2017 ¹⁸	1/10/2027 ¹⁹	N/A
Taxation Administration (Remedial Power – Small Business Restructure Roll-over) Determination 2017	9/5/2018 ²⁰	1/4/2028 ²¹	N/A
Taxation Administration (Remedial Power – Disclosure of Protected Information by Taxation Officers) Determination 2020	15/5/2020 ²²	23/3/2023 ²³	1 January 2022 Items 47 and 48 of Schedule 3 to the <i>Treasury Laws Amendment (2021 Measures No.5) Act 2021</i> .
Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020	9/12/2020 ²⁴	1/1/2022 ²⁵	2 January 2022 Item 44 to 46 of Schedule 3 to the <i>Treasury Laws Amendment (2021 Measures No. 5) Act 2021</i> .
Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020	14/5/2021 ²⁶	1/4/2022 ²⁷	3 April 2022 Items 33 to 37 of Schedule 8 to the <i>Corporate Collective Investment Vehicle Framework and Other Measures Act 2022</i> .

¹⁸ Australian Taxation Office, 'Commissioner's remedial power applied-individuals' (Last modified 24 April 2023) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-has-been-used/Commissioner-s-remedial-power-applied---individuals/>>.

¹⁹ Ibid.

²⁰ Australian Taxation Office, 'Commissioner's remedial power applied-business' (Last modified 24 April 2023) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-has-been-used/Commissioner-s-remedial-power-applied---business/>>.

²¹ Ibid.

²² *Taxation Administration (Remedial Power – Disclosure of Protected Information by Taxation Officers) Determination 2022* para 2.

²³ The CRP determination was repealed on 23 March 2023 by the *Taxation Administration (Remedial Power – Disclosure of Protected Information by Taxation Officers) Repeal Determination 2022*.

²⁴ *Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020* Endnote 3.

²⁵ The CRP determination was repealed on 1 January 2022 by the *Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Repeal and Transitional Arrangements Determination 2021*.

²⁶ Australian Taxation Office, 'Commissioner's remedial power applied-individuals' (Last modified 24 April 2023) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-has-been-used/Commissioner-s-remedial-power-applied---individuals/>>.

²⁷ *Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020* was repealed on 1 April 2022 by the *Corporate Collective Investment Vehicle Framework and Other Measures Act 2022*.

CRP modification	Date of effect	Ceases/ceased to be in effect	CRP issue resolved via legislation
Taxation Administration (Remedial Power – Work Test for Personal Superannuation Contributions) Determination 2023	11/08/ 2023 ²⁸	1/7/2028	N/A
Taxation Administration (Remedial Power – Remission of Charges and Penalties) Determination 2023	15/09/2023 ²⁹	1/10/2028	N/A

Of the remaining 61 applications, four (4) were withdrawn by applicants, and 57 were assessed as not suitable for the CRP. The ATO reasons for why these 57 applications were not suitable for the CRP are as follows:

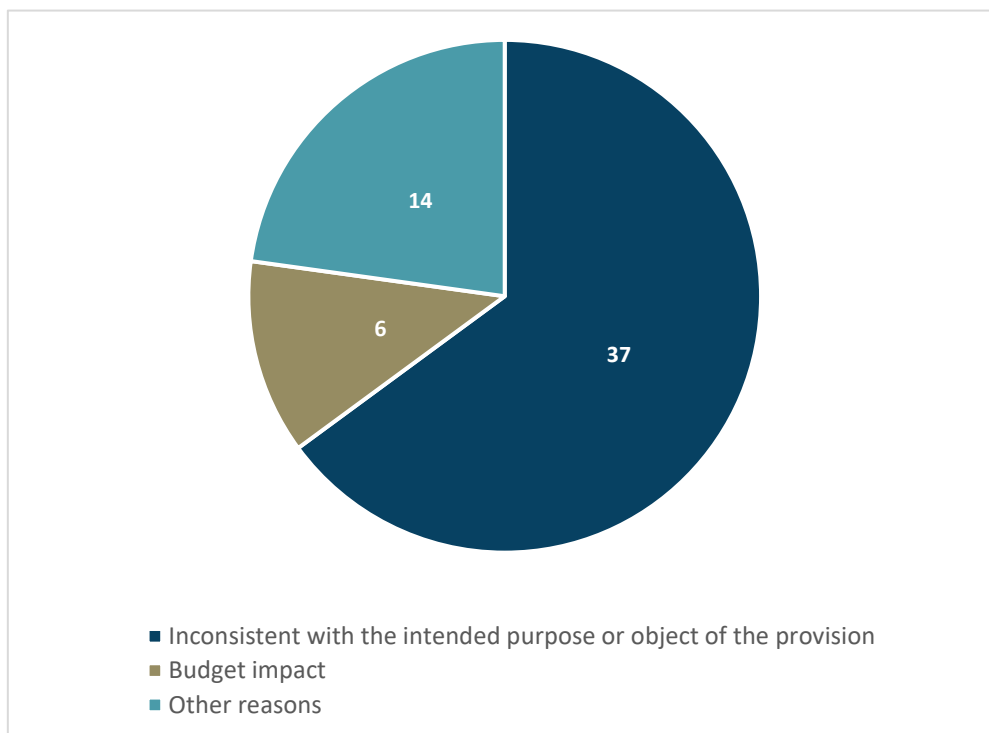
Table 1.3: The ATO reasons for why candidates did not result in an exercise of the CRP

ATO reasons for why candidates were not suitable for the CRP	Identified by ATO	Identified by external stakeholders	Total # of candidates	%
Inconsistent with the intended purpose or object of the provision	15	22	37	65%
Budget impact	3	3	6	11%
Legislative solution applied / pursued	7	1	8	14%
Not beneficial to taxpayers	3	0	3	5%
Resolved by administrative solution	1	0	1	2%
Complex drafting required & changes announced in Budget	0	1	1	2%
Not a provision of the tax law	0	1	1	2%
Total	29	28	57	100%

²⁸ Australian Taxation Office, 'Commissioner's remedial power applied – superannuation' (Last modified 21 June 2023) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-has-been-used/Commissioner-s-remedial-power-applied---superannuation/>>.

²⁹ Australian Taxation Office, 'Commissioner's remedial power applied – tax administration' (Last modified 15 September 2023) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-has-been-used/Commissioner-s-remedial-power-applied---tax-administration/>>.

Figure 1.2: The ATO reasons for why candidates did not result in an exercise of the CRP



Treasury stated in the Regulatory Impact Statement (**RIS**) at the time the CRP was introduced:³⁰

1.152 It is estimated that the Commissioner may use the Remedial Power to modify the operation of the law up to ten times per annum.

The CRP has been considered on 68 occasions and exercised seven (7) times only. The low exercise rate of the CRP is not itself a reason to conclude the CRP process has failed or is flawed. For example, where the majority of unintended consequences in the tax law that were identified after the enactment of the CRP provision may not have required the power to be exercised, as they may have been resolved by the ATO at an earlier stage in the 3-step process, through purposive interpretation or through an administrative solution.

The IGTO considers that the CRP's measure of success should be assessed by reference to the purposes for which the provisions were introduced, and not simply by the number of times that the power has been used.

³⁰ Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 2) Bill 2016, para 1.152.

Accordingly, it will be important to consider whether the CRP has in fact:

- provided a '*timelier option to address smaller unintended outcomes that cannot be resolved administratively*',³¹ and
- enhanced '*the capacity of existing legislative mechanisms to consider more significant taxation law change*'³² by reducing the need for smaller unintended outcomes to be resolved through the law change process.

To answer these questions, it is necessary to examine the resolution status of CRP candidates assessed by the ATO. Table 1.4 below and Figure 1.3 following provide an overview of the outcomes of the total 68 CRP cases (i.e. applications) received and considered by the ATO.

Table 1.4: Resolution status of all CRP cases received by the ATO as at 30 September 2023

Status of CRP cases	Identified by the ATO	Identified by external stakeholder	Total	%
Resolved – CRP assessed and applied [See Table 1.2]	6	1	7	10.29%
Resolved via CRP	6	1	7	10.29%
Resolved – CRP assessed as not suitable and administrative solution was pursued	5	0	5	7.35%
Resolved via administrative solution	5	0	5	7.35%
Legislative solution pursued after CRP was found not suitable	2	3	5	7.35%
Legislative solution pursued after CRP was found not suitable	2	3	5	7.35%
CRP assessed as suitable (i.e. meeting all CRP legislative criteria) but legislative solution pursued and/or enacted	1	1	2	2.95%
CRP assessment was not completed but legislative solution pursued and/or enacted	10	3	13 ³³	19.12%
Legislative solution preferred at first instance	11	4	15	22.07%

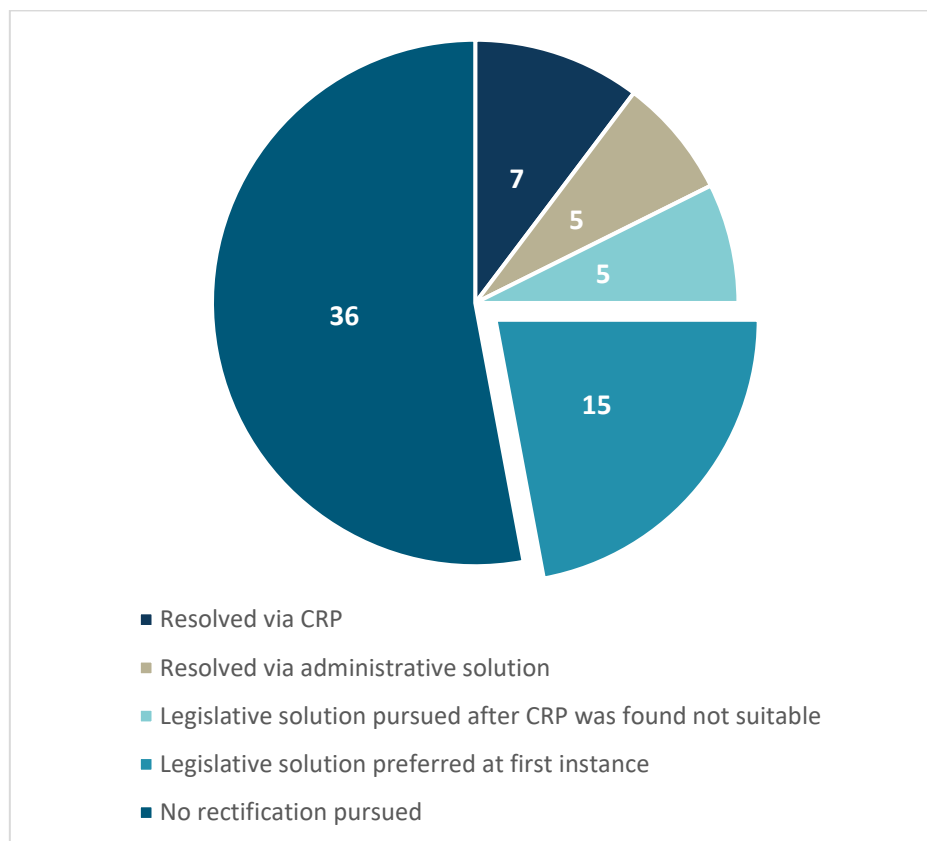
³¹ Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 2) Bill 2016, para 1.91.

³² Ibid.

³³ This figure includes 3 CRP issues that the ATO considered to be *potentially suitable* for the CRP, 7 CRP issues that the ATO considered to be *potentially unsuitable* for the CRP and 3 CRP issues that the ATO has not made any assessment as to the candidates' suitability for the CRP.

Status of CRP cases	Identified by the ATO	Identified by external stakeholder	Total	%
Unresolved – CRP assessed as not suitable, and no further reform is pursued	11	21	32	47.06%
Unresolved – CRP applications withdrawn	4	0	4	5.88%
No rectification pursued	13	23	36	54.41%
Total CRP Applications	39	29	68	100%

Figure 1.3 Resolution status of all CRP cases received by the ATO as at 30 September 2023



Whether the CRP has provided a timelier resolution of unintended outcomes and reduced the need for them to be resolved through the law change process serve as an important focal point for this report, in particular the discussion of the interaction between the CRP and law change in chapter 5. Chapter 5 examines in further detail the 14 cases where the ATO pursued legislative change in the first instance instead of the CRP process.

The IGTO's observations and recommendations in this report are ultimately directed towards improving the administration of the CRP, so that it can better achieve the purposes for which the provisions were introduced and assist to alleviate taxpayer uncertainty.

1.5. Structure of this report

The remainder of this report is structured as follows:

- Chapter 2 provides an outline of the introduction of the CRP and an overview of the CRP provisions.
- Chapter 3 examines the ATO's processes for identifying issues and receiving applications for CRP consideration.
- Chapter 4 considers how potential CRP issues are initially assessed upon receipt, the reasons why some candidates may not be able to proceed further in the process, and the CRP implementation process for successful CRP applications.
- Chapter 5 discusses the interaction between the CRP process and the law change process, and the extent to which the CRP has allowed legislative resources to be prioritised towards more significant primary law changes.
- Chapter 6 provides some general information about Parliamentary oversight of the CRP and a brief discussion of other international experiences.
- Chapter 7 sets out the IGTO's final concluding remarks about the CRP.



2

BACKGROUND AND OVERVIEW OF THE COMMISSIONER'S REMEDIAL POWER

This chapter provides an overview of the
Commissioner's Remedial Powers

2. Introduction to the Commissioner's Remedial Power

The CRP is outlined in Division 370 of Schedule 1 of the *Taxation Administration Act 1953* (TAA). The CRP provisions came into effect on 1 March 2017.

The CRP is a discretionary power that empowers the Commissioner to modify the operation of a provision of a taxation law³⁴ administered by the Commissioner. The mechanism to achieve this is for the Commissioner to issue a disallowable legislative instrument. The legislative instrument is tabled in the Australian Parliament and so is transparent to Parliament and may be disallowed by Parliament. Unlike legislation which may be modified or amended as it passes through the Parliament, a legislative instrument is either allowed or disallowed. That is, it may not be amended by Parliament.

The CRP effectively confers a power like a legislative power on the Commissioner in limited circumstances where the law is not operating as intended by Parliament. However, the Commissioner cannot use the CRP to make a textual amendment to the law, or to alter the purpose or object of the law.

The CRP operates as a temporary (or interim) alternative to primary law change, which would otherwise be required to address instances of unintended outcomes in tax and superannuation laws. As primary law change can be a lengthy process, the exercise of the CRP can facilitate '*a more timely resolution of certain unforeseen or unintended outcomes in the taxation and superannuation laws*'³⁵ as well as reduce uncertainty for taxpayers. It also allows legislative resources to be prioritised towards more significant legislative changes and reforms.

The problem that the CRP was introduced to address was clearly summarised in the Regulation Impact Statement prepared by the Department of the Treasury:³⁶

1.90 Australia's taxation (and superannuation) law is very complex. The nature and volume of taxation law and its evolution over time has, and continues to, produce unforeseen or unintended outcomes in its application. These outcomes can result in entities generating tax liabilities where this was not intended, or entities being subject to record keeping or other compliance requirements that were not intended. The impact of unforeseen or unintended outcomes can range from minor to large. Unintended outcomes that cannot

³⁴ The TAA defines a taxation law by reference to the *Income Tax Assessment Act 1997* (ITAA 1997). The ITAA 1997 defines a taxation law in subsection 995-1(1) to include a) an Act (or a part of an Act) of which the Commissioner has the general administration; and b) legislative instruments made under those Acts. Accordingly, a taxation law could include superannuation laws or other laws which the Commissioner has the general administration of the relevant Act or part of it.

³⁵ Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016, para 1.1.

³⁶ Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 2) Bill 2016, para 1.90.

be addressed administratively are resolved through primary law change, which can be a lengthy and resource intensive process.

1.91 While amendments to the primary law are appropriate for large unintended outcomes, **there is a need for a timelier option to address smaller unintended outcomes that cannot be resolved administratively.** This option would allow the taxation law to be remedied to apply as intended in more situations, enhancing certainty and reducing compliance costs for entities. It would also **enhance the capacity of existing legislative mechanisms to consider more significant taxation law changes.** This too would deliver greater certainty for entities, as contemplated taxation law changes could be considered and delivered more quickly. [emphasis added]

Any modifications made using the CRP must satisfy the criteria prescribed in subsection 370-5(1) of Schedule 1 to the TAA. The modification must:

- not be inconsistent with the intended purpose or object of the provision;
- be considered by the Commissioner to be reasonable, having regard to the intended purpose or object of the provision and whether the cost of complying with the provision is disproportionate to that intended purpose or object; and
- have a negligible impact on the Commonwealth Budget.

2.1. Historical background and context to the enactment of the CRP

The need for care and maintenance of the tax system, the problem of unforeseen or unintended outcomes and how best to address the issue has been the subject of some debate over many years. It is also not a uniquely Australian concern. Different jurisdictions address these issues differently. In the United Kingdom (UK) for example, the tax laws are updated each financial year through the re-introduction of the Finance Act and accordingly care and maintenance can be addressed regularly and annually when it is reintroduced and updated.³⁷

As part of the 2015-16 Budget the Government announced that it would provide the Commissioner with a statutory remedial power to allow for a more timely resolution of certain unforeseen or unintended outcomes in the taxation and superannuation law.³⁸ The CRP commenced on 1 March 2017. However, the concept of an extra-statutory power for the Commissioner was raised and discussed much earlier.

³⁷ Antony Seely, *The Budget and the annual Finance Bill* (House of Commons Library Research Briefing, 21 September 2023) <<https://researchbriefings.files.parliament.uk/documents/SN00813/SN00813.pdf>>.

³⁸ The Hon Josh Frydenberg MP, 'Providing more certainty and better outcomes for taxpayers' (1 May 2015) <<https://ministers.treasury.gov.au/ministers/josh-frydenberg-2014/media-releases/providing-more-certainty-and-better-outcomes>>.

This section discusses the various historical consultations and reports that are relevant to understand the context for the introduction of the CRP.

2.1.1. Review of Aspects of Income Tax Self-Assessment (2004)

The Department of the Treasury observed in its ‘Report on Aspects of Income Tax Self-Assessment’ that several submissions had suggested the Commissioner could make greater use of his or her administrative powers by adopting extra-statutory concessions (ESCs) similar to those adopted in the UK. The Treasury also observed that the Commissioner had made no request for additional powers to facilitate administration of the tax system and, moreover, noted that:

*Using slightly different means, the Australian system achieves the same result [as ESCs in the UK]. Through the binding ruling system (especially as modified by the recommendations of this review) and the general administrative power, **the Tax Office may make statements of interpretation or intended compliance practice.***³⁹ [Emphasis added]

The Treasury concluded that ‘*no further statutory provisions are required for the Commissioner to fulfil his duties as administrator of taxation laws in Australia*’.⁴⁰

2.1.2. The Tax Design Review Panel’s report on Better Tax Design and Implementation (2008)

On 8 February 2008, the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs announced the appointment of a Tax Design Review Panel (TDRP) to examine options to reduce delays in the introduction of tax legislation and improve the quality of tax law changes.⁴¹ The TDRP finalised their report (TDRP Report) on 30 April 2008 and made 26 recommendations.

The TDRP recommended, at Recommendation 24, that:

*The Government should consider whether the Commissioner of Taxation should be given further power to modify the tax law to give relief to taxpayers, or whether there are preferable ways in which the Commissioner could provide extra-statutory concessions in appropriate circumstances.*⁴²

³⁹ The Treasury, *Report on Aspects of Income Tax Self Assessment* (2004) pp 72-73 <<https://treasury.gov.au/publication/p2004-aspects-income-tax-self-assessment>>.

⁴⁰ Ibid.

⁴¹ The Hon Chris Bowen MP, ‘Tax Design Review Panel to Look at Ways to Streamline Process for Changing Tax Laws’ (8 February 2008) <<https://ministers.treasury.gov.au/ministers/chris-bowen-2007/media-releases/tax-design-review-panel-look-ways-streamline-process>>.

⁴² Tax Design Review Panel, *Better Tax Design and Implementation - A report to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs* (3 April 2008) p41 <https://web.archive.org/awa/20120316191700mp/http://www.treasury.gov.au/documents/1342/PDF/tax_design_review_panel_report.pdf>.

In this respect, the TDRP heard during consultation that a large amount of legislation involved relatively minor amendments to ensure the law operated as intended. It was submitted to the TDRP that the Commissioner should be given greater power, for example, power to make extra-statutory concessions, to ‘*administer the law in a flexible way that would deliver sensible and pragmatic outcomes*’.⁴³ The TDRP recognised that there were advantages and disadvantages to such a proposal,⁴⁴ and noted that there were precedents for these powers such as:

- the Extra-Statutory Concessions issued by HM Revenue & Customs in the UK;
- the power of the Australian Prudential Regulation Authority to exempt people from certain provisions of the *Superannuation Industry (Supervision) Act 1993*;⁴⁵
- the power of the Australian Securities and Investments Commission to exempt people from certain provisions of the *Corporations Act 2001*;⁴⁶ and
- the power of the Commissioner to make certain determination to ensure certain provisions apply in a way that is appropriate in the circumstances under the *A New Tax System (Goods and Services Tax) Act 1999*.⁴⁷

Whilst the TDRP noted that it did not have time to examine this issue in detail and therefore did not reach a fixed view as to the best way to proceed, the TDRP considered that this was an issue that warranted further investigation and made recommendation to the Government to that effect.

The Treasury published the TDRP Report on 22 August 2008 and announced the Government’s support in principle for all recommendations made by the TDRP.⁴⁸

2.1.3. Treasury’s discussion paper “An ‘extra-statutory concession’ power for the Commissioner of Taxation?” (2009)

Following the release of the TDRP Report, on 12 May 2009, the Treasury released a discussion paper titled “An ‘extra-statutory concession’ power for the Commissioner of Taxation?” to explore whether the

⁴³ Ibid p 40.

⁴⁴ The TDRP noted, at paragraph 3.77 of the TDRP Report, that ‘[a]dvantages might include giving relief more quickly than by legislation and with greater certainty than by press release. It may also facilitate changes that improve the care and maintenance of the existing tax law... Disadvantages might include the increased burden on the Commissioner and the weakening of the rule of law that delegating such a power entails.’

⁴⁵ *Superannuation Industry (Supervision) Act 1993* Part 29.

⁴⁶ *Corporations Act 2001* s 741.

⁴⁷ *A New Tax System (Goods and Services Tax) Act 1999* s 29-25.

⁴⁸ The Hon Chris Bowen MP, ‘Release of Tax Design Review Panel’s Report Better Tax Design and Implementation’ (22 August 2008) < <https://ministers.treasury.gov.au/ministers/chris-bowen-2007/media-releases/release-tax-design-review-panels-report-better-tax-design>>.

Commissioner should have an extra-statutory concession power to modify tax laws to give relief to taxpayers in appropriate circumstances.⁴⁹

The paper discussed potential models for implementing such a power, being the ‘legislative instrument model’ and the ‘discretion model’.

Under the ‘legislative instrument model’, it was proposed that the Commissioner would have power to make legislative instruments that varied the way a tax law applied to taxpayers generally or to a class of taxpayers. The paper discussed the uncertainty of having the legislative instruments disallowable by Parliament and possible solutions to address it, including the pros and cons of each solution:⁵⁰

30. Typically, a legislative instrument that is disallowed still has effect for the period before it is disallowed. In the taxation context, this could lead to uncertainty (or even more serious problems) in that interim period. Several possible solutions to this could be considered. One might be to suspend the operation of the instrument until the period for disallowance had passed. Another might be to add these instruments to the list in section 44 of the Legislative Instruments Act of those instruments that cannot be disallowed.

31. If the operation of the variation were suspended until the end of the disallowance period, there would be a longer delay before the defect was corrected. That would be inconsistent with the reason for giving the Commissioner a power to vary the law in the first place (namely, to speed up the correction process).

32. On the other hand, if the variation were implemented by a legislative instrument that could not be disallowed, this model would provide no answer to concerns about the weakening of the rule of law implied by preventing parliamentary scrutiny. Such an approach would also remove the major difference between the legislative instrument model and the discretion model.

Under the ‘discretion model’, the Commissioner would have a discretionary administrative power to vary the application of the tax law in relation to taxpayers generally or to a class of taxpayers, by publishing a declaration of the variation he or she had made. The paper noted that if the Commissioner’s exercise of that power were to be reviewable by the Administrative Appeals Tribunal (**AAT**), in theory, it could create uncertainty for taxpayers (i.e., uncertainty could arise if taxpayers relied on a declaration that could later be overturned, however, as the variation would be for the relief of taxpayers, the likelihood of it being challenged would be small). Alternatively, if the AAT’s review power were removed, it could create concerns about whether the Commissioner’s discretionary administrative power would be subject to appropriate scrutiny.

⁴⁹ The Treasury, *An ‘extra-statutory concession’ power for the Commissioner of Taxation? – Discussion Paper* (12 May 2009) <https://web.archive.org/au/awa/20090914230736mp/http://www.treasury.gov.au/documents/1534/PDF/Extra_Statutory_Concessions.pdf>.

⁵⁰ Ibid paras 30-32.

The Treasury received 11 submissions in response to the discussion paper, of which:

- Six (6)⁵¹ were supportive of the proposal to provide the Commissioner with an extra-statutory concession power;
- One (1)⁵² was equivocal and suggested that the matter be referred to the Board of Taxation for further review and consultation; and
- Four (4)⁵³ opposed to the idea that the Commissioner be granted a general power to alter or modify taxation laws.

Whilst the responses to the discussion paper were mixed, most submissions agreed that if extra-statutory concessionary powers were to be given to the Commissioner, the preferred model was the legislative instrument model.

2.1.4. The Board of Taxation's post implementation review of the TDRP's recommendations (2011)

In line with Recommendation 26⁵⁴ of the TDRP Report, in September 2008, the Government requested the Board of Taxation to review the tax design process in late 2010 and report to the then Assistant Treasurer on whether there have been any improvements as a result of implementing the TDRP's recommendations.⁵⁵

The Board of Taxation completed its review and provided its report to the Government in December 2011. On 6 September 2012, the Government announced the release of the Board of Taxation's report.

In relation to the Government's implementation of the TDRP's recommendation 24 (i.e. for the Government to investigate whether the Commissioner should be granted an extra-statutory concessions power), the Board of Taxation noted:

- The Treasury released the discussion paper "An 'extra-statutory concession' power for the Commissioner of Taxation?" on 12 May 2009.
- The Treasury received 11 submissions in response to the discussion paper.
- The Government had not made any further announcement in relation to this matter.

⁵¹ CPA Australia, The Institute of Chartered Accountants in Australia (now Chartered Accountants Australia & New Zealand), Investment & Financial Services Association Ltd, Australian Bankers Association, Ernst & Young (now EY) and a private barrister.

⁵² Law Institute Victoria.

⁵³ Law Council of Australia, Taxation Institute of Australia, BDO Kendalls and Perrier Ryan Business Advisors.

⁵⁴ Recommendation 26 states that '[t]he Government should ask the Board of Taxation to review the tax design process after two years and report to Government on the extent to which there are demonstrated improvements'.

⁵⁵ The Board of Taxation, *Post-implementation Review of the Tax Design Review Panel Recommendations* (December 2011) <<https://taxboard.gov.au/consultation/tax-design-review-panel-recommendations>>.

- The Board of Taxation received submissions expressing opposing views in relation to whether the Commissioner should be given an extra-statutory concessions power.
- This matter was then before the Government.
- Accordingly, the Board of Taxation considered that the TDRP recommendation 24 had been implemented and made no further recommendation to the Government in relation to this matter.

2.1.5. Subsequent activities leading to the enactment of the CRP (2014 – 2017)

In early February 2014, a ‘Tripartite Working Group’⁵⁶ was established to consider potential statutory remedial powers for the Commissioner.⁵⁷ The tripartite consultation on the feasibility and operation of those powers concluded in May 2014 and resulted in a joint statement of intent setting out the policy intent of any proposed solution and a proposal to the Government to progress this concept.⁵⁸

The Government announced on 1 May 2015 (and then on 12 May 2015 as part of the 2015-16 Budget) that it would provide the Commissioner with a statutory remedial power to allow for a more timely resolution of certain unforeseen or unintended outcomes in the taxation and superannuation law.⁵⁹

On 4 December 2015, the Treasury conducted a public consultation on the proposed legislation and the accompanying explanatory memorandum to implement the Government’s announcement.⁶⁰ The Treasury received 11 submissions in response to the consultation.

In September 2016, the Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016 was introduced into the Parliament, which included Division 370 – Commissioner’s remedial power.

A comparison between the Exposure Draft issued by the Treasury for public consultation and the text of the Bill introduced into Parliament shows the following material changes:

Table 2.1 Comparison between the Exposure Draft and the Bill as introduced to Parliament

Exposure Draft for public consultation	The Bill as introduced into Parliament
The CRP modification must not be inconsistent with the purpose or object of the provision (s.370-1, 370-5).	The CRP modification must not be inconsistent with the <i>intended</i> purpose or object of the provision (s.370-1, 370-5).

⁵⁶ Based on a submission received by the IGTO, the Tripartite Working Group comprised of the ATO, Treasury and the private sector.

⁵⁷ Australian Taxation Office, ‘Consultation Steering Group meeting minutes 28 February 2014’ (Last modified 21 January 2015) <<https://www.ato.gov.au/misc/downloads/pdf/qc43898.pdf>>.

⁵⁸ Australian Taxation Office, *Report on ATO consultation arrangements at 31 May 2014* (Internal ATO Document, 2014).

⁵⁹ The Hon Josh Frydenberg MP, ‘Providing more certainty and better outcomes for taxpayers’ (1 May 2015) <<https://ministers.treasury.gov.au/ministers/josh-frydenberg-2014/media-releases/providing-more-certainty-and-better-outcomes>>.

⁶⁰ The Treasury, ‘Commissioner’s power to modify law’ (2015) <<https://treasury.gov.au/consultation/commissioners-power-to-modify-law>>.

Exposure Draft for public consultation	The Bill as introduced into Parliament
Commissioner's reporting of CRP: Nil	The Commissioner must include in the Commissioner's annual report information about the exercise of the CRP (Note to s.370-1).
CRP instruments issued by the Commissioner 'sunset' after 5 years.	No expressed sunset provision in the Bill. Accordingly, the standard 10-year sunset provision as per subsection 50(1) of the <i>Legislation Act 2003</i> applies, unless a specific sunset provision is included in the CRP instrument.
Review of the use of the CRP power: Nil	The Minister may seek a review of the operation of the CRP provisions within three to five years of the provisions commencing.

The Senate Standing Committee for the Scrutiny of Bills⁶¹ reviewed the Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016 and raised several concerns about the proposed Division 370 for the Government's consideration. The Bill was subsequently legislated with no changes to Division 370. Further information about the review by the Senate Standing Committee for the Scrutiny of Bills of the Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016 is included at Chapter 5 of this report.

2.2. The CRP provisions and criteria

2.2.1. Subsection 370-5(1) of Schedule 1 to the TAA

Subsection 370-5(1) states:

- (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*
 - (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;*

⁶¹ The function of the Scrutiny of Bills Committee is to assess bills against certain accountability standards.

*(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 above criteria must be satisfied for the Commissioner to exercise the CRP. However, it should be noted that the CRP is ultimately a discretionary power and is not a mandatory requirement. Each of the criterion is further discussed below.

2.2.2. Criterion 1: Modification is not inconsistent with the *intended* purpose or object of the provision

The ***intended*** purpose or object of the provision is a relevant consideration for each of the eligibility criteria listed in paragraphs 370-10(1) (a), (b)(i) and (b)(ii) as set out above. This is slightly different from the ordinary rules of statutory interpretation.

The general rules of statutory interpretation are set out in Part 5 of the *Acts Interpretation Act 1901*. Some relevant extracts are set out below.

Section 15AA Interpretation best achieving Act's purpose or object

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

...

Section 15AB Use of extrinsic material in the interpretation of an Act

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

(d) any treaty or other international agreement that is referred to in the Act;

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and

(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

The **intended** purpose or object of the provision is not expressly considered in applying the general rules of statutory interpretation. Instead, primacy is given to the text of the Act and the interpretation of those words which best achieves the purpose or objective is preferred based on the words expressly enacted. Accordingly, if those words also produce unintended or inadvertent outcomes, then typically that is a matter for Parliament. This is not always practical or timely to remedy.

Section 370-10 outlines the considerations for ascertaining the intended purpose or object of a provision of a taxation law for the purposes of the CRP:

*(a) consideration **must be given to any documents that may be considered under subsection 15AB(2) of the Acts Interpretation Act 1901** (or that subsection as applied by section 13 of the Legislation Act 2003) in relation to the provision; and*

Example: An explanatory memorandum, second reading speech or report of a parliamentary committee.

*(b) consideration **may be given to any other material** (including material not forming part of the provision) that would assist in ascertaining the intended purpose or object of the provision; and*

*(c) **primacy is not required to be given to the text of the provision.***

Note: Ascertaining an intended purpose or object for the purposes of paragraph 370 5(1)(a) or subparagraph 370 5(1)(b)(i) is not necessarily the same as ascertaining a purpose or object for the purposes of interpreting a provision of an Act. [Emphasis added]

Paragraphs 1.29 and 1.30 in the Explanatory Memorandum (EM) to the Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016 further explain the above consideration as follows:

*1.29 The expression ‘not inconsistent with the intended purpose or object’ is broader than the expression ‘consistent with the intended purpose or object’. **The former expression is intended to ensure the Remedial Power can be used to cater for circumstances where it is reasonably clear that particular circumstances, arrangements or transactions may not have been contemplated at the time the law was drafted. It is inevitable that there will be a range of such circumstances, arrangements or transactions that were not known to exist, or did not exist, at the time of drafting.*** However, it may be reasonably ascertained that, had the circumstances, arrangement or transaction been considered at the time the law was drafted, the law would have been drafted differently. In those circumstances, applying the law in a modified way would not be inconsistent with the intended purpose or object of the law.

*1.30 The expression ‘intended purpose or object’ differs from the concept of a provision’s ‘purpose or object’ as used in section 15AA of the AIA and understood through common law principles of statutory interpretation. The purpose or object of an Act for the latter purposes is considered in order to ascertain the preferred meaning of a provision of the Act. **The process of determining purpose or object in a statutory interpretation context may give weight to the text of the provision. In the context of the Remedial Power, however, the focus is on ascertaining the intended purpose or object of the provision (when considered in its broader context), and, unlike in statutory interpretation, does not require weight to be given to the text of the provision.*** [Emphasis added]

2.2.3. Criterion 2: The Commissioner considers the modification to be reasonable, having regard to the intended purpose of the provision and whether the cost of complying with the provision is disproportionate to that intended purpose or object

The Commissioner must form an opinion that the modification is reasonable having regard to:

- (a) the intended purpose or object of the provision; and
- (b) whether the cost of compliance with the provision is disproportionate to achieving that intended purpose or object.

Other than these two factors, the statute does not define what the Commissioner must consider in deciding whether it would be reasonable to exercise the CRP. However, the EM suggests that the Commissioner may consider a range of matters,⁶² including:

- *the extent to which the modification is favourable to entities;*
- *the extent to which the modification has any adverse direct impact on the tax liability of a third party;*
- *the impacts on any current judicial interpretation of the relevant law; and*
- *any other relevant matters.*

The ATO's internal CRP guide lists the following additional matters that the Commissioner may consider:

- whether an issue highlights systemic issues that may be more appropriately addressed through a review of the law and broader legislative amendment by the Parliament;
- whether there are differing views on how an issue may be resolved; and
- whether a modification requires complex drafting or administrative arrangements to implement.

⁶² Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016, para 1.39.

2.2.4. Criterion 3: Negligible impact on the Commonwealth Budget

Paragraph 1.47 of the EM states that:⁶³

Impacts on the Commonwealth budget will be determined through ordinary processes and budget rules. The Guidelines issued under the Charter of Budget Honesty by the Secretaries to the Treasury and the Department of Finance provide further information on the considerations used when undertaking costings.

The ATO has explained that in practice, the Revenue Analysis Branch (**RAB**) of the ATO's PAL business line prepares the costing for review by the Treasury's Tax Analysis Division (**TAD**). The TAD then forms an independent view and provides advice to the ATO about the budget impact of the proposal. Interactions between the ATO's RAB and the Treasury's TAD for CRP costing strongly mirrors the ATO – Treasury protocol.⁶⁴ The protocol states that *'the accountability of tax costing rests with Treasury. However, Treasury and the ATO share responsibility for costings and collaborate on all aspects of the costing process.'*⁶⁵

The ATO's internal instructions and guidance to its officers about the CRP and related processes states the following:⁶⁶

Any CRP costing has to focus on the financial impact on the Australian Government's key budget aggregates. These costings measure the difference in expected budgetary financial impacts under the proposed modification and the expected impacts already included in the 'forward estimates'.

CRP costings will consider the direct behavioural impacts (where practical to do so) and direct budgetary consequences of the modification.

If the Commissioner is advised that the budget impact of the proposed modification is not negligible, he or she will be unable to exercise the CRP. In that event, other pathways will be considered including the [Minor and Technical Amendments] process and advocacy.

⁶³ Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016, para 1.47.

⁶⁴ Australian Taxation Office, 'ATO – Treasury protocol' (Last modified 17 September 2012) <<https://www.ato.gov.au/general/new-legislation/in-detail/ato---treasury-protocols/ato---treasury-protocol/>>.

⁶⁵ Ibid.

⁶⁶ Australian Taxation Office, *CRP Guide – A guide to the Commissioner's Remedial Power (CRP) Process* (Internal ATO document, undated) p 12.

The ATO has advised the IGTO that in a broad sense, the CRP costing process involves:

- analysis of the costing request and assessment of revenue implications via RAB (undertaken by ATO);
- peer review and consideration of RAB's findings by TAD (undertaken by Treasury); and
- preparation of final costing advice by TAD and provision of this advice to RAB (undertaken by Treasury).

2.3. What is a Legislative Instrument

The requirements of a Legislative Instrument are governed by Chapter 3 of the *Legislation Act 2003*. These requirements include:

- Appropriate and reasonably practicable consultation has been undertaken for the draft legislative instrument;⁶⁷
- A requirement for disallowable legislative instruments to be tabled in both Houses of Parliament for a period of 15 sitting days, during which the instrument may be disallowed;⁶⁸ and
- A sunset period (whereupon the Instrument lapses) where the standard default period is 10 years.⁶⁹

⁶⁷ *Legislation Act 2003* s 17.

⁶⁸ *Legislation Act 2003* s 42. It should also be noted that the *Taxation Administration Act 1953* sch 1 s 370-20 specifies that a determination made under the CRP provisions 'must not commence before the first day it is no longer liable to be disallowed, or to be taken to have been disallowed, under section 42 of the *Legislation Act 2003*'

⁶⁹ *Legislation Act 2003* s 50.

3

IDENTIFICATION AND RECEIPT

This chapter explores how CRP candidates are identified or received for consideration.

3. Identification and receipt of issues for CRP consideration

This chapter explores the ATO's policies and processes for identifying and receiving potential CRP candidates for consideration. As part of this discussion, the IGTO will first set out relevant ATO information regarding this step of the CRP process pathway, before discussing key areas of stakeholder feedback, associated ATO information and IGTO observations and recommendations.

The key areas of discussion are as follows:

- ATO information on their intake and receipt of CRP candidates;
- Awareness of the existence of the CRP and the process to request an exercise of the CRP:
 - External community awareness of the CRP;
 - Internal ATO awareness, training and guidance;
- ATO information systems and processes used to capture CRP candidates; and
- Transparency about when and how CRP candidates are recorded and considered.

3.1. The ATO's CRP process: Step 1 – intake and receipt of CRP candidates (based on ATO information)

The PAL CRP team receives CRP candidates either from internal sources (ATO staff) or external sources (such as taxpayers, tax professionals or professional and industry bodies).

3.1.1. Internal ATO CRP form

ATO officers who wish to raise a potential CRP candidate are required to complete an internal form titled 'Commissioner's Remedial Power – Internal Application Form' (**ATO Internal CRP Application**). The internal form requires the ATO officer to provide a response to the following questions (a copy of the full form is provided at Appendix F of this report).

- (a) Background
- (b) How is the ATO currently managing the issue?
- (c) What is the modification we are seeking?
- (d) What is the intended purpose of the provision to be modified?
- (e) How is the proposed modification reasonable?

- (f) What is the budget impact of the proposed modification?
- (g) Would the modification provide a less favourable result for entities?
- (h) Have all other avenues been explored to address this issue? *[Please outline what other options have been considered to address this issue, including administrative remedies.]*
 - In relation to this question, the ATO has explained that it is the responsibility of relevant ATO business line to have exhausted all available interpretative or administrative solutions prior to approaching the PAL CRP team. If, upon reviewing the ATO Internal CRP Application, the CRP team considered that alternative solutions were available, it would provide its view to the relevant ATO business line for re-consideration before the matter is progressed to the next stage (i.e. CRP Secretariat assessment). To date, the CRP team has not yet had cause to request a business line to reconsider their views on whether an interpretative or administrative solution is in fact available.
- (i) Additional Information
- (j) Contact Officer

3.1.2. CRP webform for external stakeholders

External stakeholders are able to submit CRP candidates using the CRP webform⁷⁰ available on the ATO website (**External CRP Application**). The External CRP Application requires the applicant to provide a response to the following questions (a copy of the full application is provided in Appendix G):

- (a) What is the issue?
- (b) Background
- (c) How is the issue currently being managed?
- (d) What is the modification that should be made?
- (e) How is the proposed modification not inconsistent with the intended purpose or object of the provision?
- (f) How is the proposed modification reasonable?
- (g) What might the budget impact of the proposed modification be?

⁷⁰ Australian Taxation Office, 'Commissioner's Remedial Power' <<https://www.ato.gov.au/Commissioners-remedial-powers/>>.

(h) Have all other avenues been explored to address this issue? *[Provide an outline of the other options that have been considered, including changes in administrative practices or issuing new public guidance material.]*

- In relation to this question, the ATO has explained that upon receiving the external CRP application, the PAL CRP team liaises with relevant ATO experts as to whether interpretative or administrative solutions are available (or not) to resolve the CRP issue raised. To date, the CRP team has not yet had cause to disagree with a business line's consideration.

(i) Additional Information

(j) Contact Details

The similarities between the two applications suggest that an external stakeholder and an ATO officer are expected to submit the same information, however, some of the requested information may not be readily available outside the ATO. For example, an external stakeholder may find it difficult to answer (h) above, as they may not have knowledge of what administrative solutions have been considered and rejected by the ATO. The IGTO reviewed a form lodged by an external stakeholder in which the response to this question was "There does not appear to be amendments to administrative practices or to the content of public guidance that would appropriately address this issue." The IGTO notes that the inability of an applicant to respond to this question does not preclude the CRP candidate from being considered.

Once a CRP candidate has been received by the PAL CRP team, a record is created in the ATO's project management tool and a CRP Master Candidate List. Documents related to the CRP application are stored in a dedicated folder on a protected ATO share drive.

In submissions lodged with the IGTO and through discussions with stakeholders, concerns were raised in relation to the internal and external awareness of CRP processes as well as how the ATO captures and reports on CRP issues identified. Each of these concerns is addressed below.

3.2. Awareness of the existence and process for CRP

3.2.1. Stakeholder concerns and suggestions

Stakeholders have raised concerns that, although information is available on the ATO's website, there may be limited awareness and appreciation of the CRP and its purpose in the community. In particular, small and medium tax practitioners may have a lack of understanding of the CRP, which may contribute to issues being raised for consideration that are not suitable to be addressed through this process. A lack of awareness of the CRP can also lead to missed opportunities where it could have otherwise been used to address any unforeseen or unintended outcomes of the law.

It has been suggested by stakeholders that providing more regular information on the CRP through existing tax practitioner communication channels would better inform the community in identifying suitable issues for CRP consideration. Stakeholders have also highlighted that greater consultation and

engagement with the tax profession in the consideration of CRP issues may improve awareness on the availability and operation of the CRP.

Another suggestion to improve community awareness is to provide ATO officers, especially those involved in the ATO's various stewardship groups and consultation forums, with more training and guidance on the CRP requirements and processes. Further awareness of the CRP within the ATO could improve the frequency and effectiveness of the ATO's external communication of this power and how it operates.

Some stakeholders have suggested that the External CRP Application is difficult to locate on the ATO's website, which could contribute to the limited number of CRP candidates raised by the public.

3.2.2. ATO website and evidence of community awareness

The ATO's website provides the wider community with information about the CRP. The ATO's overview webpage for the CRP can be accessed via the first link after searching for 'Commissioner's Remedial Power' on Google or alternatively, by using the search function on ato.gov.au.⁷¹ The ATO's CRP overview webpage provides information about the purpose of the CRP, criteria on when it can be exercised and the limitations of its use.

The CRP overview webpage also provides a link to the process pathway containing a step-by-step explanation of the CRP process, as well as a published register of issues where the CRP has and has not been exercised by the ATO.⁷² In situations where the CRP has been considered but not applied, the ATO's website provides a description of the issue and reasons why the CRP was not considered suitable. The ATO has been publishing unsuccessful CRP candidates since March 2019 (albeit progressively), and the CRP process pathway was first published in August 2020. Both these developments were in response to internal and external feedback to provide the community with additional transparency on the ATO's CRP decisions.

The ATO made further improvements to the CRP webpages in 2020 following discussions with the CRP Advisory Panel on how the ATO can better communicate the operation of the CRP to the broader community. These improvements included providing examples on the operation of the CRP criteria and further information on the meaning of the negligible budget impact criterion.

⁷¹ Australian Taxation Office, 'Commissioner's Remedial Power' (Last modified 27 August 2020) <<https://www.ato.gov.au/general/ato-advice-and-guidance/commissioner-s-remedial-power/>>.

⁷² The register of successful and unsuccessful CRP candidates on the ATO website was updated in late 2022 to categorise candidates based on their subject matter, such as candidates that affect individuals, businesses, superannuation and tax administration.

Enquiries about CRP evidenced by the ATO's Website

Upon request from the IGTO, the ATO has provided data on the average monthly number of unique pageviews⁷³ for the following five webpages related to the CRP on the ATO website:

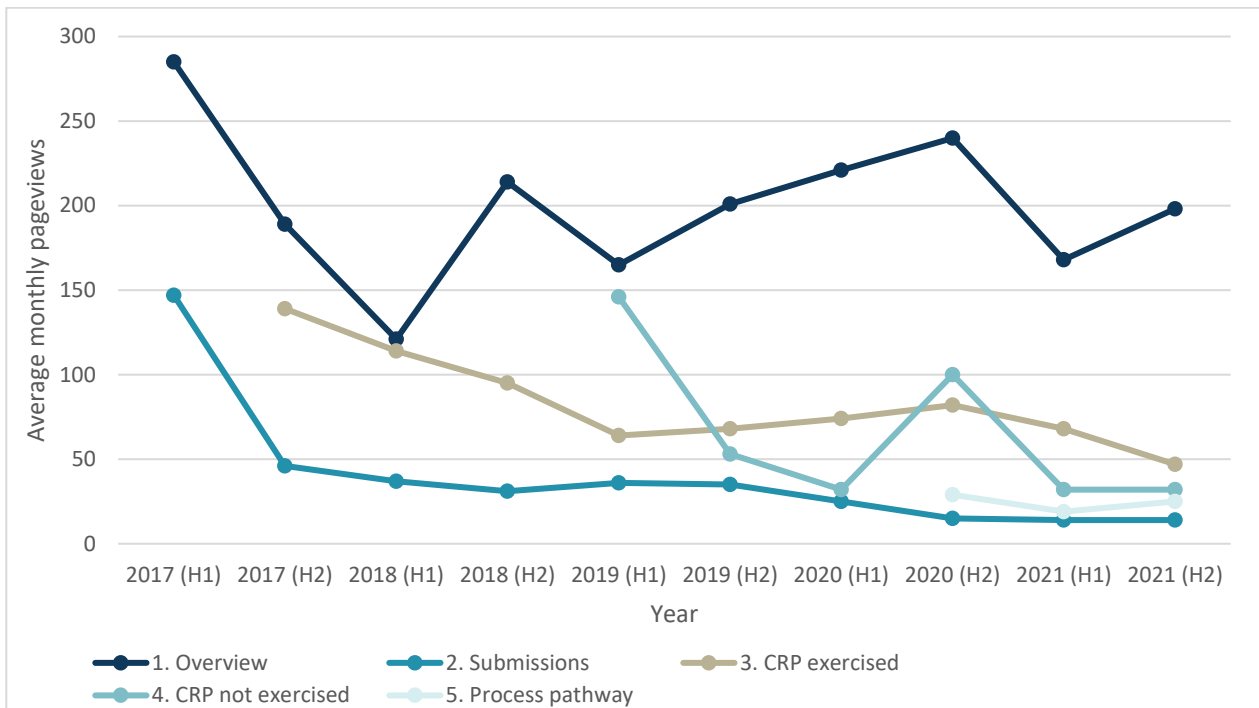
1. Commissioner's remedial power – provides an overview of the CRP and how the CRP legislative criteria operate, as well as links to the four other webpages referred to below;
2. Commissioner's remedial power assessment submissions – provides a form for the general community to submit potential CRP candidates;
3. When the Commissioner's remedial power has been used – contains an index of each case where the CRP has been exercised;
4. When the Commissioner's remedial power has been considered but not applied – provides an index of each case where the CRP has been considered but found to be unsuitable; and
5. Commissioner's remedial power process pathway – outlines each step of the current CRP process.

Figure 3.1 provides a snapshot of average monthly unique pageviews (using a monthly average across a six-month period) for each of the above pages from the 2017 to 2021 calendar years (where applicable, as some CRP webpages were only created in later years).⁷⁴

⁷³ Unique pageviews refers to the number of sessions the specified webpage was viewed at least once. This excludes webpage visits made by the user more than once in the same session.

⁷⁴ Figure 3.1 does not include average monthly unique pageviews for the CRP webpages after 2021 because the IGTO has extensively accessed the ATO CRP website for the purpose of this review investigation which commenced in December 2021.

Figure 3.1: Average monthly unique pageviews for the CRP webpages



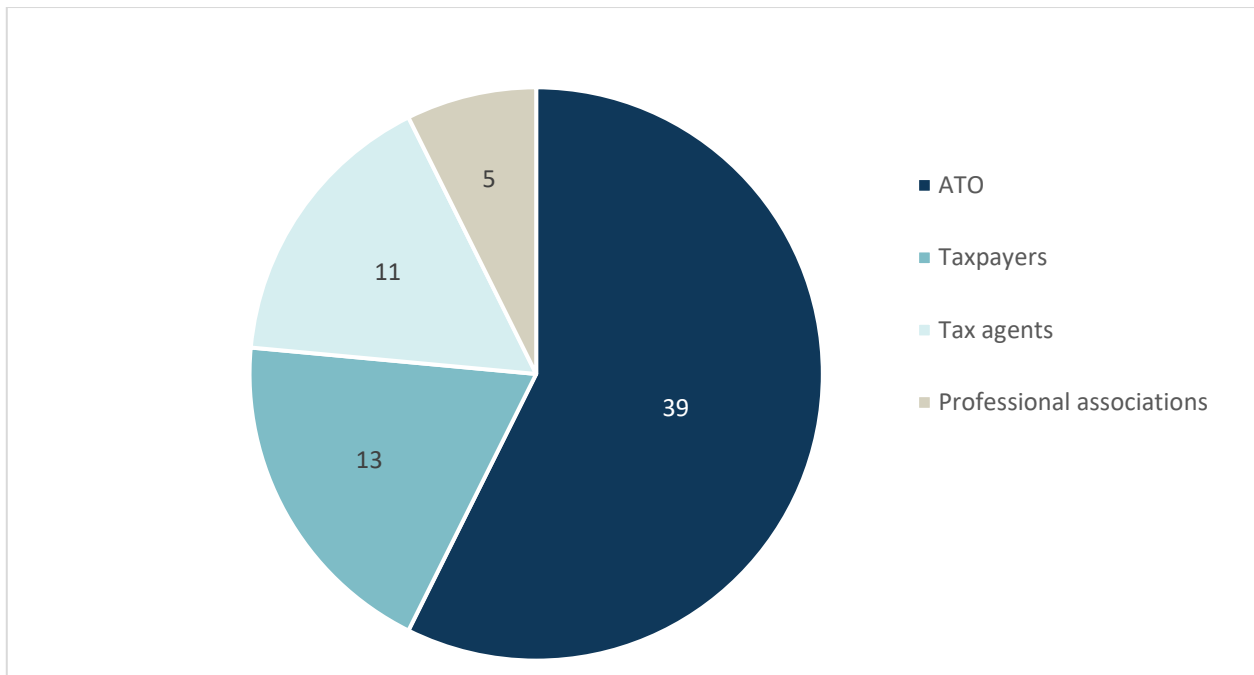
Source: Developed by IGTO from ATO data.

Based on the data provided by the ATO, the CRP overview page has generally averaged over 150 unique monthly page views whereas the four other webpages received on average fewer than 150 unique page views each month.

3.2.3. Evidence of CRP Awareness through CRP Applications

Data supplied by the ATO shows that out of the 68 CRP candidates received since the enactment of the CRP provisions, 29 candidates were submitted by external stakeholders such as taxpayers, tax agents and professional associations. ATO staff submitted the majority of CRP applications (39 applications or 57.4%). A breakdown of the sources of CRP candidates received is shown in Figure 3.2 below.

Figure 3.2: Sources of CRP candidates



Sources of CRP Candidates	#	%
ATO	39	57.4%
Taxpayers	13	19.1%
Tax agents	11	16.2%
Professional associations	5	7.3%
Total	68	100%

Source: IGTO based on ATO data.

Out of the 29 external CRP candidates received by the ATO, the CRP has been exercised on only one occasion. This instance where the CRP was exercised resulted from an issue raised by a professional association at an ATO consultation forum,⁷⁵ which is discussed in the next section.

At the IGTO's request, the ATO confirmed that 10 out of the 29 externally sourced candidates were received via completion of the External CRP Application form. The remaining 19 candidates were received through the CRP Secretariat mailbox.

⁷⁵ Taxation Administration (Remedial Power – Disclosure of Protected Information by Taxation Officers) Determination 2022.

3.2.4. Evidence of CRP Awareness through Consultation forums

Research undertaken by the IGTG to examine minutes of ATO consultation forums (as published on the ATO's website) indicates that the CRP was first raised after its enactment at the National Tax Liaison Group (NTLG) on 20 June 2019.⁷⁶ The minutes of this discussion are as follows:

The Commissioner of Taxation has limited powers to modify the operation of tax law in circumstances where entities will benefit, or at least be no worse off, as a result of the modification. This power is known as the Commissioner's Remedial Power (CRP).

Members requested an update from the Commissioner's Remedial Power Advisory Panel meeting held on 4 June 2019.

Michelle de Niese noted that since the advisory panel was established, 43 matters have been raised for consideration with only two being successful in the application of the CRP. There was concern the advisory panel was not being involved at the right time. However, this has been addressed with the revised process provided to members.

Michelle de Niese further noted that it appears that the provision is not operating in accordance with the statement of intent for the legislation. Michelle de Niese suggested that a post-implementation review of the CRP may be required.

The ATO noted that The Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017, which introduced the CRP, allows for the Minister to ask for a review of the legislation between three and five years after the start date (1 March 2017).

Tony Greco queried whether the application of CRP could be considered for tax agents/accountants to access information regarding deceased estates through the ATO tax agent online portal. There are strict legal requirements and agents are currently not able to access this information through the portal. The ATO noted that it would consider whether there was scope for access to be provided under the existing law. If an administrative solution could not be implemented, consideration would be given to whether the issue could be addressed through the CRP.

⁷⁶ Australian Taxation Office, 'National Tax Liaison Group key messages 20 June 2019' <<https://www.ato.gov.au/law/view/document?docid=rtf/ntl20190620>>.

Action item	NTLG 1906/1
Due date	9 September 2019 NTLG meeting
Responsibility	[...] Deputy Commissioner, Policy Analysis Branch
Description	<p>Consideration of agents/accountants' access to the ATO tax agent online portal for information on deceased estates.</p> <p>The ATO to consider:</p> <ol style="list-style-type: none"> 1. If access can be provided under the existing law 2. If an administrative solution cannot be implemented, whether the Commissioner's Remedial Power can be applied to allow tax agents/accountants to access information on deceased estates through the ATO tax agent online portal.

The minutes from the subsequent NTLG meeting on 9 September 2019 note that an update was provided on the above action item.⁷⁷ At the NTLG meeting on 28 November 2019, the ATO provided the following update and confirmed that the Commissioner intended to exercise the CRP to remedy the issue:⁷⁸

NTLG 1906/1 – Consideration of agents/accountants' access to the ATO tax agent online portal for information on deceased estates.

The ATO noted it has considered the issues regarding agents/accountants unable to access information for a deceased person from the Online Services for Agents portal, which has been designed to conform with existing law. As a result, the Commissioner is proposing to exercise his remedial power to modify the law.

The draft Legislative Instrument and Explanatory Statement on Taxation Administration (Remedial Power – Disclosure of Protected Information by Taxation Officers) Determination 2019 was released for public consultation on 25 November 2019 with comments due 20 December 2019.

The ATO also noted that the Inspector-General and Taxation Ombudsman is currently undertaking a review of deceased estates.

⁷⁷ Australian Taxation Office, 'National Tax Liaison Group key messages 9 September 2019' <<https://www.ato.gov.au/law/view/document?docid=rtf/ntlg20190909>>.

⁷⁸ Australian Taxation Office, 'National Tax Liaison Group key messages 28 November 2019' <<https://www.ato.gov.au/law/view/document?docid=rtf/ntlg20191128>>.

Members commended Institute of Public Accountants' representative Tony Greco for suggesting consideration of the Commissioner's Remedial Power as an option to overcome the issue.

3.2.4.1. IGTO observations

The exercise of the CRP is contingent upon an application being raised for the discretionary power to be exercised. Accordingly, awareness of the existence of the CRP and the process to make an application is fundamentally important. External community awareness in particular of the CRP and its operation is important to enable the ATO to leverage the experiences and expertise of external stakeholders to generate suitable CRP candidates for its consideration. Greater understanding also fosters more willing and meaningful interaction with stakeholders and is likely to lead to improved taxation administration through rectification of anomalous and unintended legislative outcomes.

At present, the ATO's primary channel for communicating with the public about the CRP and its uses is the ATO website, which sets out general information, a process pathway and circumstances where the CRP has either been used, or considered but not applied. This necessarily relies upon the community's general awareness of the existence of the CRP and trust in the integrity of the process by which applications are considered.

The IGTO acknowledges that, following internal and external feedback in 2019 and 2020, the ATO website content has been augmented to provide more insight into CRP candidates that have been considered by the ATO and the outcomes of these considerations. The public communication of what issues have and have not been approved assists with providing the community with confidence in the governance, transparency and integrity of the process as well as a better understanding of issues that may be suitable for consideration.

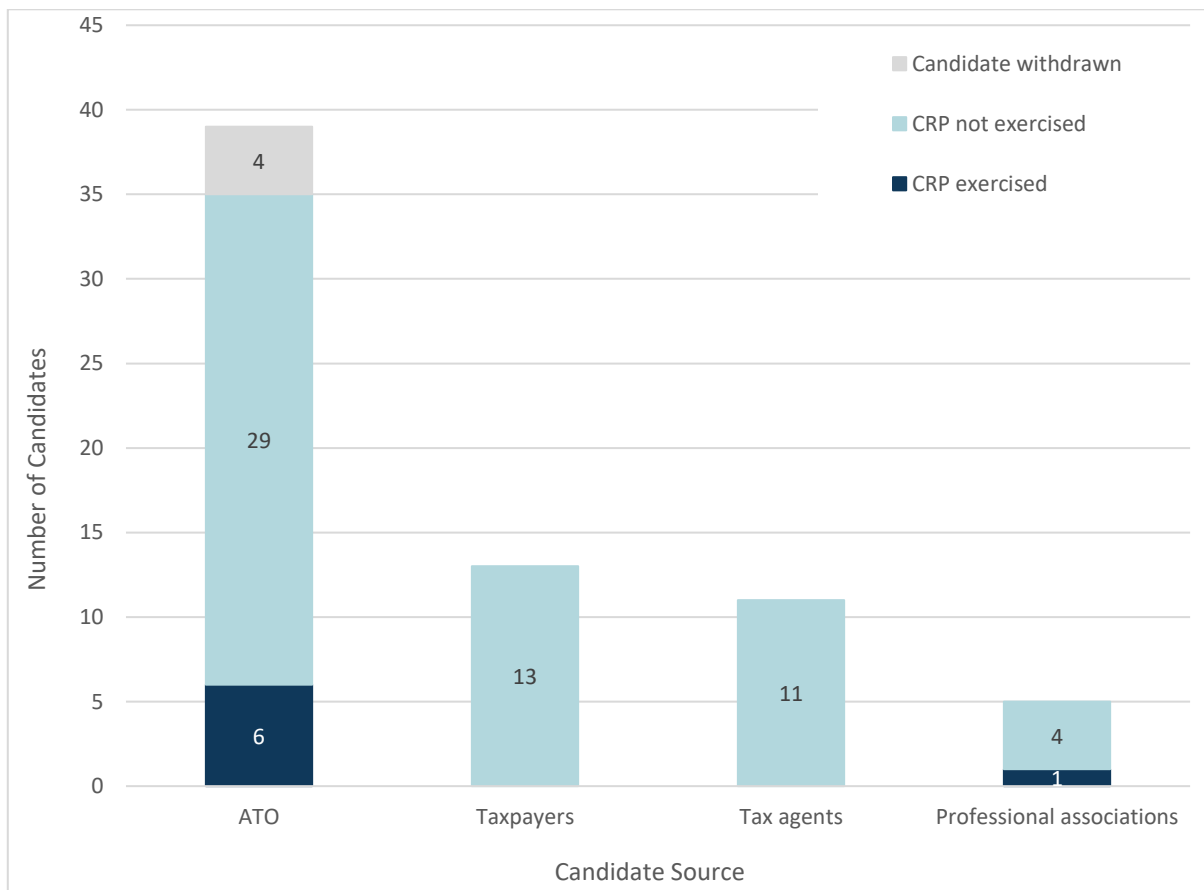
The level of website activity shown in Figure 3.1 above does not suggest there is widespread external awareness of the CRP. The pageview data obtained by the IGTO indicates a short period of increased interest soon after the CRP webpages were introduced before regressing to a consistent lower level of website activity.

Whilst the IGTO acknowledges the need to use the ATO website as the primary source of public communication, when used passively and in isolation of other promotional vehicles there may be an overall low level of awareness and engagement with the information. Further supporting activities could be useful to draw attention to the website materials, including through existing ATO consultation forums, Tax Agent communications and other engagements. Based upon this investigation, it does not appear that the ATO routinely leverages its existing consultation forums to highlight and discuss potential CRP candidates.

The low levels of interaction and activity with ATO public communications about the CRP may contribute to lower levels of external stakeholders approaching the Commissioner for an exercise of his discretionary power where there are unintended and inadvertent consequences. As can be seen in Figure 3.2, of the 68 CRP candidates, 29 (42.6%) were identified and submitted by external stakeholders while 39 (57.4%) were submitted by ATO officers.

Furthermore, Figure 3.3 below illustrates that the success rate of CRP candidates internally submitted by the ATO (17.1%, being 6 out of 35 candidates)⁷⁹ is significantly higher than the success rate of CRP candidates raised by external stakeholders (3.4%, being 1 out of 29 candidates). Had the CRP not been discussed at an ATO consultation forum, the success rate of CRP candidates submitted by external stakeholders would have been 0%.

Figure 3.3: CRP outcomes based on source of candidate submission



Source: IGTO based on ATO data.

Ultimately, whether a candidate is successful depends only on whether it satisfies the relevant statutory criteria. Nevertheless, the near zero success rate of external CRP candidates is a cause for concern and may be a symptom of a general lack of awareness of the CRP and its criteria.

The limited amount of activity on the ATO's CRP webpages suggests that the website, by itself, may not be sufficient for communicating with the public about the CRP and its uses. The IGTO considers that there are opportunities for the ATO to consider additional channels to more effectively target tax professional groups and practitioner segments to enhance their understanding and engagement with the CRP process to generate additional and more suitable candidates for consideration. Outside of the ATO, tax practitioners and their representative bodies are best placed to provide insight on areas that may

⁷⁹ These statistics do not include the four candidates withdrawn by the ATO business line.

require modification through the CRP. This is due to their large client and membership bases which provide broad insight into the experiences of taxpayers when engaging with the tax system.

For example, the ATO's existing communication channels with tax practitioners and professional associations, such as its weekly *Tax professionals newsletter*, could be leveraged to promote awareness and understanding of the availability of the CRP and its possible uses. The ATO could, through existing channels and consultation forums, periodically call for submissions of (for example, the top five (5)) issues arising from unintended applications of the laws that stakeholders wish to be addressed through the CRP.

The IGTO also considers the lack of discussion of the CRP at ATO consultation forums contributes to the low levels of external community and tax practitioner awareness. It is significant that on the one occasion that the CRP was discussed at an ATO consultation forum, this resulted in a successful CRP candidate. This represents a missed opportunity for the ATO to inform and educate tax practitioners on the operation of the CRP, so as to generate greater feedback on improvements to its operation and encourage further CRP candidates for consideration.

Recommendation 3.1

The IGTO recommends that the ATO consider additional channels and opportunities to:

- (a) communicate with stakeholders about the existence of the CRP, the process to request an exercise of the CRP, its purpose and how it can be utilised to address unintended consequences; and
- (b) bolster community awareness through guidance and information, including that which is already published and available on the ATO website.

3.3. ATO training and guidance to its officers about the CRP and its process

3.3.1. Stakeholder concerns and suggestions

Stakeholder submissions noted that it is unclear whether ATO officers are conscious of the availability of the CRP either to inform taxpayers and tax practitioners of the process, or to identify and escalate issues for potential CRP consideration.

Some stakeholders observed that ATO officers generally do not appear to discuss with taxpayers, practitioners or professional bodies the potential for the CRP to be used to address blockages regarding certain interpretational matters or anomalous outcomes in the law where the CRP could potentially provide a solution. This presents a risk that ATO officers may not have access to the appropriate information or contacts who can assist with escalating a CRP candidate for appropriate consideration.

3.3.2. Information and training available to ATO staff

3.3.2.1. ATO website and internal intranet page

The PAL business line maintains an internal intranet page, accessible to all ATO officers, which provides an overview of the CRP, its benefits and instructions on how a matter can be raised internally for possible rectification under the CRP. This is in addition to ATO staff having access to information about the CRP available on the ATO's publicly accessible website.

The CRP intranet page instructs ATO officers, when raising an issue for CRP consideration, to firstly consider whether there are any suitable alternatives, such as interpretative or administrative solutions, that could be used instead of the CRP to resolve an unintended outcome. To assist with this process, ATO officers are advised to contact the 'New Measures' team within the officer's business line in the first instance for advice.

If, after considering the issue with the 'New Measures' team, it has been identified that interpretative or administrative avenues are unsuitable to resolve the issue and it is agreed that the issue should be raised as a CRP candidate, the ATO officer is instructed to contact the PAL CRP team and submit the ATO Internal CRP Application (a copy of which is provided in Appendix F) to the CRP Secretariat for consideration.

The ATO Internal CRP Application provides guidance for business line staff on what information needs to be provided so that the CRP Secretariat can effectively consider and triage the candidate before undertaking a formal costing request, as well as preparing the candidate for CRP Advisory Panel consideration. The form asks ATO officers to consider the intended purpose of the provision to be modified, the reasonableness and implications of the proposed modification and potential budget impact, as well as what other options have been considered to address this issue, including administrative remedies.

PAL has also developed an internal CRP guide that is available to the CRP team and the CRP Secretariat in early 2021. This guide is a comprehensive internal resource that provides further details about the CRP process and criteria. The CRP guide is not accessible to staff via the ATO intranet but available on request. That is, it is provided to ATO officers who request further information about the CRP or guidance on how to raise CRP candidates for consideration. A copy of this guide is provided in Appendix H.

The ATO Practice Statement, *Law Administration Practice Statement PS LA 2009/4: When a proposal requires an exercise of the Commissioner's general powers of administration (PS LA 2009/4)* was updated in 2019 to explain the distinction between the ATO's powers of general administration and the CRP and refers ATO officers to the PAL intranet page for further information on the CRP.

As noted earlier in this chapter in Figures 3.2 and 3.3, there have been 39 CRP candidates that have been internally raised by ATO staff, from which six have been successful. However, it should be noted that 17 of the 39 candidates identified by the ATO were raised prior to and in preparation for the commencement of the CRP provisions, including two candidates that were ultimately successful (CRP 2017/1 and CRP 2017/2).

In relation to the 22 internal candidates submitted by the ATO post-enactment of the CRP provisions, the ATO has confirmed, at the IGTO's request, that 9 were submitted using the internal application form. The remaining 13 internal candidates were informally raised with PAL by another ATO business area.⁸⁰

3.3.2.2. Internal news articles

PAL periodically publishes news articles which are internally circulated to some ATO staff to promote the CRP, provide advice on how to raise matters for CRP consideration and advise who to contact for further information. News articles promoting the instances where the CRP has been used are usually communicated to all ATO staff.

Articles highlighting the availability of the CRP as a mechanism to resolve unintended consequences in tax and superannuation law are generally only sent to specific ATO groups, primarily staff in Client Engagement Group (CEG) and Law Design and Practice Group (LDP), which are best placed to understand and identify prospective CRP issues as their roles are more likely to focus on legal interpretation in the administration of tax and super laws.

From the information made available by the ATO, the IGTO is aware of 15 internal news articles that have been published about the CRP since it commenced on 1 March 2017. The details of these news articles are summarised in the Table 3.1 below.

Table 3.1: List of internal ATO news articles about the CRP

Date	Article title	Audience
2 March 2017	Commissioner's Remedial Power – New legislation allows the Commissioner to modify operation of the tax law	All staff
29 August 2017	Commissioner's Remedial Power – New legislation allows the Commissioner to modify operation of the tax law	Law Design & Practice
17 October 2017	First use of the Commissioner's Remedial Power – Modification of the foreign resident capital gains withholding regime	Law Design & Practice
23 October 2017	Commissioner's remedial power first use – Taxpayer lodgements reduced as a result of the application	All staff
18 July 2018	Second use of the Commissioner's Remedial Power – Giving small business flexibility to change their legal structure without immediate income tax consequences	Law Design & Practice
23 July 2018	Commissioner's remedial power second use – Transfer of depreciating assets will have no direct tax consequences	All staff
3 April 2019	Commissioner's Remedial Power – New page detailing examples where CRP has been considered but not used	Law Design & Practice
29 May 2020	All LDP staff – Improving access to deceased people's information	Law Design & Practice
6 July 2020	Commissioner's Remedial Power – What you need to know	Client Engagement Group

⁸⁰ For completeness, the ATO also advised that 12 of the 17 pre-commencement candidates were not submitted using the internal application form.

Date	Article title	Audience
8 July 2020	Commissioner's remedial power – Know who to contact if you have an issue you are considering using the remedial power for	Client Engagement Group
30 July 2020	When the Commissioner has been unable to use the remedial power – What you need to know	Client Engagement Group
11 February 2021	Commissioner's Remedial Power – When the Commissioner has been unable to use the remedial power	Law Design & Practice
5 March 2021	Commissioner's Remedial Power – What you need to know	Law Design & Practice
28 April 2023	Draft remedial power proposals released	Client Engagement Group
28 April 2023	Draft remedial power proposals released	Service Delivery

Source: ATO information

The above list of ATO news articles indicates there was between one and three articles published about the CRP each year from FY17 to FY20. The number of internal CRP articles published then increased to five in FY21 before dropping to zero in FY22. Two internal articles were published about the CRP in April 2023.

3.3.2.3. Training modules

The ATO has explained that it does not have specific internal training or learning modules for the operation and administration of the CRP. On-the-job training, supervision and feedback is provided to ATO staff who work directly on CRP matters.

The ATO has two non-mandatory training modules available to its staff that refer to the CRP, titled *Legislation – Introduction* and *Writing technical decisions*, which are discussed below.

- *Legislation – Introduction* contains an overview of the use and purpose of the CRP and includes an example of the exercise of the CRP.

Figure 3.4a: CRP information provided in the *Legislation – Introduction* ATO training module

5.2 COMMISSIONER'S REMEDIAL POWER

In March 2017, the Commissioner was granted the power to modify the effect of taxation and superannuation laws where they produced unintended or unforeseen negative outcomes. This power is called the 'Commissioner's Remedial Power' (CRP) and its use is discretionary.

The CRP is unique in that it is a legislative power (and not simply an administrative power) given to the Commissioner. However, several legislative criteria must be met before the CRP may be exercised. Modifications made in exercise of the CRP are made through disallowable legislative instruments.



Provisions that are subject to a modification under the CRP are flagged with an attention note on *ATOlaw* and the Legal database on ato.gov.au. For example, see section 18-15 of Schedule 1 to the TAA.

There is also an example in Appendix C (under Appendices in the Topics menu): see Division 40 of the ITAA 1997.

The CRP is used as a last resort when other options, such as administrative or interpretive approaches, are not adequate to resolve an issue.

Furthermore, the CRP may only be used to resolve general issues that arise for all entities, or issues that impact a particular class of entities; it can't be used to resolve specific issues affecting a particular individual or entity.

Source: ATO

Figure 3.4b: CRP information provided in the *Legislation – Introduction ATO* training module

Income Tax Assessment Act 1997

CHAPTER 2 – LIABILITY RULES OF GENERAL APPLICATION

PART 2-10 – CAPITAL ALLOWANCES: RULES ABOUT DEDUCTIBILITY OF CAPITAL EXPENDITURE

Division 40 – Capital allowances

Commissioner's Remedial Power

Note: A Commissioner's Remedial Power (CRP 2017/2) is relevant to this part of the tax law. Taxation Administration (Remedial Power – Small Business Restructure Roll-over) Determination 2017 (F2017L01687) modifies the operation of s 40-340 of the *Income Tax Assessment Act 1997* and any other provisions of a taxation law whose operation is affected by the modified operation of s 40-340 in relation to an asset transferred under a small business restructure roll-over (item 8 of the table in s 40-340(1)).

The operation of the relevant provisions is modified as follows:

If s 40-340 of ITAA 1997 provides for rollover relief in relation to a disposal of a depreciating asset because the condition in item 8 of the table in s 40-340(1) of ITAA 1997 is satisfied in relation to the asset, that section has effect as if it also provided that the disposal of the asset has no direct consequences under the income tax law (other than Div 40 of ITAA 1997).

The modification applies in respect of transfers on or after 8 May 2018.

An entity must treat a modification as not applying to it or any other entity if the modification would produce a less favourable result for it. The Commissioner is empowered by s 370-5 of Sch 1 to the *Taxation Administration Act 1953* to make modifications, by legislative instrument, to ensure the law is administered to achieve its intended purpose or object.

Source: ATO

- *Writing technical decisions* provides a link to the CRP information contained on the ATO website.

Figure 3.5: Reference to the CRP in the *Writing technical decisions ATO* training module

ATO guidance products

- Practical compliance guidelines
- Oral and other guidance products
- Taxpayer alerts
- ATO interpretative decisions
- Law administration practice statements
- Self-managed super fund Regulator's Bulletins

See also the [Commissioner's remedial power](#)

Source: ATO

The number of ATO staff that have completed these training modules since FY18 are provided in Table 3.2 below:

Table 3.2: ATO staff completion of CRP-related training modules

Training module	Number of ATO officers who have completed the course				
	FY18	FY19	FY20	FY21	Total
Legislation – Introduction	80	165	302	268	815
Writing technical decisions	N/A	199	85	395	679

Source: ATO

3.3.3. IGTO observations

The IGTO considers that it is imperative that officers at the coalface of interactions with taxpayers and tax practitioners are aware of the CRP, its purpose and functions and how to identify and escalate CRP issues for consideration. This is because officers in these positions – including those within CEG, LDP, the client contact centres and ATO complaints – are uniquely positioned to identify potential issues or anomalies within the law that may require rectification and to resolve taxpayer disputes.

As identified above, the ATO has implemented a number of different communication channels to raise awareness of the CRP within the ATO. This includes dedicated business line advisory officers, an intranet page, application forms, references to the CRP in training modules and the circulation of news articles.

The IGTO considers that the internal ATO materials are comprehensive and informative, and the dedicated internal application form provides sufficient detail for an ATO officer to understand what is required to propose a CRP candidate for consideration. However, it is likely that officers would only know to access the internal CRP materials or seek advice where they are already informed and aware of the CRP and its uses. Also, one of these materials, the internal CRP guide, is only made available to officers upon request for further information, which limits its accessibility and possibly its effectiveness in improving ATO staff's understanding and use of the CRP.

In this respect, the IGTO considers that relevant training is of critical importance in ensuring that there is broad awareness and understanding of the CRP. At present, the IGTO has been unable to identify any dedicated CRP training opportunities or modules outside of general references to the CRP within two non-mandatory training modules related to other more general matters, as noted above. The CRP references are also general in nature, or highlight a single specific example of the CRP, but do not provide any further detail. For example, while the *Legislation – Introduction* training module refers to the CRP legislative criteria, it does not outline the specific criteria that must be satisfied in order for the CRP to be exercised, nor does it discuss in any depth how a matter can be raised by an ATO officer for CRP consideration and what materials are relevant for a comprehensive examination of a CRP candidate.

Based on training completion statistics provided by the ATO, as set out in Table 3.2, it is clear that relative to the ATO workforce,⁸¹ the percentage of officers that have completed the *Legislation – Introduction* and *Writing technical decisions* training modules is low. This is reflective of the non-mandatory nature of the relevant courses.

Even when accounting for only officers within specific business areas (such as CEG and LDP) or job families (such as Engagement, assurance and compliance (EAC) and Law job families) having to complete these courses, the completion rate remains less than 10% (see Figure 3.3b). A relative comparison based upon employee statistics in the ATO's annual report is set out in Table 3.3a and Table 3.3b below for completeness.

Table 3.3a: Number of employees in ATO business areas or job family relating to law administration and interpretation

Financial year (FY)	Number of ATO employees					
	According to ATO business area			According to ATO job family ^(c)		
	CEG ^(a)	LDP ^(b)	Total	EAC	Law	Total
FY19	7302	1041	8343	5575	1648	7223
FY20	7123	1057	8180	5444	1568	7012
FY21	6753	1222	7975	5874	1660	7534

Source: ATO Annual Reports 2018-19, 2019-20, 2020-21.

(a) Number of CEG employees is comprised of employees from Individuals and Intermediaries, Integrated Compliance, Private Wealth, Public Groups and International, Small Business, and Superannuation and Employee Obligations. This excludes the Smarter Data and CEG Strategy and Performance business lines, which are unlikely to be involved in law interpretation matters.

(b) Number of LDP employees is made up of employees from Policy, Analysis and Legislation, Review and Dispute Resolution, Tax Counsel Network and Law Design and Policy Strategy and Support.

(c) Number of employees per job family is extrapolated from ATO data on the percentage of employees by job family.

⁸¹ Based on the ATO Annual Reports for 2018-19, 2019-20, and 2020-21, the total number of ATO employees was 19,157 (FY19), 21,184 (FY20) and 21,281 (FY21).

Figure 3.3b: Training completion rate for relevant ATO business areas and job families^{(a)(b)}

Training module and FY	Number of ATO staff completing training module (cumulative)	Staff completion rate for relevant ATO business areas (CEG and LDP)	Staff completion rate for relevant ATO job families (EAC and Law)
Legislation – Introduction			
FY19	165	1.98%	2.28%
FY20	467	5.71%	6.66%
FY21	735	9.22%	9.76%
Writing technical decisions			
FY19	199	2.39%	2.76%
FY20	284	3.47%	4.05%
FY21	679	8.51%	9.01%

Source: Calculated by IGTO from data in Tables 3.2 and 3.3a.

(a) Staff completion rate calculated using total number of employees in relevant ATO business areas and job families provided in Table 3.3a

(b) Relies on the assumptions that no staff have left the ATO business area or job family after completing the module or that the module has been completed on more than one occasion

The PAL business line also sporadically circulates news articles about the CRP. The list of internal ATO news articles provided in Table 3.1 demonstrates that from FY17 to FY20, the majority of the articles published are prompted by a particular event, such as the introduction of the CRP legislation or the ATO's decision to exercise the CRP. In FY21, it is noted that there was an increase in the number of news articles, including articles that internally promote the use of the CRP without a trigger event or successful candidate.

These articles are not sent on a fixed timetable, nor are they always circulated to all ATO officers. It is not clear to the IGTO how these articles are created and circulated and what factors are considered when deciding the relevant audience.

In its present form, the suite of channels through which the ATO communicates internally about the CRP may be limiting its reach, resulting in fewer and lower quality candidates being escalated for CRP consideration and increasing the risk of potentially viable CRP candidates being overlooked.

The IGTO also considers that any concerted effort to raise internal awareness of the CRP should take into account where the CRP is situated in the broader 3-step process for resolving unforeseen issues that may arise in the administration of tax law. The Commissioner's instructions⁸² confirm that consideration of the CRP is only appropriate if the underlying problem cannot be resolved by purposive interpretation of the law or via administrative means such as the GPA and statutory discretions. Although these steps are separately mentioned in relevant ATO guidance materials, such as PS LA 2009/4 and the ATO Internal

⁸² For example, the instructions in the ATO Internal CRP Application (a copy of the full form is provided at Appendix F of this report).

CRP Application, they do not appear to be systematically incorporated into ATO training modules, procedures and behaviours as a 3-step process at present.

A solution that simply seeks to improve staff knowledge and awareness of the CRP and how it functions, such as a dedicated CRP training course, may not necessarily result in better tax administration unless it also seeks to improve knowledge and awareness of the broader 3-step process. This is because knowledge and awareness of how to interpret statutes in a purposive manner, as well as consideration of whether the issue can be resolved through an administrative solution is required before the CRP can or should even be considered.

Furthermore, improving knowledge and understanding of the broader 3-step process may not only increase the number of candidates raised, but also help reduce the cases which are considered for CRP when the issue is better addressed through purposive interpretation or an administrative solution. The need to ensure that ATO officers have a holistic understanding of the entire 3-step process is evident in one CRP candidate sampled by the IGTO, where concerns were raised about the level of understanding that ATO business areas have about the use and operation of the CRP and its intersections with the Commissioner's GPA. An internal email suggests that the confusion about the ATO's broader 3-step process may not be isolated:⁸³

*...it clearly needs to be emphasised (**again**) that the GPA and CRP are not interchangeable processes. The CRP Secretariat is not an advice and guidance area in respect of how case teams should deal with case management issues that present themselves. In particular it is not the job of the Secretariat to advise on how and when the GPA may be used. I am concerned as to how many of these cases there may be and that each time they are going to be referred to the Secretariat for guidance on issues beyond the scope of the CRP itself. It needs to be made clear that the CRP Secretariat cannot advise on the GPA.*

[emphasis added]

In the IGTO's view, the ATO should consider strategies to improve awareness and understanding of the CRP and the broader 3-step process amongst its staff, especially in tax technical business lines in CEG and LDP, so that matters can be more readily and appropriately raised and considered through this process. This could possibly be achieved through a more deliberate integration of information about the availability of the CRP within the broader 3-step process, for example, by incorporating this into ATO policies and procedures that relate to statutory interpretation, or by providing more targeted and detailed training materials. A targeted mandatory training module (especially for CEG and LDP staff) that incorporates both the CRP and the broader 3-step process as part of statutory interpretation, may improve awareness of the relevant context and increase the visibility of this mechanism for ATO officers when completing statutory interpretation tasks. Additionally, the CRP Secretariat and CRP Team may

⁸³ Internal ATO email, 'FW: IGTO Complaint - First Home Super Saver Scheme - Timeline Request', 22 June 2021.

wish to more regularly promote their role and the work they undertake through more frequent newsletters or articles being circulated, dedicated webinars or other learning and development events.

Recommendation 3.2

The IGTO recommends that the ATO consider strategies to improve the level of staff awareness and understanding of the CRP and how it operates within the broader 3-step process for resolving unforeseen issues that may arise in the administration of tax law, particularly for ATO officers in CEG and LDP who engage frequently with taxpayers and tax practitioners.

3.4. Information systems and processes to capture and manage issues for CRP consideration

3.4.1. Stakeholder concerns and suggestions

Unsurprisingly, no stakeholder concerns or suggestions have been raised regarding the internal information systems and processes used by the ATO to capture and manage issues raised for CRP consideration.

3.4.2. ATO information systems and processes to support the CRP process

The CRP webform on the ATO's website⁸⁴ allows members of the community to suggest potential CRP matters for consideration. Where CRP matters are raised internally by an ATO officer, an ATO Internal CRP Application is submitted to the CRP Secretariat. Once either form is finalised and submitted, the information contained in the form is sent via email into the CRP Secretariat inbox which is monitored by officers in the CRP team.

Issues and project tracking software

The PAL business area uses a commercial project tracking software to capture, manage, and track the consideration of all CRP candidates received through the key stages of the CRP consideration process. CRP decisions, including decisions to resolve issues raised in CRP applications via another pathway, are also recorded in the project tracking software.

When a matter is submitted for CRP consideration, information from the submitted form is manually entered by PAL staff into this software. This includes details of where the issue originated from, the names of responsible staff members, business line contacts and a summary of the application. The summary field of the software record is also used to capture other relevant information from the application form that does not have a corresponding field in the project tracking software.

⁸⁴ Australian Taxation Office, 'Commissioner's Remedial Power' <<https://www.ato.gov.au/Commissioners-remedial-powers/>>.

Master Candidate List

In addition to the project tracking software, the ATO also maintains as a separate document an internal 'Master Candidate List' of all CRP candidates. This internal list is used by PAL staff to capture the relevant information on all CRP applications received in a user-friendly format. It is the central repository for all CRP matters and is continually updated by PAL when key milestones of the CRP consideration process have been met. The ATO uses information from this list to brief external stakeholders on the outcomes of all CRP candidates that have been considered to date.

PAL officers manually update and reconcile information stored in the Master Candidate List against the project tracking software at the key stages of the CRP consideration process.

ATO ShareDrive

The ATO has informed the IGTO that documents related to a CRP application are not stored in the project tracking software. As items stored in the project tracking software may be accessed by anyone in the ATO it is not a secure document management system that is used to store sensitive files. The ATO classifies documents relating to CRP candidates as sensitive because they may contain information that does or could potentially identify taxpayers. Instead, these documents are separately stored on a protected ShareDrive, which must be accessed separately via Windows File Explorer if an ATO officer wishes to view, edit and retrieve them.

3.4.3. IGTO observations

The IGTO recognises that the CRP has been in operation for a period of six (6) years and the ATO continues to explore different ways to receive, consider and manage candidates. Furthermore, the IGTO acknowledges the niche nature of the CRP and the different requirements when compared with broader, more general tax administration case management.

The IGTO has concerns about the manual and duplicate nature of the information capture associated with CRP case and project management. Where manual information capture and extraction is utilised, it is prone to human and other transposition errors, which affects the integrity of the overall information and diminishes its value in project tracking and associated reporting. The risk of error is further exacerbated by a misalignment between the fields contained within the CRP application form and those in the project tracking software and the Master Candidate List. The misalignment results in a need for officers to make a judgement call as to where certain information needs to be captured.

Through the course of this review investigation, it has been identified that the Master Candidate List maintained by the ATO may not always be accurate or up to date. This could potentially lead to the provision of incomplete information to internal or external stakeholders about the progress and outcome of a CRP application.

Examples of inaccurate or incomplete candidate information held in the ATO's Master Candidate List, which were identified following enquiries made by the IGTO and have since been addressed as a result of this review investigation, include:

- for two candidates where the CRP was deemed not to be appropriate, the CRP decision was incorrectly recorded as unresolved rather than unsuccessful;

- there were incomplete reasons recorded for two unsuccessful candidates i.e. the candidates were recorded on the Master Candidate List as unsuccessful because the proposed modification would only apply to one taxpayer, but the ATO website also explained that they were inconsistent with the intended purpose or object of the relevant provisions;
- a candidate that was recorded as being addressed via the Miscellaneous and Technical Amendment (MTA) pathway had not been updated to reflect that the MTA process had been abandoned in this case; and
- one candidate was incorrectly recorded as received from a tax practitioner instead of a professional association.

It is not immediately clear to the IGTO whether the errors within the Master Candidate List were replicated from similar errors within the project tracking software or if they arose through transposition from the software to the Master Candidate List.

In addition to the risk of error discussed above, the IGTO has also observed that the ATO's Master Candidate List is not presented in chronological order and no date of receipt of the candidates is captured. In many cases, the list does not include the dates of key decisions made in relation to the candidates. As such, a reader would necessarily need to cross reference the Master Candidate List details with those contained on the project tracking software to identify the timeframe under which CRP candidates were received, considered and finalised.

Finally, the IGTO is concerned about the separate storage of evidentiary and deliberation documents associated with the consideration and finalisation of CRP candidates. This approach appears to be inconsistent with broader, whole of ATO processes when managing tax administration matters more generally and creates a risk of information being inadvertently or otherwise moved or destroyed. The risk of insufficient record-keeping was also evidenced during the IGTO's case sampling enquiries, where the ATO advised that both ATO and Treasury were unable to locate documents relating to the costing of a particular CRP candidate.

As the ATO's CRP work continues to mature and develop, the IGTO considers that manual and dispersed systems for the capture and management of CRP candidates is sub-optimal. The ATO's CRP work should, ideally, be captured within a single source of truth that minimises unnecessary manual input, manual cross referencing and provides users with an easily accessible platform to identify the progress of candidates and next actions and ensures the integrity of information about all candidates considered.

Recommendation 3.3

The IGTO recommends that the ATO consolidate and improve its system for capturing, tracking and reporting on the progress of CRP candidates, to reduce duplications and minimise the need for manual inputs and ensure that there is a complete record of relevant communications and deliberations for all CRP candidates.

3.5. Transparency about when and how issues for CRP consideration are identified and recorded for consideration

3.5.1. Stakeholder concerns and suggestions

Stakeholders have raised concerns about a lack of transparency on when matters are referred for consideration under the CRP and suggested that there needs to be greater clarity in this regard. In particular, they have noted that there is little or no information as to how a matter that has been raised for CRP consideration has progressed through the process.

A similar concern was identified within the context of CRP matters being raised through ATO stewardship groups or consultation forums, with stakeholders similarly indicating that there is little or no transparency or public line of sight as to how such matters are escalated to the CRP Secretariat.

The lack of transparency and line of sight may lead to perceptions of matters either not progressing or having been stopped before they are considered by the CRP secretariat.

3.5.2. ATO communication to CRP applicants

The ATO has advised the IGTO that the PAL CRP team sends a written acknowledgment to every CRP applicant to advise them that their application has been received and will be considered in line with the ATO's CRP process. At the same time, a formal record is created in the ATO's project management software which generates a corresponding reference number that is used for internal record-keeping purposes only. The applicant is not informed of the CRP reference number.

The written acknowledgment provides the applicant with the name of an ATO contact person and contact telephone number and is sent from the CRP Secretariat mailbox. This enables the applicant to contact the ATO should they wish to enquire about the progress of their CRP application or ask any questions.

The ATO has provided the IGTO with a number of examples about the types of acknowledgement that it may issue in response to a CRP candidate being received, these have included:

- a direct email between the CRP officer and another ATO officer, where the CRP candidate is escalated internally;
- an email from the CRP officer to the external applicant, where the CRP candidate is submitted by the public; and
- a formal acknowledgement and update to members of an ATO stewardship group in relation to a candidate that had been raised within that group.

Importantly, the ATO has advised the IGTO that matters raised with the CRP team are only recorded and considered as CRP candidates where a formal request has been made, either with or without an application form, for an issue to be resolved via an exercise of the CRP. In some instances, CRP

candidates are submitted where the issue would be more appropriately dealt with through another channel. These cases are referred to the relevant ATO area and are not recorded or considered by PAL as CRP candidates and therefore do not invoke the usual CRP acknowledgement and consideration processes. Examples of such referrals include a request for an amendment to an income tax return and a request to consider financial hardship, both of which were transferred to the ATO's Service Delivery Complaints area for action.

The PAL CRP team has also informed the IGTO that it has received a number of informal approaches or enquiries about the exercise of the CRP, from both internal and external sources via the CRP Secretariat mailbox, which are not recorded as CRP candidates. Further, records or other written correspondence regarding general enquiries or informal discussions about the scope of the CRP, which do not result in a formal CRP application, are not routinely filed by the CRP team in the project tracking software.

3.5.3. IGTO observations

It is evident from the materials provided by the ATO that an acknowledgement is provided to CRP applicants who lodge a formal application, and an avenue is provided for the CRP applicants to seek an update on the progress of the CRP consideration.

However, as the ATO advised, only those applications which have been received and formally registered as CRP candidates would result in a CRP acknowledgement and flow through the usual CRP processes. Stakeholders who have raised concern about the lack of acknowledgement and transparency may include those who believe they have raised a CRP candidate but who may not have had their matter formally recognised as a CRP application and therefore may not have been referred through appropriate channels for CRP registration and consideration.

In the IGTO's own experience, it is not always clear who at the ATO provides responses to potential CRP candidates being raised. For example, as part of the IGTO's investigation into *Aspects of The Australian Taxation Office's Administration of Jobkeeper and Boosting Cash Flow Payments for New Businesses*, the IGTO raised a potential issue to the ATO for CRP consideration. The ATO advised the IGTO that it was not open to the Commissioner to consider exercise of the CRP having regard to the law and the relevant extrinsic materials. It was not clear to the IGTO whether the proposed CRP had been escalated to the CRP Secretariat to consider before that response was issued. The IGTO did not receive any formal acknowledgment of the CRP matter from the CRP Secretariat. Based upon the IGTO's review of the ATO's Master Candidate List, the IGTO noted that the matter that had been formally raised by the IGTO was not formally registered as a CRP candidate and accordingly appeared not to have been processed as such.

From the CRP Secretariat minutes reviewed in relation to one of the candidates sampled, the IGTO observed an entry about an enquiry from a franchisee as to whether the CRP could be applied to allow franchisees to access cash flow boost payments where the franchise management company (instead of

the franchisees) had made the relevant withholding payments. In response to the IGTO's follow up queries on the matter, the ATO explained that:⁸⁵

... the possible application of the CRP was discussed internally ... However, the issue was not formally recorded and considered as a CRP candidate for two reasons:

1. It was determined that any proposed CRP modification would have no chance of success. The explanatory materials to the Cash Flow Boost Act do not provide any indication that the Commissioner has any discretion to disregard business structures in determining which entities are eligible for cash flow boost payments. Further, it was also considered that the budget impact of extending eligibility for cash flow boost payments would not be negligible.

2. No formal CRP application was received internally or externally from the affected taxpayers ... they were merely seeking the ATO's view on whether the CRP would be applied to resolve this issue. As previously advised, a proposal is only recorded and considered as a CRP candidate when a formal request is received. [Emphasis added]

The IGTO makes two observations in relation to the above example. Firstly, it appears that although a request was made in this instance about exercising the CRP, no formal application was submitted. However, based on information provided by the ATO, the IGTO observed several CRP candidates that have been recorded without a formal application (i.e. an internal or external application form). Secondly, the IGTO observed that a decision that the CRP would not be exercised was made without the CRP assessment being followed. As the purpose of having a CRP process is to determine whether the CRP should be exercised, the ATO's decision appears to be premature. Further, a determination was made about the budget impact without involving the costing experts in RAB or TAD (as part of the CRP process). Without commenting on the likelihood of success of the proposed CRP modification, regardless of whether a request is formally made or informally made, it should be registered and follow the CRP process – simply as a matter of good governance, good decision making, good administrative process and for consistency.

As a result, it is not entirely clear to the IGTO how informal approaches which are not recorded as CRP candidates, such as the example above, differ from other requests made without a formal application that have been recorded and considered as CRP candidates. Given the potentially inconsistent treatment of CRP requests made, the IGTO considers that good governance requires that the ATO should develop a set of criteria or guidelines to provide clarity on when an application *should* be treated as a formal CRP request or application and ensure there is a consistent treatment of all approaches made to the CRP team. Any such guidelines may also seek to explore ways to make it clearer to applicants that a CRP candidate has either been recorded or not been recorded. For example, where a CRP candidate has been recorded, a unique reference number may be provided to the applicant, and where a candidate has not been recorded, as in the case described above, the applicant should be made aware of the fact that it

⁸⁵ Australian Taxation Office, 'IGTO information request 10', 9 January 2023.

has not been forwarded to the CRP Secretariat and provided information on how to submit a formal request if they wish to do so.

Furthermore, the perception of a lack of transparency and accountability may arise due to the ATO not proactively providing applicants with status and progress updates of CRP applications they have lodged. As explained by the ATO, while it was open to applicants to reach out to the CRP team for updates, this may not be understood, or acted upon, by applicants. If the ATO chooses not to provide periodic progress updates to the applicants, the ATO should consider whether its current acknowledgement and early communications with applicants make this clear, and that applicants who wish to receive updates may contact the ATO and have a reference number for this purpose. An estimate of timeframes for key milestones might also assist applicants to understand when major milestones in the CRP process would or could occur, to set and temper expectations regarding when significant updates might be available.

Recommendation 3.4

The IGTO recommends that the ATO:

- a) develop guidelines or a set of criteria that clearly define the circumstances in which an approach or enquiry made to the CRP team is formally recorded as a CRP candidate for consideration and ensure there is a consistent treatment of all approaches made to the CRP team; and
- b) provide periodic progress updates to CRP applicants, or alternatively, clearly inform CRP applicants that they can contact the ATO to receive progress updates if the ATO does not provide updates to CRP applicants automatically.

4

ASSESSMENT OF ISSUES

This chapter examines the process through which issues raised for CRP consideration are assessed.

4. Assessment of issues for CRP consideration

This Chapter considers the ATO's policies and processes for assessing potential CRP candidates that are brought to its attention or that are identified. This Chapter commences by providing a broad overview of the ATO's processes for assessing CRP candidates (based upon information provided by the ATO to the IGTO). This is followed by individual sections discussing stakeholder feedback on aspects of the ATO's CRP assessment process, the ATO's response to that feedback (where available) and IGTO observations. Where appropriate, the IGTO has made recommendations for improvement following each of the observations.

4.1. The ATO's CRP process: Assessment of CRP candidates (based on ATO information)

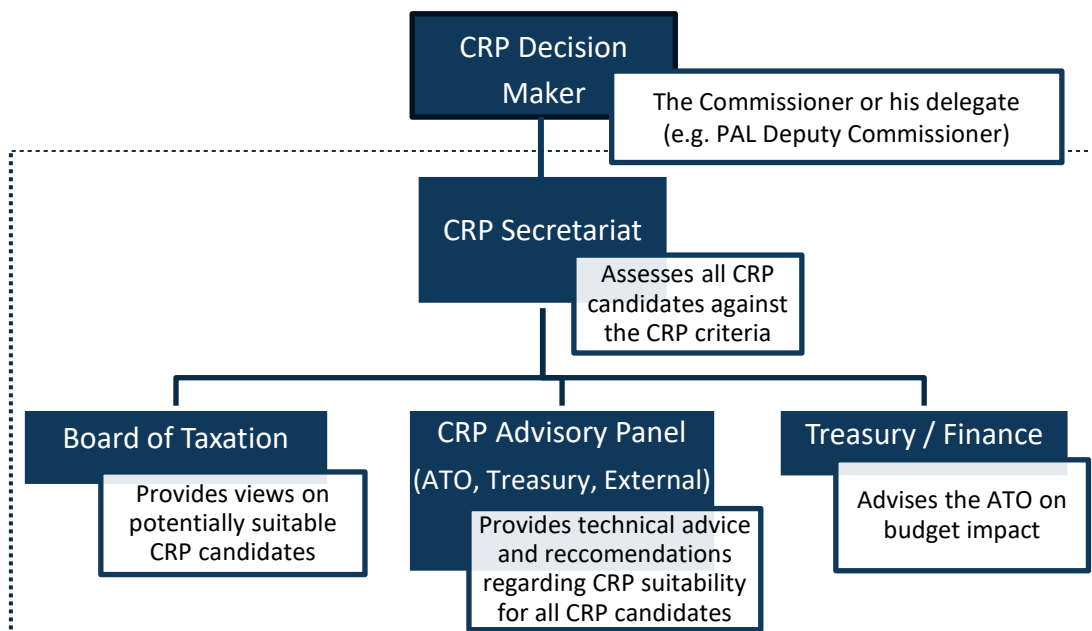
4.1.1. Governance of CRP decisions

The PAL Deputy Commissioner is ordinarily the CRP decision maker, as the Commissioner's delegate.⁸⁶ The PAL Deputy Commissioner considers assessments by the CRP Secretariat, the CRP Advisory Panel, the Board of Taxation, and budget impact advice from Treasury or Finance (as the case may be) before making a final decision on a CRP candidate.

The IGTO's visualisation of the governance of CRP decisions is presented in Diagram 4.1 below. It is not a diagram for the ATO CRP process pathway. Rather, it is intended to visualise that the Commissioner's (or his delegate's) decision on the CRP is supported by input from various stakeholders. The CRP Secretariat coordinates responses or input from the Board of Taxation, the CRP Advisory Panel, and the Treasury or Finance; hence it is placed in between the CRP decision maker and the other stakeholders in the diagram.

⁸⁶ The Commissioner or a Second Commissioner could also make the CRP decision in a particular case, although to date this has not happened in practice.

Diagram 4.1: The IGTO's visualisation of the Governance of CRP decisions



Source: IGTO diagram based on ATO information

4.1.2. The ATO's CRP assessment process pre-June 2019

The ATO has provided the IGTO with information regarding its CRP assessment process. That information suggests that this process has evolved over time. In the months immediately after the commencement of the CRP, the PAL CRP Team took initial responsibility for triaging CRP applications. Only candidates that were assessed as potentially suitable for the CRP by the PAL CRP Team were provided to the CRP Secretariat and the CRP Advisory Panel for review. Candidates that the PAL CRP Team considered unsuitable for the CRP did not progress further in the CRP process.

Diagram 4.2: The ATO's CRP assessment process prior to June 2019

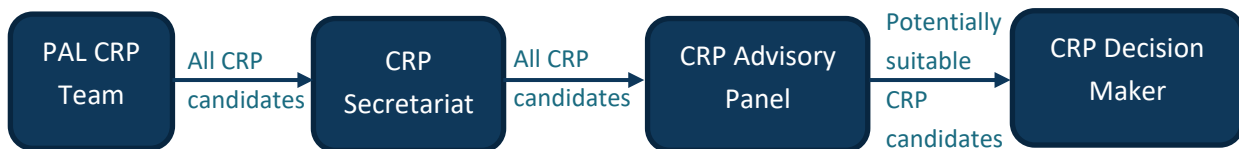


Source: IGTO diagram based on ATO information

4.1.3. The ATO's CRP assessment process from June 2019

From June 2019, the ATO advised that all CRP candidates have been triaged by the CRP Secretariat and reviewed by the CRP Advisory Panel. Candidates that are considered unsuitable for the CRP do not progress further in the CRP process (i.e. they would not be referred to the CRP Decision Maker to exercise the CRP).

Diagram 4.3: The ATO's CRP assessment process from June 2019



Source: IGTO diagram based on ATO information

A process map of the ATO's current CRP assessment process is included at Appendix E of this report.

4.1.4. Initial assessment by the CRP Secretariat

4.1.4.1. Members of the CRP Secretariat

The CRP Secretariat is a group of ATO officials with expertise in the CRP. They are responsible for assessing each CRP candidate against the legislative criteria to determine its suitability for the CRP process.

The CRP Secretariat consists of four members:

- Two permanent members, being the SES Band 1 Assistant Commissioner from PAL that is responsible for the CRP (as Chair of the Secretariat) and the EL2 Director from the Legislation Care and Maintenance Team in the PAL business line.
- A rotating EL2 Director from the Tax Counsel Network (**TCN**) in the ATO Law Design and Practice Group, selected by the ATO's Chief Tax Counsel.
- A rotating EL2 Director from a business line in the Client Engagement Group, invited by the PAL Deputy Commissioner in consultation with that staff member's SES officer.

The rotating members are selected based on their broad tax technical knowledge and understanding of the CRP process and criteria.

4.1.4.2. The assessment process by the CRP Secretariat

The CRP Secretariat discusses the CRP candidate with relevant ATO business line subject matter experts, the TCN or other PAL staff to assess whether:

- the CRP legislative criteria are met;
- interpretative and administrative approaches have been fully considered; and
- the issue may be too complex or inappropriate to be rectified using the CRP.

This assessment process involves:

- Consideration of materials that would assist in ascertaining the *intended* purpose or object of the relevant provision proposed to be modified:
 - The Explanatory Memorandum which inserts and/or amends the relevant provision;
 - Second Reading Speeches;
 - Government announcements and press releases pertaining to the origins and history of the relevant provision; and
 - Purposive statements or guides to interpretation in the relevant legislative provision (e.g. What this Division is about and Examples).
- Analysis of the tax outcome under the application of the existing law to determine whether the proposed CRP modification is reasonable having regard to the intended purpose or object of the relevant provision.
- Consideration and independent analysis of advice from ATO business lines that have direct responsibility for administering the relevant taxation law as to:
 - The compliance cost impact of the proposed CRP modification. This is to determine whether the cost of complying with the proposed CRP modification is disproportionate to the intended purpose or object of the relevant provision; and
 - Why the present administrative approaches are not sufficient to address the issue. This is to ensure all other avenues have been exhausted.
 - The ATO has advised that to date, the CRP Secretariat has not had cause to disagree with a business line's assessment that all available administrative or interpretative approaches have been exhausted.

The CRP Secretariat's assessment or decision represents a consensus (rather than unanimous) view of all Secretariat members. Nonetheless, the ATO has advised the IGTO that to date, there have been no disagreements amongst CRP Secretariat members about a CRP candidate. If disagreement were to occur, the Chair of the CRP Secretariat (i.e. the PAL Assistant Commissioner responsible for the CRP) will make a final decision based on the views expressed by all Secretariat members and available evidence.

If the CRP Secretariat considers that the CRP candidate does *not* meet the CRP criteria:

- The PAL CRP Team captures the CRP Secretariat's decision and reasons in the 'Commissioner's Remedial Power Assessment Methodology Form' ('Candidate Assessment Methodology Form' or

‘CAM Form’). The CRP Secretariat is then sent the CAM Form for comment before it is provided to the entire CRP Advisory Panel for their consideration and comments.⁸⁷

- The CAM Form contains details to assist the CRP Advisory Panel in deciding the suitability of the candidate. It provides a summary of the candidate, the proposed modification, the extrinsic materials considered, assessment of the relevant CRP criteria considered, and the conclusion reached by the CRP Secretariat.

If the CRP Secretariat considers that the CRP candidate *meets* the CRP criteria, and the CRP is an appropriate mechanism to resolve the issue:

- The PAL CRP Team prepares a submission which is first sent to the CRP Secretariat for comment before it is circulated to selected members of the CRP Advisory Panel. The CRP submission contains a similar level of details as the CAM Form.
- The CRP Team engages the ATO’s RAB to prepare a costing assessing the budget impact of the proposed CRP modification. RAB’s costing is provided to the Treasury for consideration and approval.

4.1.5. Assessment by the CRP Advisory Panel

The ATO has explained to the IGTO that the CRP Advisory Panel is a technical advisory group comprising private sector experts and representatives from the ATO and the Treasury. Currently, the ATO does not have any Charter to govern the functions of the Advisory Panel. However, the ATO has ‘Consultancy Services’ contracts with external members of the CRP Advisory Panel. The sample contract⁸⁸ that the ATO provided to the IGTO states:

C.A.2 The requirement

The Commissioners Remedial Power Panel (CRP) will convene on an ad hoc basis in order to deliberate on potential CRP candidates presented to them by the ATO and make recommendations on the use of the remedial power. In performing this function, the CRP Panel would identify and consider all implications from the exercise of the CRP to ensure that its exercise is appropriate in the circumstances or advise otherwise.

The role of the CRP Panel would be consultative as well as advisory. The CRP Panel’s advice will assist the Commissioner in managing consideration of issues that may potentially be addressed with the CRP.

The services will be delivered on an as required basis and relate to, but not restricted to, the following issues:

- *Consultation on the suitability of exercising the CRP,*

⁸⁷ Prior to June 2019, these CRP candidates would not be provided to the CRP Advisory Panel for consideration.

⁸⁸ ‘Commonwealth Contract – Consultancy Services’, 28 May 2018.

- *Independent assessment of CRP candidates,*
- *Identification of implications of exercising the CRP, and*
- *Other issues*

C.A.2(a) Standards

The Supplier [i.e. the relevant contracted CRP Panel member] must ensure that any goods and services provided under this Contract comply with all applicable Australian standards (or in its absence an international standard) including any requirements or standards specified in this Statement of Work...

The service contract has requirements regarding security clearance held by the Supplier, Work Health and Safety, conflict of interest, confidentiality, etc. It does not specify any requirements regarding the standards of services delivered by the Suppliers.

External members of the CRP Advisory Panel are remunerated for their services based on an hourly rate. Funding is reserved from within the ATO's operating budget and allocated to PAL as the ATO business line responsible for the administration of the CRP. The level of funding reserved to compensate Panel members is based on the work Panel members are anticipated to undertake across the duration of a contract period,⁸⁹ which is derived from prior years' data.

4.1.5.1. Members of the CRP Advisory Panel

The CRP Advisory Panel considers each CRP candidate and recommends to the Commissioner whether or not the CRP should be exercised.

The CRP Advisory Panel comprises 10 individuals:

- From the ATO:
 - SES Band 2 PAL Deputy Commissioner (as Chair);
 - SES Band 1 Assistant Commissioner from the Legislation Care and Maintenance Team in the PAL business line;
 - SES Band 1 Assistant Commissioner from the Private Wealth Technical Leadership and Advice group (as a rotating ATO Business Line member);
- From the Treasury:
 - Assistant Secretary from the Law Division in the Corporate and Foreign Investment Group; and
- External members:

⁸⁹ Currently 3 years.

- Six expert external consultants.
 - In 2023, the ATO has undertaken a process to refresh the membership of external members of the CRP Advisory Panel. The Panel is now comprised of 2 new members, and 4 of the previous members (the 2 new members were not members of the ‘Tripartite Working Group’ referenced below).
 - Prior to the refresh exercise, all six external consultants were previously members of the ‘Tripartite Working Group’ established in 2014 to consider potential statutory remedial power for the Commissioner.

4.1.5.2. The assessment process by the CRP Advisory Panel

Prior to June 2019, the CRP Advisory Panel was only invited to consider potentially successful CRP candidates. From June 2019, the CRP Advisory Panel considers all CRP candidates after the CRP Secretariat has completed its triage. Members of the CRP Advisory Panel make their individual recommendation as to whether the CRP should be exercised. The IGTO notes that in one case sampled by the IGTO,⁹⁰ the CRP Panel members had mixed views as to the suitability of the candidate for the CRP.

The CRP Advisory Panel’s recommendation is persuasive rather than determinative as to the Commissioner’s exercise of the CRP. The decision to exercise the CRP rests with the Commissioner, a Second Commissioner or the PAL Deputy Commissioner (as the Commissioner’s delegate). Practically, the relevant decision maker will consider analysis and recommendation by all relevant CRP advisory stakeholders (i.e. CRP Secretariat, CRP Advisory Panel, and Board of Taxation) before making his or her decision.

Where the CRP Secretariat has assessed a CRP candidate as suitable for the CRP

A CRP Panel meeting is held to discuss the candidate. Generally, only two of the six expert external consultants are invited to attend each Panel meeting, unless the issues being considered would benefit from wider consultation. The external expert consultants are selected by the Chair of the Advisory Panel (i.e. PAL Deputy Commissioner) based on the experts’ experience and tax technical background in the subject matter relating to the candidate being considered.

The CRP Advisory Panel members that attend the relevant Panel meeting are provided with, prior to the meeting, a CRP submission outlining the history of the issue, the proposed modification, and an assessment on how each of the CRP criterion has been met. Advice from the Board of Taxation is also provided to those CRP Advisory Panel members for consideration. The Panel members may question the PAL CRP Team and relevant ATO technical experts on matters relating to the candidate before making their recommendation.

If the CRP Advisory Panel considers that the CRP candidate meets all of the CRP criteria and the CRP is an appropriate mechanism to resolve the issue, it will recommend the CRP be exercised. Subject to the Treasury’s advice that the budgetary impact of the proposed CRP modification is negligible, the PAL CRP

⁹⁰ Candidate 55 Loss carry back tax offset.

team will, in consultation with the relevant ATO business line, draft a legislative instrument to implement the CRP modification. The process to implement a CRP modification is discussed further at section 4.1.6 of this Chapter.

If the CRP Advisory Panel considers the CRP candidate does not meet all of the CRP criteria or is otherwise unsuitable for the CRP, the CRP Secretariat will consider the Panel's advice and resolve any issues raised. The CRP Advisory Panel may reconvene to consider the candidate. If the CRP Advisory Panel's view is unchanged, the CRP candidate will not be progressed through the remainder of the CRP process. In these cases, the ATO will consider other pathways for resolving the technical issue raised by the candidate if appropriate, including the MTA process and the 'advocacy' process, where PAL works with relevant stakeholders across the ATO to identify and develop law reform ideas to be shared with Treasury, who has ultimate responsibility for providing advice to Government on tax policy and law design issues.

The interaction between the CRP and law change processes is discussed further in Chapter 5.

Where the CRP Secretariat has assessed a CRP candidate as not suitable for the CRP

The CRP Secretariat emails the CAM Form to the entire CRP Advisory Panel for consideration and comments.⁹¹

If the CRP Advisory Panel agrees with the CRP Secretariat that the candidate is unsuitable for the CRP, it will not progress through the remainder of the CRP process. The ATO will consider other pathways to resolve the issue if appropriate, including the MTA process and advocacy. The interaction between the CRP and law change processes are discussed further in Chapter 5.

If the CRP Advisory Panel disagrees with the decision of the CRP Secretariat, the CRP Secretariat will reassess the candidate. If the CRP Secretariat subsequently considers the candidate suitable after taking into account feedback from the CRP Advisory Panel, advice on the budgetary impact of the proposed modification will be sought, and the remainder of the CRP process will be followed.

To date, the CRP Advisory Panel has not disagreed with any assessment by the CRP Secretariat that a candidate was not suitable for the CRP. Further, since the introduction of the CRP in 2017, the ATO has not made any CRP decision that is inconsistent with the CRP Advisory Panel's assessment.

4.1.6. Implementation of CRP modifications

Where the relevant decision maker (ordinarily the PAL Deputy Commissioner) supports the exercise of the CRP, a CRP legislative instrument and accompanying explanatory statement are drafted and released for public consultation. The ATO will generally consult for a period of four weeks, however, where the matter requires urgent resolution, a shorter consultation period may be appropriate. The ATO also consults the relevant members of the CRP Advisory Panel involved in considering the candidate and the Board of Taxation on the draft documents.

⁹¹ Prior to June 2019, these CRP candidates would not be provided to the CRP Advisory Panel for consideration.

At the conclusion of public consultation, the PAL CRP team will consider all feedback received and prepare final versions of the legislative instrument and explanatory statement and provide them to the relevant decision maker (ordinarily the PAL Deputy Commissioner) for approval. If the legislative instrument and explanatory statement are approved by the relevant decision maker, PAL will arrange to register them with the Office of Parliamentary Counsel. Once registered, the legislative instrument is tabled in Parliament no later than six days after the registration date.

Once the legislative instrument is tabled in Parliament, 15 parliamentary sitting days must pass before the legislative instrument comes into effect.⁹² This time provides Parliament with the opportunity to review and potentially disallow the instrument. If the instrument is disallowed, six months must pass before the instrument can be tabled in Parliament again, unless the relevant House of the Parliament approves, by resolution, the tabling of the instrument.⁹³ The legislative instrument comes into effect on the first calendar day after the end of the parliamentary disallowance period.

4.1.7. Communication of decisions to CRP applicants

Where a CRP candidate is assessed to be suitable for an exercise of the CRP, the ATO will advise the applicant via email when the CRP Advisory Panel recommends the use of the CRP. The ATO will also advise the applicant when key implementation milestones, such as registration of the legislative instrument, are met ahead of the legislative instrument taking effect.

Where a CRP candidate is assessed to be unsuitable for an exercise of the CRP, external applicants will be sent a letter that details the proposed CRP modification, key facts, and the collective reasoning of the CRP Secretariat and the CRP Advisory Panel on why the candidate was found to be unsuitable. The IGTO have reviewed several of these communications as part of our investigation and have observed that these communications discuss each of the relevant criteria in detail and provide clear reasons to explain why the CRP was not exercised. If the applicant is an internal ATO officer, similar information will be provided on why the candidate was found to be unsuitable, albeit in a less formal format.

The ATO has advised that it does not routinely advise applicants whether the ATO is currently undertaking other action (such as advocating for law change) to resolve the issue underpinning the candidate. However, where the issue is ultimately resolved via legislative amendment, the IGTO has observed that the ATO will communicate this information on its website.⁹⁴

⁹² *Legislation Act 2003* s 42; *Taxation Administration Act 1953* sch 1 s 370-20.

⁹³ *Legislation Act 2003* s 48.

⁹⁴ See for example: Australian Taxation Office, 'Commissioner's remedial power not applied – business' (Last modified 22 November 2022) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-hasn-t-been-used/Commissioner-s-remedial-power-not-applied---business/>>.

4.2. Potential CRP candidates are rejected by the ATO if they only affect one taxpayer

4.2.1. Stakeholder concerns and suggestions

A stakeholder has raised concerns that the ATO's view outlined in its website guidance, extracted below in 4.2.2, is narrow and contrary to the intention of the legislation. In the main, the stakeholder acknowledged that the ATO's aim is to clarify that the CRP is a method to remedy underlying technical deficiencies in the law and not a vehicle to replace or displace existing legal review rights (such as those under Part IVC of the TAA 1953). However, the stakeholder observed that in its current form, the text suggests that the CRP cannot be exercised where only one taxpayer is identified as being adversely affected by the legislative deficiency or anomaly.

In their view, the law provides only that the class of taxpayers or circumstances needs to be sufficiently specified, rather than quantified. As such, in their view, the number of affected taxpayers is an irrelevant consideration when determining whether or not a CRP candidate meets the criteria set out in subsection 370-5(3). The stakeholder considered that the ATO's guidance in this regard needs to be reconsidered to minimise the risk that a CRP candidate which otherwise meets the criteria is prematurely removed from consideration before it reaches the CRP Secretariat or CRP Advisory Panel, resulting in adverse or inequitable outcomes for affected taxpayers.

4.2.2. ATO information

Subsection 370-5(3) states:

(3) A modification applies generally, unless the determination states that the modification only applies:

- a) to a specified class of entities; or*
- b) in specified circumstances.*

The ATO website guidance states:⁹⁵

The CRP may only be used to resolve general issues that arise for all taxpayers, or issues that impact a particular class of taxpayers. It can't be used to resolve specific issues affecting a particular individual. The CRP is not an alternative to objecting to a decision made by the Commissioner.

⁹⁵ Australian Taxation Office, 'Commissioner's remedial power' (Last modified 27 August 2020) <<https://www.ato.gov.au/general/ato-advice-and-guidance/commissioner-s-remedial-power/>>.

The ATO has provided the following explanation of its approach to subsection 370-5(3):⁹⁶

Subsection 370-5(3) of Schedule 1 to the Taxation Administration Act 1953 (TAA 1953) provides that CRP modifications will apply generally, but also provides legislative authority for a modification to deviate from general application and instead apply only to a specified class of entities, or in specified circumstances. This does not provide authority for modifications to apply to a particular individual. The ATO web guidance reflects this.

*The ATO's web guidance reflecting the CRP cannot be used to resolve a specific issue affecting a particular individual is consistent with Parliament's intention about how the CRP was intended to apply. At paragraph 1.54 of the Explanatory Memorandum to the Bill which ultimately legislated the CRP, it states (**emphasis added**):*

*The Remedial Power cannot be used to modify the operation of a taxation law for a particular entity. **This includes exercising the power in relation to a class that is so narrowly defined that it could practically only consist of a particular entity.** This can be distinguished from a class that may be capable of consisting of many entities but actually only applies at any given time to one particular entity.*

Paragraph 1.55 of the Explanatory Memorandum also explains that '[h]aving the Remedial Power apply broadly to entities and circumstances ensures that the power properly relates to taxation and helps prevent it from being exercised in an arbitrary way. This ensures that its use is consistent with the requirements of the Constitution.'

These extracts demonstrate that Parliament never intended for the CRP to be exercised in respect of a class defined so narrowly that it could only include one individual.

*The ATO also considers the requirement that a CRP modification can only apply in specified circumstances' (as per paragraph 370-5(3)(b) of Schedule 1 to the TAA 1953) was designed to allow the scope of the modification to be targeted, and cannot be interpreted to support the CRP being exercised in respect of one individual or entity. This is supported by various references in the Explanatory Memorandum. For instance, at paragraph 1.65 of the Explanatory Memorandum, it states that '[a] determination may provide that it only applies in **specified circumstances**', for example, 'to ensure that a particular modification does not result in asymmetrical outcomes.'*

*Paragraph 1.66 of the Explanatory Memorandum further provides that '[i]n addition to the favourable application rule, **an entity will need to consider the terms of the legislative instrument to work out the scope of application of the particular determination and whether it applies to them.** Specifying that the determination only applies in **specified***

⁹⁶ Australian Taxation Office, 'IGTO Information Request 4 – Terms of Reference No. 2', 16 June 2022.

circumstances could, for example, include a requirement to apply the modification consistently over the ten-year period that an instrument remains in force.'

*Paragraph 1.67 of the Explanatory Memorandum provides a further example 'of where a **determination may state the modification only applies in "specified circumstances"**', such as 'where the determination **caters for asymmetrical outcomes** by providing that it does not apply to you if it would:*

- produce a less favourable result for another entity because the other entity's rights or obligations under a taxation law are worked out by reference to your rights or obligations under a taxation law; and*
- be reasonable for you to be aware of this impact on the other entity - for example, where it would be reasonable to expect you to be aware that the other entity's rights or obligations under a taxation law are worked out by reference to yours.'*

These extracts show that the term 'specified circumstances' is used to provide further clarification about how a CRP modification is to apply, to appropriately define its scope, or to prevent asymmetrical outcomes from a CRP modification. Therefore, this term cannot be interpreted in such a way to suggest the CRP can be applied for one individual or entity. We believe that such an interpretation would also be inconsistent with Parliament's clear guidance regarding how the term 'class of taxpayers' should be interpreted as noted above.

Therefore, we believe the ATO's guidance and practice is consistent with Parliament's intent that the CRP can only apply to a broadly defined class of taxpayers, in specified circumstances, and not to a particular individual.

4.2.3. IGTO observations

The ATO website states that the CRP '*can't be used to resolve **specific issues affecting a particular individual***'⁹⁷ [emphasis added].

The ATO's explanation as extracted above recognises that:

- a CRP modification applies generally but can also apply to a specified class of entities, or in specified circumstances; and
- the CRP is not an appropriate mechanism to address 'specific issues' affecting 'a particular individual' as it could result in the power being exercised in an arbitrary and inconsistent manner.

The IGTO acknowledges that the CRP is intended to remediate situations where the law is not operating as intended by Parliament. The legislation does not require a minimum number of taxpayers to be affected and indeed does not require ALL the taxpayers that are affected to be identified. If a CRP

⁹⁷ Australian Taxation Office, 'Commissioner's remedial power' (Last modified 27 August 2020) <<https://www.ato.gov.au/general/ato-advice-and-guidance/commissioner-s-remedial-power/>>.

application raises unintended consequences in the law, then the IGTO considers that it should be assessed against the CRP legislative requirements.

Based on the information provided by the ATO for the purpose of this review, including the list of CRP applications assessed by the ATO from the commencement of the CRP, the IGTO has not observed an instance where the ATO has rejected a CRP application *solely* because only one taxpayer has been identified as being adversely impacted.

The IGTO observed that, of the 68 CRP matters listed on the ATO's internal list of CRP candidates, six (6) were noted as being only applicable to 'one particular entity'. However, each of the six (6) candidates was also determined to have been inconsistent with the intended purpose or object of the relevant provision.

The IGTO has selected one of those six candidates for detailed sampling review to verify the ATO's CRP consideration process in that case. The selected candidate is referred to as 'Simplified reporting to access tax relief at trustee level' on the ATO webpage 'When the Commissioner's remedial power has been considered but not applied.'⁹⁸ This candidate was referred to the ATO by a tax agent on behalf of a client. Further details of the ATO's consideration of this candidate are set out below.

4.2.3.1. IGTO review of sampled cases

The ATO has explained that it received this CRP application in May 2017, i.e. shortly after the commencement of the CRP legislation. Accordingly, the ATO did not follow the process pathway that is currently adopted by the ATO and as published on the ATO's website.

Candidate Name	Accessing Managed Investment Trusts (MIT) withholding rate for a chain of entities simplified reporting
Candidate Number	16 (on the ATO's internal Master Candidate List)
Issues prompting CRP application	Due to its structure, to obtain certain credit, the applicant must lodge tax returns for a number of entities (at least six) in its group.
CRP sought	To simplify the applicant's reporting obligations (i.e. lodging one tax return instead of multiple tax returns and for tax to be paid at the 30% rate rather than 45% at the trustee level).
CRP Secretariat Determination	No
CRP Advisory Panel Consultation	No
ATO website publication	Yes

⁹⁸ Australian Taxation Office, 'Commissioner's remedial power not applied – business' (Last modified 12 October 2023) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-hasn-t-been-used/Commissioner-s-remedial-power-not-applied---business/>>.

Other relevant matters	<p>The candidate was triaged by the PAL CRP Team, who made an initial assessment that an exercise of the CRP was not appropriate, and it was not necessary to engage the full CRP Secretariat.⁹⁹</p> <p>The PAL CRP Team considered that the proposed CRP modification would be inconsistent with the intended purpose or object of the relevant provision, having regard to the Explanatory Memorandum to the Tax Laws Amendment (2007 Measures No 3) Bill 2007. Further, it was noted that the applicant was only inquiring about options that might be available for them, rather than a modification to the law for all entities – the applicant did not raise concerns that the relevant trust reporting provisions were not operating as intended.</p> <p>The ATO finalised this candidate as unsuitable for the CRP and referred the applicant to the ATO Public Groups & International's Advice and Guidance area if they wished to commence an early engagement discussion.</p>
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Ultimately, the IGTO acknowledges the intent of Parliament for the CRP not to be used in place of formal review rights or to 'modify the operation of a taxation law for a particular entity', as suggested by paragraph 1.54 of the EM to the Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016,¹⁰⁰ and in that respect the current ATO guidance is consistent with the EM.

However, Division 370 does not prescribe the minimum number of affected taxpayers as a criterion for the exercise of the CRP. Practically, it would be difficult to assess with any degree of certainty whether an issue only affects one taxpayer. Further it is also important to recognise that the size of the class of taxpayers affected by the proposed CRP may vary at different points in time and as such, consideration both of the current circumstances and possible future impacts are necessary.

Whilst it would have been preferable for Candidate 16 to be formally considered by the CRP Secretariat and the CRP Panel to ensure robust decision making, the IGTO appreciates that the matter was considered during the early months of the CRP (i.e. May 2017) and the ATO has since updated its process to require all CRP candidates to be considered by both the CRP Secretariat and the CRP Advisory Panel.

It is comforting that the IGTO's review of candidates considered by the ATO, and the above case sampling has not identified any instances where a CRP candidate has been rejected solely because it was considered to only affect one taxpayer. The IGTO considers the current ATO CRP process whereby all CRP candidates are assessed by the CRP Advisory Panel whether they are initially triaged by the CRP Secretariat as being potentially suitable or unsuitable for the CRP, theoretically addresses stakeholders'

⁹⁹ Since June 2019, the ATO has updated its CRP process such that all CRP candidates are assessed by both the CRP Secretariat and the CRP Advisory Panel.

¹⁰⁰ The EM states: *'The Remedial Power cannot be used to modify the operation of a taxation law for a particular entity. This includes exercising the power in relation to a class that is so narrowly defined that it could practically only consist of a particular entity. This can be distinguished from a class that may be capable of consisting of many entities but actually only applies at any given time to one particular entity.'* Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016, para 1.54.

concerns that potential CRP candidates may be prematurely rejected where it is identified that only one taxpayer may be affected. That is, because the CRP Advisory Panel should provide their independent advice and input into the relevant decision.

4.3. Inconsistency with the intended policy objective is a primary reason many candidates are found unsuitable for the CRP

4.3.1. Stakeholder concerns and suggestions

A criterion for exercising the CRP is that the proposed modification of a provision is ‘not inconsistent with the intended purpose or object of the provision.’¹⁰¹

Some stakeholders have correctly observed that this criterion has been the primary reason for CRP candidates failing to satisfy the requirements set out in Division 370. As at 30 September 2023, the ATO website listed 40 instances when the CRP had been considered but not applied. Of those, 29 (i.e. 72%) were unsuccessful for the CRP because the proposed modification would be inconsistent with the intended purpose or object of the relevant provision.

As part of the IGTO’s investigation, the ATO’s internal list of all CRP candidates received has been reviewed. As at 30 September 2023, the ATO’s internal list had 69 candidates, 68 of which had been finalised – seven (7) were successful for the CRP, four (4) were withdrawn by applicants, and 57 were assessed as not suitable for the CRP. Of these 57 unsuccessful CRP candidates, 37 (i.e. 65%) were unsuccessful because the proposed modification was determined to be inconsistent with the intended purpose or object of the relevant provision.

Stakeholders suggested that this could be due to the type of candidates submitted to the ATO or because the ATO’s assessment of the intended purpose of the relevant provisions was conservative. Regardless of the reason, this result highlights the importance of having external and independent expert inputs during the CRP candidate assessment to ensure the ATO’s CRP decision making process is informed by external views and perspectives about the *intended purpose or object of the provision*.

4.3.2. ATO Information

The IGTO observed¹⁰² (based on the ATO information) that, in the 37 cases where the ATO decided not to use the CRP because the proposed CRP modifications were determined to be inconsistent with the intended purpose or object of the law, four (4) CRP issues (11%) were addressed through legislative solutions (e.g. through Treasury’s miscellaneous taxation amendments) and three (3) (8%) were

¹⁰¹ *Taxation Administration Act 1953* sch 1 s 370-5(1)(a).

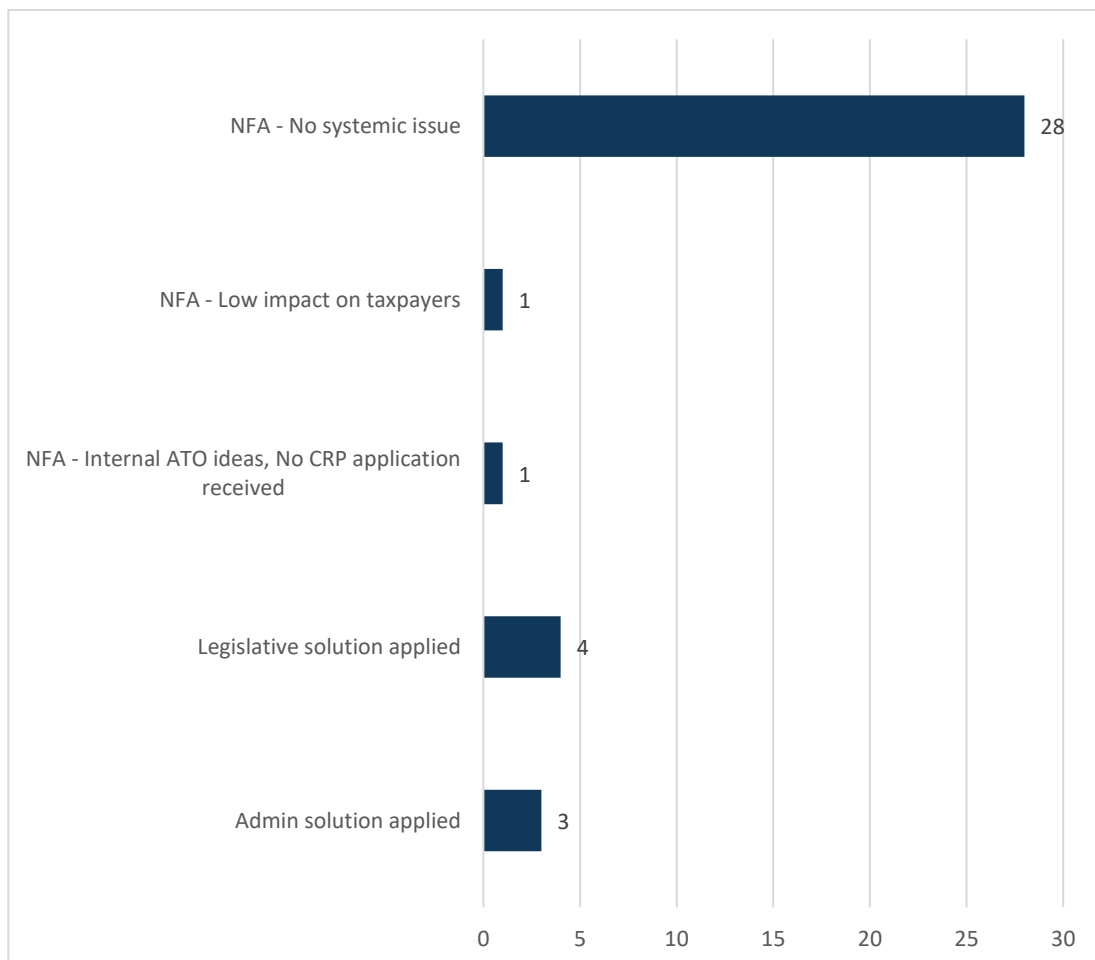
¹⁰² These statistics were current as at 30 September 2023.

addressed through ATO administrative solutions. The remaining 30 CRP issues (81%) appear to remain unresolved after the ATO's decision not to exercise the Commissioner's discretion to use the CRP.

The ATO explained that this was because in their view:

- they did not raise any systemic issues (28 issues);
- the proposed modification would make it easier for the ATO to manage running balance accounts, but would have little impact on the taxpayer experience (1 issue); and
- the issue was an internal ATO idea identified before the CRP was enacted, and in the absence of any request to progress it, the ATO has not advocated for legislative reform in this area (1 issue).

Figure 4.1: Post-CRP outcomes for CRP candidates where the proposed modification was considered to be inconsistent with the intended purpose or object of the provision



4.3.3. IGT0 observations

Based on the ATO information, it is clear that the vast majority of CRP candidates have been unsuccessful because the proposed modifications were determined to be inconsistent with the intended purpose or object of the provision. This may give the impression that this criterion and/or the ATO's application of it, is causing the CRP to be underutilised and preventing it from achieving its intended purpose. However,

the IGTO considers that a high number of unsuccessful CRP applications does not necessarily mean the CRP has not operated effectively.

As mentioned in Chapter 1, the IGTO considers that the measure of success for the CRP should be the extent to which the CRP expedites the resolution of small unintended outcomes in the tax law, that may otherwise not be prioritised for quicker resolution through law change, due to limited parliamentary resources.¹⁰³ Accordingly, if a large number of CRP candidates were unsuccessful because they failed this criterion, and these candidates subsequently needed to go through the MTA or other law change process, then we may infer that this criterion is somehow preventing the CRP from achieving its intended purpose.

Figure 4.1 above shows that only 11% (i.e. 4 out of 37) of unsuccessful CRP applications (due to the proposed modification being inconsistent with the intended purpose or object of the provision) were subsequently resolved through the legislative process. The ATO considered that the majority of unsuccessful CRP applications (28 applications where the proposed modification was inconsistent with the intended purpose or object of the provision) did not require further or immediate legislative intervention because they did not raise a systemic issue. The IGTO notes that the ATO's assessment of no systemic issues in these cases (and consequentially, the decision not to engage with Treasury to resolve the issues raised) was not subject to independent expert inputs.

The high number of CRP candidates that failed this criterion and remained unresolved highlights the importance of having external and independent expert inputs to ensure the ATO's CRP decision making process is informed by external views and perspectives about the *intended purpose or object of the provision*.

As part of this review investigation, the IGTO has sampled seven (7) CRP candidates against the ATO's CRP process pathway, including the ATO's assessment of whether the relevant CRP modifications are 'not inconsistent with the intended purpose or object of the provision'. A table providing details of those candidates and the ATO's assessment of relevant CRP legislative criteria is included in Appendix C of this report. The IGTO's observations based on our sampling review of those candidates are discussed in the 'IGTO case sampling' section below.

4.3.3.1. IGTO review of sampled cases

The IGTO has conducted a sampling review of the following seven (7) CRP candidates:

1. Candidate 16: Accessing Managed Investment Trusts (MIT) withholding rate for a chain of entities simplified reporting

¹⁰³ The EM states: '*Schedule 1 to this Bill establishes a Remedial Power for the Commissioner to allow for a more timely resolution of certain unforeseen or unintended outcomes in the taxation and superannuation laws*' and '*Government action is needed to provide for the more timely resolution of unintended outcomes, particularly smaller unintended outcomes which struggle to be prioritised for resolution under the existing approach of primary law change*'. Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016, paras 1.9 and 1.112.

2. Candidate 33: Debit value for certain capped defined benefit income streams
3. Candidate 35: GST - ensuring the supply of cars for use by disabled people remains GST-free
4. Candidate 44: Deceased estates - covered entity
5. Candidate 50: Veteran payment issues
6. Candidate 55: Loss carry back tax offset
7. Candidate 58: First home saver superannuation scheme

Further details of those candidates and the ATO's assessment of relevant CRP legislative criteria are set out in Appendix C. Table 4.1 below summarises:

- The CRP outcome of the Candidate (column 'CRP?')
- Whether the CRP Advisory Panel was consulted during the ATO's assessment of the candidate (column 'CRP Panel consultation')
- The ATO's assessment of whether the proposed CRP modification was not inconsistent with the intended purpose or object of the relevant provision (column 'CRP Criterion 1')
- Whether the ATO expressly stated the intended purpose or object of the relevant provision in its assessment of the candidate (column 'Was intended purpose or object expressly stated?')
- Whether the ATO considered relevant materials. Paragraph 370-10(a) of Sch 1 to the TAA outlines what materials *must* be considered and paragraph 370-10(b) of Sch 1 to the TAA outlines what materials *may* be considered (column 'Did the ATO consider relevant materials?')
- Whether primacy was given to the text of the provision. Paragraph 370-10(c) of Sch 1 to the TAA states that 'primacy is not required to be given to the text of the provision. (column 'Was primacy given to the text of the provision?')

Table 4.1 Summary of the ATO's assessment of CRP candidates against the intended purpose or object of the provision

#	CRP?	CRP Panel consultation	CRP Criterion 1	Was intended policy or object expressly stated?	Did the ATO consider relevant materials?	Was primacy given to the text of the provision?
16	No	No	Not met	No	Unclear	Unclear
33	No	No	Met	Yes	Yes	No
35	Yes	Yes	Met	Yes	Yes	No
44	Yes	Yes	Met	Yes	Yes	No
50	No	No	Not met	No	Yes	Yes
55	No	Yes	Not met	No	Yes	Unclear

#	CRP?	CRP Panel consultation	CRP Criterion 1	Was intended policy or object expressly stated?	Did the ATO consider relevant materials?	Was primacy given to the text of the provision?
58	No	Yes	Met	Yes	Yes	No

Of the above seven (7) sample candidates:

- three (3) were found to be inconsistent with the intended purpose or object of the provision (i.e. Candidates 16, 50, and 55), but the CRP Advisory Panel was only consulted during the CRP assessment process on one (1) of these three (3) candidates (i.e. Candidate 55).
- In all three (3) sampled candidates that were found to be inconsistent with the intended purpose or object of the provisions, the ATO did not expressly state what (in their view) was the *intended* purpose or object of the provision in the CAM forms outlining the ATO's assessment of the candidates.
- It is not clear based on ATO documentation made available to the IGTO whether the ATO considered relevant materials as required under section 370-10 (including whether primacy was not given to the text of the provision) in its decision that the CRP modifications proposed for Candidates 16 and 55 were inconsistent with the intended purpose or object of the provision. The absence of an express statement or conclusion as to the intended purpose or object of the provision contributes to the difficulty in making this assessment.
- Based on the CAM form for Candidate 50, the IGTO observes that, whilst the ATO considered relevant materials as required under paragraphs 370-10(a) & (b), the ATO's consideration seemed to focus on the statutory interpretation or meaning of the word 'repay' in the relevant provision, as opposed to the intended purpose of the provision itself.

Further details about Candidates 50 and 55 are discussed below.

In relation to Candidate 16, the IGTO observed that the ATO's documented assessment of this candidate is limited. The ATO has explained that it received and assessed this candidate in May 2017, shortly after the CRP commenced. The ATO's CRP process at that time did not involve the full CRP Secretariat or the CRP Advisory Panel if the PAL CRP team considered the candidate as potentially unsuitable for the CRP. Ultimately, the ATO referred this candidate to its Public Groups and International (PGI) Advice and Guidance area for an early engagement discussion.

IGTO case sample: Candidate Number 55 – Loss carry back tax offset	
Issues prompting CRP application	<p>The temporary 'loss carry back tax offset' allowed certain corporate tax entities to carry back a tax loss for certain income years and apply it against tax paid in a previous income year to generate a refundable tax offset.</p> <p>Entities needed to make a choice to claim the refundable tax offset.</p> <p>The Explanatory Memorandum to the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020 suggested that a loss carry back choice could</p>

IGTO case sample: Candidate Number 55 – Loss carry back tax offset	
	be changed in certain circumstances. However, the legislation did not have any mechanism to support an amendment to the loss carry back choice.
CRP sought	To allow taxpayers to revoke or change their loss carry back choice.
CRP Secretariat Determination	<p>Candidate was unsuitable for the CRP because the proposed modification was inconsistent with the intended purpose or object of the provision.</p> <p>The CAM form outlines the CRP Secretariat's reasons as follows¹⁰⁴:</p> <p><i>The temporary loss carry back measure was enacted by the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Act 2020 and is contained in Division 160 of the Income Tax Assessment Act 1997 (ITAA 1997). The choice is permitted by subsection 160-15(1) and subsection 160-15(2) specifies the method to make the choice. The Explanatory Memorandum makes two references that indicates that a loss carry back choice is revocable and can be changed. At paragraph 2.30, it notes that:</i></p> <p><i>[A]n entity might wish to claim the offset when an assessment for an income year is amended after it has lodged its income tax return, making loss carry back possible for the current year or changing the maximum amount of the offset available - in such a case, the Commissioner would have to allow the choice to be made after the date for lodging the income tax return.</i></p> <p><i>Example 2.1, which steps through the process for calculating the refundable tax offset, makes the following statement:</i></p> <p><i>If Company A's loss carry back choice does not reflect this position, it can modify the choice to reduce the amount of tax losses carried back.</i></p> <p><i>As a result, the unutilised amount of the loss (\$130,000) can be carried forward and deducted in future income years.</i></p> <p><i>However, the Explanatory Memorandum does not provide any guidance about the method for amending a loss carry back choice, or how the refundable tax offset is recalculated after a choice is amended. Division 36 of the ITAA 1997, which allows a corporate tax entity to carry forward tax losses under section 36-17, mirrors the choice available for carrying back losses (noted at paragraph 2.25 of the Explanatory Memorandum) and has a mechanism to amend a choice and a recalculation procedure.</i></p>

¹⁰⁴ Australian Taxation Office, 'Commissioner's Remedial Power Assessment Methodology Form – Revocable loss carry back choice' (Internal ATO document, undated).

IGTO case sample: Candidate Number 55 – Loss carry back tax offset	
	<p><i>The references from the Explanatory Memorandum cited above make clear that it would not be inconsistent with the intended purpose or object of the provision, section 160-15, for the loss carry back choice to be modified so that it can be revoked and changed. The emphasised parts of these references provide sufficient evidence to support this conclusion.</i></p> <p><i>However, as there is no guidance about the process a taxpayer would follow to amend their choice or how the refundable tax offset would be recalculated to reflect the new loss carry back entitlement after the choice is amended, the Commissioner would need to apply his own independent view about how these machinery provisions should be drafted to operate. A procedure to revoke and change a choice previously made is needed to assist taxpayers in complying with the law and understanding how that change can be made. Similarly, a recalculation procedure is needed to ensure that taxpayers are not carrying back a greater tax loss than they are entitled to, and the entitlement is amended when the choice is changed. These mechanisms mirror existing processes under section 36-17, and ensure a loss carry back choice mechanism works correctly and effectively.</i></p> <p><i>It is not within the scope of the CRP for the Commissioner to be designing a modification without some sort of evidence from the extrinsic materials to support it given a modification cannot be inconsistent with the intended purpose or object of the provision as explained by the relevant extrinsic materials. In this case, the ATO may be impermissibly broadening the policy to support a modification extending beyond merely providing for a revocable loss carry back choice to implementing the required machinery provisions. This issue would be better suited for rectification via legislative amendment where the required machinery provisions could be integrated into a more holistic solution.</i></p> <p><i>This issue is not suitable for CRP as the modification is inconsistent with policy intent.</i></p>
CRP Advisory Panel Consultation	<p>The ATO provided the CAM form for this candidate to all six external expert consultants (amongst other ATO and Treasury members of the Panel). The ATO received responses from four external experts and one ATO business line representative.</p> <p>The CRP Panel members had mixed views as to the suitability of the candidate for the CRP.</p>

IGTO case sample: Candidate Number 55 – Loss carry back tax offset	
ATO website publication	Yes - Commissioner's remedial power not applied - business Australian Taxation Office (ato.gov.au) ¹⁰⁵
Other relevant matters	<p>Prior to the CRP submission being made to the ATO, the Treasury and the ATO were progressing this issue as part of the MTA process. Nonetheless, the CRP candidate was formally considered by the CRP Secretariat (on 25 February 2021) and the CRP Advisory Panel (on 24 March 2021).</p> <p>On 5 May 2021 (i.e. less than 2 months from consideration of this issue by the CRP Advisory Panel), the Treasury published the exposure draft and explanatory statement for the MTA for public consultation. The MTA was introduced to Parliament on 24 June 2021 and passed by both Houses of Parliament on 1 December 2021.</p>

The CAM form for Candidate 55 does not expressly state the intended purpose or object of the loss carry back provisions in Division 160 of the *Income Tax Assessment Act 1997*. The extracts highlighted in red text above present a curious inconsistency in the ATO's rationale to exclude the CRP. On the one hand, the ATO considered it would not be inconsistent with the intended purpose or object of the provision for the loss carry back choice to be modified so that it can be revoked or changed; but on the other hand, the ATO considered that drafting machinery provisions to enable that modification would be inconsistent with the intended purpose or object due to lack of guidance in the extrinsic materials.

The IGTO observed that Candidate 55 followed the ATO's process pathway and included consultation internally (via the CRP Secretariat) as well as externally with external members of the CRP Advisory Panel. One Panel member commented:¹⁰⁶

... While I accept the point that making the choice revocable would require the insertion of further machinery provisions (which arguably stretches the boundaries of the capabilities of the CRP), there is equally no mention in the law of the choice being irrevocable... the absence of guidance in the EM on how to amend a choice to adopt the rules isn't a particularly compelling argument, given it is recognised that the machinery provisions to amend a choice are not present in the law.

That Panel member also identified other areas of confusion with the loss carry back provisions and ultimately concluded that these issues '*should be rectified via legislative amendment where the required machinery provisions could be integrated into a more holistic solution.*'¹⁰⁷

¹⁰⁵ Australian Taxation Office, 'Commissioner's remedial power not applied – business' (Last modified 12 October 2023) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-hasn-t-been-used/Commissioner-s-remedial-power-not-applied---business/>>.

¹⁰⁶ Email from Panel member to the ATO, 'RE: Commissioner's Remedial Power – Loss Carry Back Choice', 23 March 2021.

¹⁰⁷ Email from Panel member to the ATO, 'RE: Commissioner's Remedial Power – Loss Carry Back Choice', 23 March 2021.

Another Panel member commented:¹⁰⁸

...The comments in the EM strongly suggest that it was intended by Parliament that the choice was to be revocable... exercising the CRP for this candidate is likely to be at or beyond the boundaries of its original intention, but there appears to be arguments both ways...

The third Panel member agreed with the views expressed by the first two Panel members (extracted above). The fourth Panel member commented that they did not have anything further to add.

The IGTO observed that the ATO's decision not to use the CRP in Candidate 55 was not inconsistent with views provided by (some) members of the CRP Advisory Panel. However, it is curious to the IGTO that the CRP decision in this case seemed to be centred around the 'boundaries' of the CRP, as opposed to whether the proposed CRP modification meets the CRP criteria under section 370-5 (i.e. it is not inconsistent with the intended purpose or object of the provision being modified, is reasonable having regards to the intended purpose or object of that provision and compliance costs and has a negligible impact on the Commonwealth Budget). It is also unclear to the IGTO as to why the Panel considered exercising the CRP in this case would stretch or be at or beyond the boundaries of the CRP and the issue should be rectified via legislative amendment, since the CRP was enacted to provide a timelier but temporary resolution of unintended tax outcomes before a more permanent legislative amendment could be made.

The IGTO notes that the ATO does not currently have any Charter that governs the functions of the CRP Advisory Panel. The IGTO considers that it would be beneficial for the ATO to develop formal documentation to outline its governance of the CRP and the roles and terms of engagement with the CRP Advisory Panel. This is discussed further in section 4.5 below.

IGTO case sample: Candidate Number 50 – Veterans payment issues	
Issues prompting CRP application	<p>Taxpayers who have repaid an amount on which they previously paid tax may be able to amend prior year tax returns to receive a refund of the tax paid (section 59-30 of the ITAA 1997). This would apply to veterans who have to repay Department of Veterans' Affairs (DVA) pension because they have later received a Commonwealth Superannuation Corporation (CSC) military superannuation pension backdated to their date of discharge from the Defence force.</p> <p>The backdating leaves veterans with a large lump sum payment from which tax is withheld, which could be insufficient to cover the repayment to DVA, which could then prevent the veterans from being able to amend previous tax returns to receive refund of the tax previously paid.</p>
CRP sought	To modify the operation of the law to treat 'repaid' in section 59-30 of the ITAA 1997 as including an agreement to repay.

¹⁰⁸ Email from Panel member to the ATO, 'RE: Commissioner's Remedial Power – Loss Carry Back Choice', 24 March 2021.

IGTO case sample: Candidate Number 50 – Veterans payment issues

CRP Secretariat
Determination

Candidate was unsuitable for the CRP because the proposed modification was inconsistent with the intended purpose or object of the provision.

Per the CAM form¹⁰⁹ provided to the IGTO, the CRP Secretariat's reasons are as follows:

Section 59-30 was inserted into the ITAA 1997 by the Taxation Laws Amendment Act (No.4) 2003. The Explanatory Memorandum references this provision at paragraph 3.35 and 3.76 but no guidance is available on the meaning of repay. The legislative history of this provision shows that it was first introduced with the former section 22-5, using identical words. That provision was inserted by the Taxation Laws Amendment Act (No.2) 2003. Section 22-5 is discussed at paragraphs 3.6 to 3.11 of the Explanatory Memorandum of the Bill to that Act. There is further context about how the provision operates but no guidance exists on how to interpret 'repay' under the provision. At paragraph 3.6, the Explanatory Memorandum does note that:

*[T]axpayers will be permitted to amend an earlier year's income tax assessment to **exclude previously assessable income which must be repaid when it is repaid in a later year of income.***

The current Macquarie Dictionary defines repay as 'to pay back or refund'. In Thiess v Collector of Customs (2014) 250 CLR 664, the High Court of Australia held that dictionary meanings need to be considered in light of the purpose of statute.

The enactment of the original provision (section 22-5) was announced by the then Assistant Treasurer on 1 August 2001. In this announcement, he noted the measure was 'designed to benefit Australian Defence Force (ADF) members who are injured while on duty' but went on to say that the measure would 'also benefit taxpayers who have to repay income on which they previously paid tax.' When describing this measure in the media release, he spoke of taxpayers in general as the group the measure would benefit. The associated Bills Digest does not indicate that the then Government intended that any one particular class of taxpayers benefit from any special treatment under that provision.

While the explanatory materials do not provide explicit guidance on how the word repay is to be interpreted, paragraph 3.6 of the Explanatory Memorandum relating to the original provision indicates that a modification treating repay as including arrangements to repay would be

¹⁰⁹ Australian Taxation Office, 'Commissioner's Remedial Power Assessment Methodology Form – Veterans' Payment Issues' (Internal ATO document, undated).

IGTO case sample: Candidate Number 50 – Veterans payment issues	
	<p><i>inconsistent with the intended purpose or object of section 59-30. Paragraph 3.6 indicates that in the context of section 59-30, money needs to be actually exchanged to be considered repaid. The Macquarie Dictionary definition supports that point. Paragraph 59-30(1)(b) does also indicate that the full amount needs to be repaid for the provision to apply.</i></p> <p><i>The second aspect of the modification, implementing a carveout so that a specific aspect of the provision applies to veterans would also be inconsistent with the intended purpose or object of the provision. While the welfare of Australian Defence Force (ADF) personnel was a driver for the policy, the Assistant Treasurer's media release and the Bills Digest shows that section 59-30 was never meant to solely benefit ADF personnel. This is because the media release refers to taxpayers in general as well.</i></p> <p><i>For these reasons, the overall modification would be inconsistent with the intended purpose or object of section 59-30.</i></p>
CRP Advisory Panel Consultation	<p>At the time the ATO considered the candidate and determined that it was not suitable for the CRP (November - December 2020), the CRP Advisory Panel was not consulted to provide their views. The ATO has advised the IGTO that it cannot ascertain records that detail the reason for this departure from its CRP assessment process, however, the ATO has suggested that sensitivity around this candidate at the time may have been a factor.</p> <p>The ATO has since provided a summary of the candidate to the CRP Advisory Panel (on 7 September 2022). That same summary was published on the register of unsuccessful CRP candidates on the ATO website. The reasons provided on the ATO website for why this candidate failed are:¹¹⁰</p> <p><i>The Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 2) 2003 clearly stated that amendments to earlier year income tax assessments to exclude previously assessable income are only possible when the applicable amount had been repaid. As such, the proposed modification was deemed unsuitable for the CRP as the law was operating as intended. However, the ATO has since developed an administrative solution to address this issue.</i></p> <p>The summary published on the ATO's website (and provided to the CRP Advisory Panel) lacks the detail that is contained in the CAM Form.</p>

¹¹⁰ Australian Taxation Office, 'Commissioner's remedial power not applied – individuals' (Last modified: 07 February 2023) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-hasn-t-been-used/Commissioner-s-remedial-power-not-applied---individuals/>>.

IGTO case sample: Candidate Number 50 – Veterans payment issues	
	The ATO advised the Panel that it did not require the Panel's agreement or comment on the summary, but welcomed suggestions or questions from the Panel if there are any. The ATO did not receive any comments or questions from the Panel.
ATO website publication	Yes - Commissioner's remedial power not applied - individuals Australian Taxation Office (ato.gov.au) ¹¹¹
Other relevant matters	The ATO advised that it has applied a temporary administrative solution to address this issue (i.e. by allowing impacted veterans to amend historical tax returns and receiving eligible refunds where they have entered into an agreement with the Department of Veterans' Affairs to repay outstanding amount). The ATO is also engaging with various Commonwealth agencies to develop a more robust and permanent solution.

The IGTO observed that the ATO's consideration of whether the proposed modification sought by Candidate 50 was not inconsistent with intended purpose or object of the provision focused on the interpretation or meaning of the word 'repay' in the relevant provision, as opposed to the intended purpose of the provision itself.

Candidate 50 was not referred to the CRP Advisory Panel at the time that the Secretariat determined the proposed modification was inconsistent with the intended purpose or object of the provision, which is a departure from the ATO's current CRP assessment process. It is not clear to the IGTO based on our review of the ATO's internal case notes for Candidate 50, why the Advisory Panel was not consulted at the time the determination was made in relation to this candidate, noting that this candidate was received by the ATO after June 2019. In discussions with the ATO, it has been suggested that, at the time that candidate was considered, there may have been legal and other sensitivities which prevented broader consultation.

The IGTO does not consider it to be good practice as a general principle, for the ATO to bypass its own established processes without exceptional circumstances and clear reason. This is more so in the case of processes to ensure that decisions potentially affecting large groups of taxpayers are sufficiently and robustly tested with both internal and external stakeholders. Where there is a need to depart from established processes, the ATO should ensure that these reasons are appropriately considered, approved by sufficiently senior officers and clearly documented against the relevant candidate.

Sensitivity of the issue under consideration (as has been suggested to be the case with Candidate 50) is not a sufficient reason to bypass external consultation – in fact, it is arguable that sensitive issues should be more robustly tested with external stakeholders before decisions are made.

The IGTO understands that all external members of the CRP Advisory Panel are contracted to provide their services and expertise relating to the assessment of CRP candidates. Based on a sample contract

¹¹¹ Ibid

provided by the ATO, the IGTO observed that the contract included usual duties to maintain confidentiality of information relating to the contract and the services provided.

It is expected that all CRP candidates considered by the ATO will have some degree of sensitivity to them. As such, the IGTO considers that rather than foregoing consultation when faced with sensitive matters, the better approach would be for the ATO to develop alternative consultation arrangements to sufficiently manage the sensitivities while also affording the CRP Advisory Panel members an opportunity to comment on the proposed CRP candidate before a determination is made.

Recommendation 4.1

The IGTO recommends that:

- (a) unless there are clear reasons why it would be inappropriate to do so, the ATO consult with the CRP Advisory Panel on each CRP candidate, providing a full analysis of the reasons for its view in each case, before a final decision as to the suitability of the candidate for exercising the CRP is made;
- (b) where the ATO determines that it would be inappropriate to consult on a particular CRP Candidate, ensure that the decision is carefully considered, approved and documented; and
- (c) when documenting the ATO's consideration of whether a proposed CRP modification is '*not inconsistent with the intended purpose or object of the provision*'¹¹², for consultation with the CRP Advisory Panel, the ATO document its conclusion as to their view of the *intended purpose or object of the provision* before explaining its decision on whether the proposed CRP modification is or is not inconsistent with that object or purpose.

4.4. Lack of clarity about the 'negligible' budget impact requirement and the ATO's engagement with the Treasury in this area

4.4.1. Stakeholder concerns and suggestions

A criterion for exercising the CRP is that the Commissioner receives advice from the Treasury or the Department of Finance that the impact of the proposed CRP modification on the Commonwealth budget would be negligible (paragraph 370-5(1)(c)). This requirement operates as an 'external' restraint on the exercise of the CRP, which may be viewed as an appropriate design feature. Stakeholders have raised several concerns as part of their submissions to this review investigation regarding this criterion and related ATO CRP processes.

¹¹² *Taxation Administration Act 1953* sch 1 s 370-5(1)(a).

In particular, stakeholders have highlighted that:

- There is no clarity about what a ‘negligible’ budget impact means; how the budget impact is calculated; what it is measured against; and what underlying methodology and assumptions are utilised during the costing process.
- The ‘negligible’ budget impact requirement limits the use of the CRP and lengthens the CRP process.
 - A stakeholder has conjectured that the word ‘negligible’ in paragraph 370-5(1)(c) has been taken to mean the budget impact of a proposed CRP modification is less than \$100,000. Another stakeholder has suggested that the threshold may be \$50,000 to \$100,000;
 - They have further observed that it appears the budget impact of a proposed CRP modification is measured against the effect of the unintended outcome of a provision (i.e. as it is currently operating) rather than the outcome of the provision as it was intended to operate.
 - Stakeholders have raised concern that the combined effect of the above two factors will make it difficult for the ‘negligible’ revenue impact criterion to be met in most cases.
- Progressing a CRP candidate instead through the MTA pathway because it does not meet the negligible budget impact requirement defeats the main purpose of why the CRP was established, that is, to allow for a timelier resolution of unintended outcomes in the tax and superannuation laws.

4.4.2. ATO Information

The ATO has provided the following information to the IGTO in relation to the process for assessing the budget impact of a proposed CRP modification.

If the CRP Secretariat assesses a candidate as potentially suitable for the CRP, the ATO will prepare an initial costing of the CRP proposal and provide it to the Treasury or the Department of Finance for review. The process for costing a CRP candidate largely follows the budget processes for costing measures within the Commonwealth Budget (including guidelines issued under the *Charter of Budget Honesty Act 1998*), and the ATO-Treasury protocol.¹¹³

The ATO has explained that this process broadly involves:

- The ATO PAL CRP team sending a costing request to the ATO’s RAB.
- The ATO’s RAB undertaking an initial assessment of the revenue implication of the CRP proposal.
- The ATO providing RAB’s initial assessment to the Treasury’s TAD.

¹¹³ Australian Taxation Office, ‘ATO – Treasury protocol’ (Last modified 17 September 2012)

<<https://www.ato.gov.au/general/new-legislation/in-detail/ato---treasury-protocols/ato---treasury-protocol/>>.

- The Treasury's TAD independently reviewing and forming a view about RAB's initial assessment. In this respect, the ATO has explained that:¹¹⁴

... the ATO's role is limited to providing initial advice to the Department of the Treasury or the Department of Finance. Responsible officers in those Departments are responsible for advising the Commissioner about the budget impact of a modification, and they must independently form a view about the budget impact. It is understood that Treasury at least assesses the ATO's initial advice on the basis of the ordinary costing processes and Budget rules, but it is of course under no obligation to agree with the ATO's advice.

Treasury has processes in place to ensure that they fulfil legislative requirements relating to the CRP. Treasury follows the established costing processes as set out in the Charter of Budget Honesty – Policy Costing Guidelines, and provides correspondence from an SES officer formalising their advice.

- The Treasury providing its formal revenue advice to the ATO's RAB, which in turn shares the outcome with the PAL CRP team.

The ATO considers that the above process which involves the ATO's RAB preparing an initial budgetary assessment for independent review by the Treasury (or Department of Finance) satisfies paragraph 370-5(1)(c) which requires that the Treasury (or Department of Finance) 'advises' the Commissioner of the budget impact of a CRP modification:

*... the ATO provides initial advice on budget impact to the Department of the Treasury (or the Department of Finance). Treasury takes the ATO advice into account but will form its own independent view on budget impact and advise the Commissioner of that view. The ATO has proceeded on the basis that the Commissioner receiving this advice from Treasury meets relevant legislative requirements, and we are not aware of the ATO obtaining relevant advice (such as legal advice) about whether this is the case. Further, we are not aware of what processes Treasury has adopted to ensure that they fulfil legislative requirements relating to the CRP (or whether they have obtained advice).*¹¹⁵

*... While RAB usually undertakes an initial assessment of the budget impact, this reflects the fact that, more often than not, CRP candidate costings require access to taxpayer specific data held by the ATO, and not by Treasury. The Treasury is ultimately responsible for the budget impact assessment.*¹¹⁶

¹¹⁴ Australian Taxation Office, 'IGTO Information Request 5', 21 July 2022; Email from the ATO to the IGTO, 'FW: Chapter 4.4 on the costing process', 22 September 2023.

¹¹⁵ Australian Taxation Office, 'IGTO Information Request 5', 21 July 2022.

¹¹⁶ Australian Taxation Office, 'IGTO Information Request 11', 10 February 2023.

4.4.2.1. What is the ‘impact of the modification on the Commonwealth Budget’?

The ATO webpage that explains the ‘Limitations on exercising the CRP’¹¹⁷ offers the following additional information:

*... Any CRP costing has to focus on the financial impact on the Australian Government’s key budget aggregates. These costings measure the difference in expected budgetary financial impacts under the proposed modification **and the expected impacts already included in the ‘forward estimates’**. [Emphasis added]*

CRP costings will consider the direct behavioural impacts (where practical to do so) and direct budgetary consequences of the modification.

A variety of information sources, modelling and data analysis is used to estimate the budget impact of a CRP issue.

The term ‘Commonwealth Budget’ is not defined in the legislation. The ATO’s RAB has explained to the IGTO, by way of background, that it understands the impact of a CRP modification should be measured against the Australian Federal Budget that is tabled in Parliament every year. For example, total tax receipts (excluding GST) for FY24 are estimated to be \$530.4 billion, as documented in the 2023-24 Federal Budget.¹¹⁸

When policy decisions are made, if possible they are costed and their ‘intended’ revenue impact is added to (or subtracted from) the Commonwealth Budget as part of a four-year forward estimate. Once the four-year period has passed, the ‘actual’ revenue impact of the new laws (where it can be quantified) will, in time, feed into the Commonwealth Budget as actual revenue collected, which is one of the factors that the Treasury will consider as part of its forecasts and projections.

Illustrative Example

This is best understood through the following purely illustrative and simple example.

- A hypothetical new tax law has been introduced which, according to initial costings, was intended to result in \$100 million of extra tax collected per year. The forward estimates will show the following:

	Year 1	Year 2	Year 3	Year 4
Expected impact included the in forward estimates	\$100M	\$100M	\$100M	\$100M

¹¹⁷ Australian Taxation Office, *Commissioner’s remedial power* (Last modified 27 August 2020)

<<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/>>.

¹¹⁸ Australian Parliament, *Budget Paper No.1: Budget Strategy and Outlook*, 9 May 2023, p 168

<<https://budget.gov.au/content/bp1/index.htm>>.

- Because of an unintended consequence in the tax law, an extra \$20 million is or will be collected every year under the new law. Let's assume the actual tax collected was or would be:

	Year 1	Year 2	Year 3	Year 4
Actual tax collected	\$120M	\$120M	\$120M	\$120M

Scenario 1: Identified shortly after enactment

- The unintended consequence is identified immediately, and the CRP is considered. A modification to the relevant provision under the proposed exercise of the CRP will resolve the unintended consequence, so that the extra \$20 million will not be collected every year. If the CRP is exercised, the amount of tax collected under the provision will be:

	Year 1	Year 2	Year 3	Year 4
Actual tax collected if the CRP is exercised	\$100M	\$100M	\$100M	\$100M

- In this scenario, there is no impact on the Commonwealth Budget since the amount of tax collected under the modification matches the expected impact of the provision that was included in the forward estimates.

Scenario 2: Identified after the forward estimates period

- The unintended consequence was identified many years after the law was first announced – that is, after the forward estimates period. The forward estimates are not revised or updated after a Budget measure is introduced. However, the actual tax collections relating to the relevant new provision (if quantifiable) will have been merged into the dataset that feeds into the Commonwealth Budgeting modelling. In this scenario, the actual tax collections would then be taken into account as part of that budget modelling. This would then include the \$120 million per year as actually collected as part of the general economic conditions that factor into the Commonwealth budget modelling.
- In this scenario, if the CRP is considered, the budget impact assessment will consider the difference between the actual tax collections included in the budget model and the proposed state of the world if the CRP is enacted. In other words, the proposed modification will have an impact on the Commonwealth Budget which includes actual tax collections. In this scenario, the Commonwealth Budget will include all the impacts arising from the provision as enacted – including any that were not originally intended.

Ultimately, it is a matter for the Treasury or the Department of Finance, as providers of advice to the Commissioner under paragraph 370-5(1)(c), to confirm if the impact of the CRP modification on the Commonwealth Budget is negligible.

4.4.2.2. What is considered ‘negligible’?

The EM to the Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016 provides the following explanations regarding the budgetary impact requirement:

1.46 Before making a legislative instrument under the Remedial Power, the Commissioner must receive advice from the Secretary of the Treasury, the Secretary of the Department of Finance or an authorised APS employee of either department that any impact on the Commonwealth budget would be negligible. [Schedule 1, item 3, paragraph 370–5(1)(c)].

1.47 Impacts on the Commonwealth budget will be determined through ordinary processes and budget rules. The Guidelines issued under the Charter of Budget Honesty by the Secretaries to the Treasury and the Department of Finance provide further information on the considerations used when undertaking costings.

...

1.123 The Remedial Power would only be intended to operate in situations where any impact on the Commonwealth budget would be negligible. This would ensure the Remedial Power would be used to resolve smaller issues that would be less likely to warrant resolution by way of primary law change. ...

...

1.197 Exercising the Remedial Power may have some minimal cost on the budget. However, this impact would be limited because the power would only be available where any budget impact would be negligible. The government would be subject to fewer demands to enact minor law changes and resources could be focussed on more significant issues requiring law change.

In relation to the meaning of ‘negligible’, the ATO has explained that:¹¹⁹

There is no published threshold used for the assessment of a negligible budget impact. Negligible is taken to mean ‘not zero but rounded to zero’, consistent with the treatment of costings included in the Budget (refer [to] page 195 of Budget Paper No.2 from the October 2022-23 Budget).

4.4.2.3. The budget impact may be ‘unquantifiable’

In some cases, the budget impact of a CRP modification is considered to be ‘unquantifiable.’ Where this occurs, the IGTO observed that the Treasury would be reluctant to advise the ATO that the impact of the modification is ‘negligible.’

¹¹⁹ Australian Taxation Office, ‘IGTO Information Request 11’, 10 February 2023.

For example, in relation to candidate 21 ‘Returns on foreign investment from dual resident companies,’ the ATO has explained that:¹²⁰

When Treasury, in collaboration with RAB, progressed the costing of this issue, they found that the size of the tax base involved was very large and that there was a lack of reliable data. Due to the lack of reliable data to verify the anticipated behavioural impacts underpinning the proposed CRP modification and the large tax base involved, the budget impact was assessed as unquantifiable. Given that in this case the Commissioner received advice from Treasury that the budget impact of the proposed CRP modification was unquantifiable, the matter was not suitable for an exercise of the CRP. The issue was instead resolved via legislative amendments.

In another example, i.e. Candidate 61 ‘Income tax deductions for certain GST reverse charges’, the Treasury advised the ATO that:¹²¹

- *The Budget impact of this potential application of the CRP cannot be quantified;*
- *Any potential application of the CRP requires Treasury (or Finance) advice that such an application will have a negligible impact to the Budget;*
- *Precedent exists for denying the use of the CRP where a potential Budget impact cannot be quantified (even where such an impact is expected to be small)...*

In light of these points above, it is [Treasury’s] view that the CRP cannot be applied in this case. This view hinges on a quantified Budget impact being unavailable. ...

While it may be possible in theory for the impact of the modification to be both ‘unquantifiable’ and ‘negligible,’ the IGTO has not observed any exercise of the CRP where the modification was assessed to be ‘unquantifiable.’ The ATO has explained that this is because the Commissioner has never received advice from the Treasury that a CRP modification would be both unquantifiable and negligible.

4.4.2.4. Charter of Budget Honesty and related policy costing guidelines

The Charter of Budget Honesty is a Schedule to the *Charter of Budget Honesty Act 1998*. The Charter sets out obligations of the Government to manage and report on its fiscal performance, based on the principles of ‘sound fiscal management’. These principles¹²² require the Government to:

- a) *manage financial risks faced by the Commonwealth prudently, having regard to economic circumstances, including by maintaining Commonwealth general government debt at prudent levels; and*
- b) *ensure that its fiscal policy contributes:*

¹²⁰ Australian Taxation Office, ‘IGTO Information Request 5’, 28 July 2022.

¹²¹ Email from the Treasury to the ATO, ‘RE: CRP costing request – income tax deductions for certain GST reverse charges 2122_152’, 14 June 2022.

¹²² *Charter of Budget Honesty Act 1998* sch 1 s 5.

- i) *to achieving adequate national saving; and*
- ii) *to moderating cyclical fluctuations in economic activity, as appropriate, taking account of the economic risks facing the nation and the impact of those risks on the Government's fiscal position; and*
- c) *pursue spending and taxing policies that are consistent with a reasonable degree of stability and predictability in the level of the tax burden; and*
- d) *maintain the integrity of the tax system; and*
- e) *ensure that its policy decisions have regard to their financial effects on future generations.*

In relation to how policy costings are to be prepared, subclause 30(1) of Schedule 1 to the Charter provides that the Secretary of the Department of the Treasury and the Secretary of the Department of Finance may *'jointly, issue written guidelines recommending approaches or methods to be used in the preparation of policy costings.'*

Pursuant to subclause 30(1), the Secretaries of the Treasury and the Department of Finance have jointly issued the Charter of Budget Honesty Policy Costing Guidelines. Relevantly, Part 2 of the Guidelines sets out guidance from the Secretaries about costing protocols and methods. In summary, this Part of the Guidelines details different responsibilities and obligations of the Treasury and Department of Finance and their respective Secretaries. It also provides details about how to manage costing variables and assumptions. Relevantly, the Guidelines provide for the Secretaries to request assistance from another Australian Government body to provide information to assist in the costing.¹²³

COMMONWEALTH BODIES' ASSISTANCE IN PREPARING COSTINGS

The Charter allows the Secretaries to request an Australian Government body (for example, other government departments or agencies) to provide information to assist in the costing. An Australian Government body is required by the Charter to comply with such a request in time to allow the information to be taken into account in the preparation of the policy costing, unless it is not practicable for the body to do so, or where providing the information would contravene another law of the Commonwealth. The Secretaries will ensure consultations take place with other relevant departments or agencies, at senior management level, as a matter of course in producing a costing, so as to help ensure the assumptions chosen are the most appropriate. However, the final responsibility for the assumptions used will remain with the Secretaries.

An extract of Part 2 of the Guidelines is included in Appendix I of this report.

¹²³ Department of Finance, *Charter of Budget Honesty – Policy Costing Guidelines*, p7
<https://www.finance.gov.au/sites/default/files/2021-09/charter-of-budget-honesty-policy-costing-guidelines-2021.pdf>.

4.4.2.5. Candidates that were found to be unsuitable for an exercise of the CRP due to their costed budget impact

The IGTO noted six (6) CRP candidates that were found ineligible solely because their budget impact was not negligible. These were as follows:

Table 4.2 – Candidates that were found to be unsuitable for an exercise of the CRP due to their costed budget impact

Candidates	Date received	Budget assessment	Did the ATO receive Treasury's advice?		How is the issue being managed?
			Yes/ No	If not, why?	
11. PAYG high instalments	2016	Not negligible	No ¹²⁴	CRP not necessary. The issue could be addressed via an administrative solution	Administrative solution
21. Division 768-A application to dual residents	15/6/2018	Unquantifiable - Large tax base - Lack of reliable data to verify anticipated behavioural impacts underpinning the proposed modification - Difficult to ascertain from income tax returns whether taxpayers were following the law as intended	Yes	N/A	MTA passed (22/6/2020)
25. Interposition of new head company- CoT losses	31/8/2018	Unquantifiable - Lack of reliable data to quantify revenue impact	Yes	N/A	MTA passed (22/6/2020)
30. NFP- spreading deduction for gift of property in particular circumstances	9/11/2018	Unquantifiable - The Treasury advised the cost 'is expected to be small', potentially in the Tax Benchmark Variation Statement	Yes	N/A	MTA is being considered

¹²⁴ Candidate 11 was raised with and considered by the ATO prior to the commencement of the CRP (i.e. there was no legislative requirement at the time for the Commissioner to receive advice from the Treasury about budget impact). ATO RAB undertook a preliminary costing, which showed a likely small revenue impact.

Candidates	Date received	Budget assessment	Did the ATO receive Treasury's advice?		How is the issue being managed?
			Yes/ No	If not, why?	
		Category 1+ (\$0 to \$10 million per annum) - Lack of reliable data on who is currently spreading their donation across income years			
60. Exempt FBT for not-for-profit hospitals	27/7/2021	Not negligible - RAB accessed the costing to be around \$1 to \$2 million. No formal costing was sought from the Treasury	No	CRP process was abandoned prior to receiving formal advice; MTA process continued to be progressed	MTA passed (9/8/2022)
61. Income tax deductions for certain GST reverse charges	29/9/2021	Unquantifiable - Lack of reliable data on how many taxpayers will make amendments or claim a deduction going forward - The Treasury expressed that 'precedent exists for denying the use of the CRP where a potential Budget impact cannot be quantified (even where such an impact is expected to be small)'	Yes	N/A	MTA is being considered

4.4.3. IGTO observations

The inclusion of a negligible revenue impact criterion on the exercise of the CRP is understandable from a policy and law design perspective. This requirement operates as an 'external' restraint on the exercise of the CRP, which may be viewed as an appropriate design feature. Additionally, the Commissioner of Taxation is primarily responsible for the general administration of the taxation laws – any power to modify these laws, even in limited circumstances, should consider the impact on the Commonwealth budget. The question remains, however, whether this criterion is unduly interfering with the efficient and effective operation of the CRP.

Many stakeholders consulted as part of the review considered that failure to meet the negligible impact criterion may have been the core reason for CRP candidates being rejected. Based upon the IGTO's

review of CRP candidates that have been considered by the ATO as at 30 September 2023, only six (6) out of 57 unsuccessful candidates¹²⁵ (10.5%) failed the CRP *solely* due to this criterion. This is relatively small compared to the 37 cases where the CRP was not exercised due to the inconsistency with the intended purpose or object criterion.¹²⁶ However, it should be noted that where a candidate does not meet the intended purpose or object criterion, formal costings of the impact of the modification are not typically undertaken.¹²⁷ We are thus unable to ascertain how many of the 37 candidates, which failed the inconsistency with the intended purpose or object criterion, would have also failed the negligible budget impact criterion. According to the ATO data, formal costings were only sought for 14 candidates,¹²⁸ with an additional two (2) candidates being informally assessed by RAB.¹²⁹ The impact of the modification was assessed to be negligible for 10 (i.e. 62.5%) of these candidates.

4.4.3.1. Data limitations may limit the opportunities for this criterion to be met

The lack of available data and limitations in relation to data where it is available may make it difficult to reliably assess whether the negligible budget impact criterion is met. A positive obligation to confirm the impact is negligible is different from an obligation to assess if the impact is material or indeed that the impact is not negligible. A statutory obligation to provide a positive assertion implies that there will be reliable data to support the assessment, whereas reality may be less than perfect. In these incomplete circumstances, a test that introduces a double negative can be more easily applied where there is imperfect information.

The inability to positively advise the ATO that the impact of the modification is ‘negligible’ when the impact is ‘unquantifiable’ could potentially rule out a lot of CRP candidates. The unintended consequences that many CRP candidates seek to fix, by their very nature, relate to very specific topics and affect very specific taxpayer populations. As the data that is collected by the ATO in tax returns and BASs are typically not broken down to the required level of specificity, it can be extremely difficult for RAB (and in turn TAD, who relies on tax return data provided by RAB, amongst other sources) to quantify the exact impact of a proposed modification. This challenge is further compounded by the fact that it can often be difficult to ascertain from tax return data what proportion of taxpayers had been historically

¹²⁵ This does not include 4 CRP candidates that were withdrawn by applicants.

¹²⁶ The CRP was not exercised for the remaining 14 cases for various other reasons, including due to the matters being able to be resolved by administrative solutions, legislative solutions preferred, the proposed CRP modifications were not beneficial to taxpayers, etc.

¹²⁷ There are exceptions. Where a matter is urgent, such as in candidate 60, the ATO may request a costing as soon as the PAL CRP team are informed about the candidate.

¹²⁸ Formal costings were sought for the 7 successful CRP candidates, 4 of the 7 unsuccessful candidates in table 4.2, candidate 58, which met all the CRP criteria but did not result in the exercise of the CRP (see Chapter 5 for more details about this candidate), and candidates 14 and 54, which was found to have negligible budget impact but the ATO paused CRP process to pursue legislative solution.

¹²⁹ Candidate 60 did not proceed to formal costing as the CRP process was abandoned to pursue administrative or legislative solutions. RAB assessed the budget impact of candidate 60 as being not negligible. Candidate 11 was considered by the ATO prior to the commencement of the CRP. ATO RAB undertook a preliminary costing, which showed a likely small revenue impact.

applying the law as written (i.e. consistent with the unintended consequence) compared to the proportion of taxpayers who had been applying the law incorrectly.

The following excerpts of costing requests sent from RAB to TAD are illustrative of the types of challenges that affect the quantification process.

In relation to candidate 30:¹³⁰

The two models are attached to illustrate why we think the CRP will result in an unquantifiable impact to revenue:

- *We don't know from the data who is currently spreading their donation across income years without the backing of the law*
- *Donation data is volatile, across each income year and so is the proportion that would be affected by the CRP*
- *We have no ATO data for this costing. We have assumed a taxable income profile for these taxpayers.*
- *The donation may be made by one or more taxpayers.*

In relation to candidate 61:¹³¹

To the extent that affected entities are already claiming a deduction on GST imposed by reverse charge on imported services, the proposal to change the wording at section 27-15(3) to align with current practice is expected to have a minimal impact on revenue. However, due to a lack of data, RAB is unable to verify affected entities that are already claiming a deduction. Should any taxpayers as a result of this legislative change make amendments to their historical returns to claim a deduction and/or start to claim deductions going forward, this will result in a revenue cost.

While the quantification challenge can make it more difficult for certain CRP candidates to meet the negligible budget impact criterion, these difficulties are further exacerbated by the linearity of the ATO's procedure for assessing CRP candidates. For example, if the Treasury is unable to advise that the impact of the modification on the Commonwealth Budget is negligible, then the CRP assessment process effectively ends. The process currently adopted by the ATO does not allow for CRP candidates to be reconsidered – for example, to narrow the scope to overcome this conclusion or outcome. There is currently no mechanism in place to consider whether the proposed CRP modification could be altered, reframed, or have its scope limited in a way so that the impact on the Commonwealth Budget becomes either smaller or easier to quantify.

¹³⁰ Email from the ATO to the Treasury, 'CRP – Cultural Gifts Program', 23 August 2019.

¹³¹ Email from the ATO to the Treasury, 'CRP costing request – income tax deductions for certain GST reverse charges', 25 February 2022.

The ability for the Commissioner to limit the effect of modifications in this manner is clearly outlined in subsection 370-5(3) of Schedule 1 to the TAA:

(3) A modification applies generally, unless the determination states that the modification only applies:

(a) to a specified class of entities; or

(b) in specified circumstances.

It is unclear why the ATO's assessment process does not entertain the possibility that a proposed modification might be reconsidered to cure it of potential defects, such as potential data limitations that may be impacting an assessment that there is a negligible impact. It could be that the ATO sees its role, in the context of CRP assessment, as simply assessing whether a CRP candidate as submitted fits the legislative criteria. Therefore, the ATO's role is completed once a decision has been made about the CRP candidate. Notwithstanding that the ATO may consider the unsuccessful CRP candidate for resolution through other pathways, such as the MTA, the better approach is for the ATO to first explore and consider options that might potentially improve the CRP candidate if it cannot be implemented in its initially proposed form. This is because the CRP, if it is able to be exercised, would generally provide a timelier resolution to the unintended outcome raised.

In the IGTO's view, the ATO should be adopting a CRP assessment process that is less linear, more flexible, and more iterative. Measures should be adopted so that candidates which fail the budget impact criterion, but otherwise satisfy all the other criteria for the exercise of the CRP, can be reconsidered to determine if the proposed modification can be altered, reframed, or have its scope limited to overcome this outcome. While it might still be the case that some CRP candidates, for one reason or another, cannot be cured by altering the scope of the proposed modification, it is not possible to unreservedly reach this conclusion without first having a process for considering the question.

4.4.3.2. The relevance and importance of the identified Commonwealth Budget

Some stakeholders have suggested that the impact of proposed CRP modifications should be measured against how the law was initially intended to operate. In their view, it is not logical to measure budgetary impact against a figure which contains the extra revenue collected as a result of the unintended operation of the provision, especially where there was no intention to collect those amounts in the first place. So long as the proposed CRP modification only seeks to restore the tax law back to how it was initially intended to operate, the impact on the Commonwealth Budget should be negligible, as the CRP modification would simply be 'giving back' what should not have been collected in the first place.

While the IGTO sees some merit in this point of view, interpreting the words 'impact of the modification on the Commonwealth Budget' in this way ultimately may then make the criterion in paragraph 370-5(1)(c) of Schedule 1 to the TAA redundant. It is difficult to envision a scenario when a proposed CRP modification would fail to meet the budget impact criterion if the impact of the modification was to be measured against the outcome of the provision as it was intended to operate.

Interestingly, the question of whether the 'Commonwealth Budget' (against which impact is measured) does or does not contain amounts collected as a result of the unintended operation of the provision

actually depends on the timing of when the CRP candidate was considered. As the two scenarios outlined in section 4.4.2.1 above demonstrate, if the CRP candidate was considered during the first four years after a measure was introduced, the impact of the modification will be measured against a Commonwealth Budget figure that does not contain amounts collected as a result of the unintended operation of the provision. This is because the Commonwealth Budget would still contain the figures from the initial costing of the measure (i.e. the 'intended' revenue impact).

An example of this approach was seen in Candidate 58:¹³²

The impact of future cases has a nil cost to revenue. The reason for the nil cost is that the measure corrects unintended consequences in the law. Since the revenue impact from these unintended consequences were not factored into the original FHSSS costing, the forward estimates would already reflect these amounts.

However, most CRP candidates are identified and therefore considered outside of the relevant four-year period. Accordingly, the impact of the modification will be measured against a Commonwealth Budget figure that takes into account historical data of the total tax collected in previous years (which will include amounts collected, if quantifiable, as a result of the unintended operation of the provision). This means that it will be more difficult for candidates who fall into this category to satisfy the negligible budget impact criterion.

The timing of a CRP candidate currently has quite a large influence on whether the candidate will successfully meet the negligible budget impact criterion. Such an approach may be seen by critics as being inconsistent and arbitrary. At the same time, the alternatives are similarly problematic. It is difficult to argue that budgetary impact should be measured against a figure which contains the extra revenue collected as a result of the unintended operation of the provision, as there was no intention to collect those amounts in the first place. It is also difficult to argue that budgetary impact should be measured against a figure which does not contain the revenue collected as a result of the unintended operation of the provision, as that would render the negligible budget impact criterion effectively redundant.

The Minister could request a review be undertaken within three (3) to five (5) years of the CRP provisions being enacted to assess their operation.¹³³ Following the Minister's consideration of this IGTO report, if the Minister wishes to direct a further review to be undertaken to examine whether the policy considerations and framework for implementation of the CRP are operating effectively, the operation of the budget impact criterion may be an area that deserves thorough examination.

Many of the challenges associated with the negligible budget impact criterion are unlikely to be resolved administratively by the ATO. However, in the IGTO's view, there are some simple actions that the ATO

¹³² Email from the ATO to the Treasury, 'Commissioner's Remedial Power – FHSS technical amendments', 23 July 2021.

¹³³ *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017* sch1 item 4.

can take now to enhance transparency and to better inform stakeholders about how the criterion operates.

It is evident that there is very little public information about the costing processes, the extent to which an impact must be quantifiable, and the thresholds used to determine what candidates may or may not have a negligible budget impact. The absence of information is, on the one hand, understandable as budget costings are highly sensitive areas of work for the Government of the day as well as the agencies and departments involved. On the other hand, the absence of insight and guidance about these processes in the context of the CRP has led to stakeholders forming their own views about what these thresholds may be. So long as the costings of CRP proposals are not made public (unlike costings of election commitment, which are publicly available), stakeholders will remain concerned about the transparency and clarity of such assessments.

Greater public information about the CRP costing processes and details about the costings for unsuccessful CRP candidates may assist to assure stakeholders about the processes undertaken to assess CRP candidates. The IGTO notes that these would not be matters for the ATO alone but would also involve agreement from the Treasury or Department of Finance.

Recommendation 4.2

The IGTO recommends that:

- (a) the ATO CRP assessment processes are reviewed and revised, as necessary, to ensure that in scoping a CRP candidate there is a fulsome consideration of the potential scope of application and legislative parameters by the Secretariat with input from the Advisory Panel at the outset in accordance with section 370-5(3), including identifying opportunities for the Secretariat and the Advisory Panel to revisit and review the scope of a candidate which may fail the budget impact criterion, but otherwise satisfy all the other criteria for the exercise of the CRP; and
- (b) the ATO, in consultation with the Treasury and the Department of Finance, consider what further information may be published about the CRP costing process generally as well as the costings of CRP candidates, both successful and unsuccessful, where the negligible budget impact criterion is considered.

4.5. Uncertainty about the ATO CRP consultation process and perception of insufficient CRP consultation (*prior to a CRP decision being made*)

4.5.1. Stakeholder concerns and suggestions

Stakeholder feedback to the IGTO on the ATO's CRP consultation process has been mixed. Some stakeholders have observed that ATO CRP consultations are limited and not undertaken widely – there is generally no consultation with other stakeholders, affected industry groups or other practitioners on CRP candidates at the early stages of the process. Although comments are invited on draft CRP legislative instruments, this necessarily occurs *after* a decision has been made to exercise the CRP. Further, there is very limited public information about the ATO's engagement with the CRP Advisory Panel or the Board of Taxation.

Those stakeholders suggested that increased early consultation and engagement would help increase community awareness on the availability and operation of the CRP, as well as reduce the risks of incorrect decisions being made due to information gaps.

In other cases, it has been observed that the ATO consultation processes on certain CRP candidates have been effective. For example, a stakeholder shared positive feedback in relation to the ATO's early consultation on the proposed CRP modifications to allow a taxation officer to disclose protected information of a deceased person to certain specified entities.

In that instance, the stakeholder explained that the ATO had commenced targeted consultation with external stakeholders *prior* to the matter being considered by the CRP Advisory Panel and the CRP consideration process was executed efficiently and timely. During that process, the ATO provided external stakeholders with a detailed consultation paper which covered the background, the main issue, how the ATO was managing the issue, what modification it was seeking and how the candidate met the CRP requirements. Stakeholders also noted that the ATO had communicated the CRP process pathway and estimated timeframes to reach each step in the process. This greatly assisted the collaboration between the ATO and external stakeholders to progress through the various processes as efficiently as possible.

The ATO then shortly made the draft CRP instrument available for public consultation for four (4) weeks. Even though it ultimately took almost seven months from initial targeted consultation to registration of the CRP instrument, the delay was because the draft legislative instrument had a four-week public consultation period and it had to sit in both Houses of Parliament for 15 sitting days from when it was introduced into Parliament.

4.5.2. ATO CRP Protocols

The ATO does not generally have any documented policies or processes that set out its consultation practices prior to a CRP decision being made (other than its protocol with the Treasury and the

Consultancy Services Contract with external (i.e. non-ATO/Treasury) members of the CRP Panel, which is discussed later).

The following sections have been drawn together from responses provided by the ATO to the IGTO's enquiries as part of this review investigation.

Generally, prior to a decision being made on a CRP candidate, the ATO consults with the CRP Secretariat (including the ATO business line subject matter experts and/or the TCN) and CRP Advisory Panel on all candidates, and with the Board of Taxation on potentially suitable CRP candidates.

The ATO may also consult with specific stakeholders (such as industry groups, tax practitioners etc.) where necessary.¹³⁴

... [the ATO does not] routinely [undertake consultation] with stakeholders outside of the ATO or Treasury. However, this may occur where PAL CRP Director and Assistant Commissioner consider that this is appropriate in the circumstances. Consultation with external stakeholders might be appropriate if, for example, there was a group of stakeholders that would be specifically affected by the implementation and administration of the CRP modification.

The ATO has explained that it:¹³⁵

...considers that consultation in this manner ensures various stakeholder viewpoints on potential applications of the CRP are reflected as part of the ordinary CRP processes. Consultation processes also seek to strike a balance ensuring the proposed modification is properly understood before further viewpoints are sought.

The PAL CRP Director and Assistant Commissioner are the decision makers on when it is appropriate to consult more widely on a CRP matter and which specific stakeholders to invite to the consultations. Their decision is made based on advice by the relevant ATO business line which would be best placed to identify the stakeholders that would be impacted by a CRP modification.

4.5.2.1. Consultation with the CRP Advisory Panel

As discussed above, the CRP Advisory Panel currently includes six external consultants from various parts of the tax profession. Generally, two external consultants are invited to each CRP Panel meeting when a potentially suitable CRP candidate is considered, and all six external experts are consulted on a potentially unsuitable CRP candidate. The Chair of the CRP Advisory Panel (i.e. the PAL Deputy Commissioner) decides which external panel members are invited to the CRP Advisory Panel meeting after considering the candidate and the relevant experience of the external panel members. Where deliberations on a potentially suitable candidate would benefit from wider consultation, more than two external consultants may be invited.

¹³⁴ Australian Taxation Office, 'IGTO Information Request 11', 10 February 2023.

¹³⁵ Australian Taxation Office, 'IGTO Information Request 4 – Terms of Reference No. 7', 16 June 2022.

The ATO has provided the following example:¹³⁶

...the 'Returns on foreign investment from dual resident companies to Australian residents being treated as assessable income' candidate raised a variety of corporate tax issues. Accordingly, four external consultants were invited to attend the CRP Panel meeting to consider the corporate tax issues. They were two barristers with broad tax law experience and two law firm partners with specific experience in advising corporate groups.

Similarly, the ATO has advised that:¹³⁷

...when the CRP Advisory Panel met to consider the CRP candidate that led to the enactment of the Taxation Administration (Remedial Power – Disclosure of Protected Information by Taxation Officers) Determination 2020, three external consultants were invited to that meeting. This allowed the Panel to draw on their broad industry expertise and networks about the prevalence of the issue and how it was affecting the tax professional community and their clients. Their expertise was also drawn upon when discussing the specific text of the modification.

The ATO does not currently have any Charter that governs the function of the CRP Advisory Panel. The working relationship between the ATO and each external member of the CRP Advisory Panel is governed by a Consultancy Services Contract, which sets out the rights and obligations (including confidentiality obligations) of each member (referred to in the Contract as the Supplier) and their remuneration basis (i.e. on an hourly rate).

The ATO provided to the IGTO a Consultancy Services Contract that the ATO had entered with one of the Panel members as an example. This contract contains the standard terms and clauses in the Commonwealth Contract Sample for Goods and Services.¹³⁸ It does not contain other terms or conditions that are specific to the service standards of the Supplier as a CRP Advisory Panel member. For example, there does not seem to be a requirement or obligation for the Panel member under the Consultancy Services Contract to provide opinion on a CRP candidate upon request by the ATO. In one case sampled by the IGTO (i.e. Candidate 55 Loss carry back tax offset), the ATO provided the CAM form to all six external members of the CRP Advisory Panel but only received responses from four Panel members (two provided detailed responses and two confirmed agreement with the first two respondents).

The CRP Advisory Panel also includes a representative (i.e. an SES Band 1 officer) from the Treasury. As a CRP Advisory Panel member, the Treasury representative is consulted on both successful and unsuccessful CRP candidates. The ATO may also consult with the Treasury in relation to the intended purpose or object of a particular provision where the intended purpose or object cannot be clearly

¹³⁶ Australian Taxation Office, 'IGTO Information Request – Terms of Reference No. 7', 18 March 2022.

¹³⁷ Australian Taxation Office, 'IGTO Information Request – Terms of Reference No. 7', 18 March 2022.

¹³⁸ Department of Finance, *Commonwealth Contracting Suite (CCS)* (Last modified: 28 July 2023)

<<https://www.finance.gov.au/government/procurement/commonwealth-contracting-suite-ccs>>.

ascertained from the relevant explanatory materials, or it is not clear that a proposed modification is not inconsistent with the intended purpose or object.

For example, the ATO had advised that it:¹³⁹

...consulted with Treasury on the policy intent behind the provisions modified by the Seasonal Worker Program Legislative Determination before proceeding with the CRP process.

The ATO's relationship with the Treasury member of the CRP Advisory Panel is governed by the ATO – Treasury Protocol.¹⁴⁰ The Protocol provides a high-level framework that governs the working arrangements between the two agencies. It does not have specific provisions relating to the Treasury's participation in the operations of the CRP Advisory Panel. The ATO advised that it does not have any specific CRP Advisory Panel related protocol in place with the Treasury. There is no Consultancy Services Contract similar to those entered with the other external members of the CRP Advisory Panel given the Treasury member's status as an Australian Public Service employee.

4.5.2.2. Consultation with the Board of Taxation

It is worth noting that the Commissioner of Taxation and Secretary of the Treasury are ex-officio members of the Board of Taxation. The ATO does not have a specific protocol governing the Board of Taxation's input on CRP matters.

The ATO consults with the Board of Taxation on candidates identified as potentially suitable for the CRP, to ascertain the Board's views on those candidates. The Board of Taxation does not participate in CRP candidate assessment meetings, such as the CRP Advisory Panel meeting. Where practicable, the ATO will provide the Board of Taxation's views to CRP Advisory Panel members for consideration ahead of the CRP Advisory Panel meeting.

In addition to consulting with the Board on CRP candidates and potential legislative instruments to exercise the CRP, the ATO also consults with the Board in relation to amendments or repeal of those legislative instruments. The ATO also keeps the Board informed about pertinent matters related to the administration of the CRP.

The IGTO has observed email correspondence which evidences communications between the ATO and the Board of Taxation regarding CRP Candidates 44 (Disclosure of protected information by tax officers) and 52 (Seasonal labour mobility program). A summary of those emails is provided below.

¹³⁹ Australian Taxation Office, 'IGTO Information Request – Terms of Reference No. 7', 4 March 2022.

¹⁴⁰ Australian Taxation Office, 'ATO – Treasury protocol' (Last modified 17 September 2012)

<<https://www.ato.gov.au/general/new-legislation/in-detail/ato---treasury-protocols/ato---treasury-protocol/>>.

Candidate Number 44 – Disclosure of protected information by tax officers

Date	Interactions
21 October 2019	The ATO emailed the Board of Taxation (Board) the submission paper that was presented to the CRP Advisory Panel (Panel) regarding this candidate and comments received from members of the Tax Practitioners Stewardship Group regarding this paper. The ATO advised the Board that the Panel had considered the candidate suitable for the CRP and that the ATO was waiting for Treasury's advice about the budget impact of the proposed CRP. The ATO invited comments and feedback from the Board about the above matter.
30 October 2019	The ATO emailed the Board to advise of Treasury's confirmation that the proposed CRP had a negligible cost to the budget.
13 November 2019	The ATO emailed the Board and invited their comments on the draft CRP legislative instrument and explanatory statement.
20 November 2019	The Board emailed the ATO their comments on the draft CRP legislative instrument and expressed their view that use of the CRP was appropriate. The ATO acknowledged receipt of the Board's comments on the same day.

Candidate Number 52 – Seasonal labour mobility program

Date	Interactions
22 September 2020	The ATO emailed the Board of Taxation (Board) and invited their comments on the submission paper to be presented to the CRP Advisory Panel (Panel).
29 September 2020	The ATO emailed the Board to advise that the Panel had considered the candidate suitable for the CRP.
6 October 2020	The Board emailed the ATO to provide comments on the submission paper and advise their view that the proposed CRP was appropriate, subject to a costing from Treasury.
9 October 2020	The ATO emailed the Board and invited their comments on the draft CRP legislative instrument and explanatory statement. The ATO advised the Board that costing to assess the budget impact of the proposed CRP was being finalised.
16 October 2020	The ATO emailed the Board to respond to their telephone enquiry about the draft explanatory statement.
19 October 2020	The Board emailed the ATO with comments on the draft legislative instrument and expressed their view that use of the CRP was appropriate.
20 October 2020	The ATO emailed the Board to acknowledge the Board's comments and advise the Board of Treasury's negligible budget impact assessment of the proposed CRP.

The ATO has advised that to date, it has not had a disagreement between the CRP Advisory Panel and the Board of Taxation on whether a CRP candidate is suitable. If the Board were to disagree with the suitability of a candidate, their advice would be provided to the Panel for consideration (either at the Panel meeting or afterwards). However, the Panel would be responsible for either confirming their previous decision or revising their decision in light of the Board's advice. The Chair of the CRP Advisory

Panel¹⁴¹ (i.e. the PAL Deputy Commissioner) ordinarily has ultimate responsibility for deciding whether to exercise the CRP, as the Commissioner's delegate.

4.5.2.3. Consultation with specific stakeholders

The ATO has advised that it may also consult with specific stakeholders (such as industry groups, tax practitioners, etc.) where it is necessary for the ATO to understand how stakeholders with special interest in a proposed CRP modification may be affected by the modification.

As an example, the ATO has advised that:¹⁴²

...members of the Tax Practitioners Stewardship Group (TPSG) were consulted on the content of the CRP submission related to the Taxation Administration (Remedial Power—Disclosure of Protected Information by Taxation Officers) Determination 2020 (Deceased Estates Determination). This was because the issue leading to the implementation of the Deceased Estates Determination was raised by members of the TPSG, and the TPSG and their stakeholders would be impacted by how the CRP modification was designed, implemented and administered.

Similarly, the ATO has also advised that:

*...during the design of the CRP modification for the Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020 (GST-free Cars Determination), the ATO consulted with the Australian Medical Association (AMA) and the Motor Trades Association of Australia (MTAA). The input of the AMA and MTAA during the early stages of the CRP process for the GST-free Cars Determination was crucial because AMA and MTAA members had an important role in key aspects of the administration of the GST-free Cars Determination, as well as the former measure which the GST-free Cars Determination was seeking to remedy.*¹⁴³

... Suppliers of cars and car parts are required by the ATO to keep a declaration from eligible disabled persons that access the GST-free concession for cars and car parts available under the A New Tax System (Goods and Services Tax) Act 1999 as their authority to supply cars and car parts GST-free. During the design of the GST-free Cars Determination, this form was revised to incorporate terminology used in the GST-free Cars Determination.

The MTAA is a professional association that represents automotive enterprises, including cars and car parts suppliers, and MTAA members operating in the cars and car parts supply market would be impacted by any changes to that form. Accordingly, the ATO consulted with

¹⁴¹ The Panel itself is not the relevant decision maker; it provides advice to the PAL Deputy Commissioner.

¹⁴² Australian Taxation Office, 'IGTO Information Request 4 – Terms of Reference No. 7', 16 June 2022.

¹⁴³ Ibid.

*the MTAA on the changes to that form, and kept them updated on developments with the design and implementation of the GST-free Cars Determination.*¹⁴⁴

4.5.2.4. Engagement and consultation with Government stakeholders

The ATO also consults with other Government agencies that may be impacted by or have an interest in the exercise of the CRP on a case-by-case basis. By way of example, the ATO has advised that:¹⁴⁵

...government agencies that have an interest or are involved in the administration of the Australian Government's Seasonal Worker Program (e.g. Department of Home Affairs, Department of Foreign Affairs and Trade, Department of Education, Skills and Employment) were consulted during the design of the Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020.

The ATO advised that this was *'to ensure that the CRP modification would not impact [these Government agencies'] administrative responsibilities.'*¹⁴⁶

The ATO does not have a specific protocol governing the consultation process with other agencies that may be impacted by CRP decisions. ATO consultation with those agencies generally involves a combination of emails and meetings.

4.5.2.5. Briefing the Assistant Treasurer

The ATO has advised that:¹⁴⁷

As the Minister responsible for the ATO, the Assistant Treasurer is provided a Ministerial Submission with a copy of the draft [CRP] legislative instrument and accompanying explanatory statement before it is publicly consulted on. The Ministerial Submission also provides a brief description and an explanation of the purpose of the legislative instrument.

Following public consultation, another Ministerial Submission is provided summarising any comments received, the outcomes of previous actions and/or public consultation on the instrument and an explanation of any changes made to the legislative instrument / accompanying explanatory statement. The Ministerial Submission also includes a copy of the final legislative instrument and accompanying explanatory statement asking that the Minister notes it by a certain date so that it can be tabled in Parliament.

The Ministerial Submissions do not seek the Minister's approval per se; they simply advise the Minister of the Commissioner's delegate's intention to undertake these actions and asks that the Minister notes the submissions before the actions are taken. The Treasurer is also provided a copy of these Submissions.

¹⁴⁴ Australian Taxation Office, 'IGTO Information Request 9', 30 November 2022.

¹⁴⁵ Australian Taxation Office, 'IGTO Information Request 4 – Terms of Reference No. 7', 16 June 2022.

¹⁴⁶ Ibid.

¹⁴⁷ Australian Taxation Office, 'IGTO Information Request – Terms of Reference No. 7', 4 March 2022.

4.5.2.6. Public consultation on draft CRP legislative instrument

By way of completeness, the ATO also provided information on its consultation process *after* a decision has been made to exercise the CRP, namely consultation on the proposed CRP legislative instrument. Stakeholders have not raised concerns in relation to this aspect of the ATO consultation process.

In the main, the ATO has advised that it typically follows the same process for all types of public consultation, including in relation to the draft CRP legislative instrument, in line with the ATO consultation protocol.¹⁴⁸ For example, a draft CRP legislative instrument and accompanying explanatory statement are published on the ATO Legal Database,¹⁴⁹ the 'What's new'¹⁵⁰ and the 'Open Consultation'¹⁵¹ pages on the ATO website.

These web pages are monitored by various tax and superannuation publishers and associations for distribution to their subscribers and members. This helps raise awareness of the draft legislative instruments across the tax and superannuation professional community and allows them to make submissions on matters that may affect them or their clients.

The ATO may refine the legislative instrument and accompanying explanatory statement in light of feedback and submissions received.

The ATO has advised that public consultation would not be undertaken for a CRP legislative instrument when it only involves a machinery or administrative change, for example, inserting or amending a repeal date in an existing determination. The ATO considers that in this instance, targeted consultation with the CRP Advisory Panel and Board of Taxation is sufficient.

4.5.3. IGTO review of ATO consultation in a sample of cases

The IGTO has undertaken a review of the ATO's consultation processes prior to a decision being made to exercise the CRP in a sample of CRP cases. The results are summarised below.

Candidate Number 44 – Disclosure of protected information by taxation officers

CRP sought	The CRP was sought to modify the operation of the law to enable the ATO to provide 'pre-death' information to tax agents, BAS agents, and legal practitioners who represented the legal personal representatives of the deceased.
The ATO consulted with:	<ul style="list-style-type: none"> The Tax Practitioners Stewardship Group (because they had raised the CRP issue and would be impacted by the CRP modifications).

¹⁴⁸ Australian Taxation Office, 'Consultation' (Last modified 26 April 2023) <<https://www.ato.gov.au/General/Consultation/>>.

¹⁴⁹ Australian Taxation Office, 'Legal database' <<https://www.ato.gov.au/law/#Law>>.

¹⁵⁰ Australian Taxation Office, 'What's new' <<https://www.ato.gov.au/Whats-new.aspx?period=LastMonth&marketsegment=Entire%20Website>>.

¹⁵¹ Australian Taxation Office, 'Open consultation' <<https://www.ato.gov.au/General/Consultation/What-we-are-consulting-about/Open-consultation/>>.

	<ul style="list-style-type: none"> ▪ The CRP Advisory Panel members, including three external expert members of the Panel.¹⁵²
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Candidate Number 35 – Certificate for GST-free supplies of cars for disabled people

CRP sought	The CRP was sought to modify the operation of section 38-510 of the <i>A New Tax System (Good and Services Tax) Act 1999</i> to substitute a medical practitioner in place of the 'nominated company' (as defined) which was no longer eligible to issue the required 'disability certificate' that allowed eligible disabled individuals to acquire certain cars and car parts GST-free.
The ATO consulted with:	<ul style="list-style-type: none"> ▪ The Australian Medical Association (AMA) - The ATO obtained the AMA's support for the CRP proposal to be provided to the CRP Advisory Panel as well as feedback on the draft 'Application for a certificate of medical eligibility to obtain a car or car parts GST-free'. ▪ The Motor Trades Association of Australia (MTAA) – The ATO sought feedback from the MTAA about the design of the declaration form used by eligible disabled persons to give to car dealers to buy cars and car parts GST-free. The ATO also discussed with the MTAA other related administrative matters such as transitional arrangements, BAS reporting by dealers, etc. ▪ The CRP Advisory Panel members, including two external expert members of the Panel.

Candidate Number 52 – Seasonal labour mobility program

CRP sought	<ul style="list-style-type: none"> ▪ The CRP was sought to modify the operation of the law to enable certain foreign resident employees under the Seasonal Worker Program (SWP) who have extended their stay in Australia using a different temporary visa (as part of the Government's Covid-19 response) to continue to be covered by the special taxation regime designed for the SWP.
The ATO consulted with:	<ul style="list-style-type: none"> ▪ Department of the Treasury, on: <ul style="list-style-type: none"> ○ The taxation outcomes affecting workers under the SWP due to a change in visa arrangements during the Covid-19 pandemic. ○ The policy intent of the SWP. ○ Likely timing of any legislative amendment to address the issue. ▪ Department of Education, Skills and Employment (who administered the SWP until 4 April 2022), on: <ul style="list-style-type: none"> ○ The experiences, concerns, and taxation related questions of people impacted by the changes in visa arrangement.

¹⁵² Generally, only two of the six external members of the CRP Advisory Panel are invited to consider a potentially suitable CRP candidate. In this instance, the ATO invited four external CRP Advisory Panel members to consider the candidate and three responded to the ATO's invitation.

	<ul style="list-style-type: none"> ○ Other matters concerning the visa changes that were relevant to the design and implementation consideration for the CRP. ○ ATO's draft factsheet on the 'taxation of workers and obligations of approved employers in relation to persons who are participating in the seasonal worker program who previously were on a 403 visa and now are on a different temporary visa (for example, a 408 visa)'.¹⁵³ ▪ Department of Home Affairs, on matters concerning the visa changes, specific classes of visa, visa data information etc. that were relevant to the design and implementation consideration for the CRP. ▪ The CRP Advisory Panel members, including two external expert members of the Panel.
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4.5.4. IGTO observations

The IGTO appreciates that it may not always be appropriate or practicable for consultation to be carried out on CRP candidates in the early stages of the assessment process in all cases. This is because the CRP is only intended to be a temporary measure for providing a timely resolution of certain unintended outcomes in the taxation laws, before a more permanent solution (i.e. legislative change) is implemented. Broad consultation may unduly delay the finalisation of a CRP candidate. The IGTO acknowledges that the ATO needs to balance the benefits of increased consultation and the need to address CRP issues in a timely manner. As such, a degree of flexibility is necessary when considering consultation options.

Based upon the information provided by the ATO and the IGTO's case sampling, the IGTO acknowledges that the ATO undertakes a range of consultation in relation to proposed CRP candidates prior to a decision being made in relation to the exercise of the CRP. This consultation occurs both internally as well as externally through members of the CRP Advisory Panel. In some circumstances, the ATO has also undertaken targeted consultation with specific stakeholder groups potentially impacted by the proposed CRP, including other Government agencies.

The decisions in relation to consultation are largely discretionary and made by the PAL CRP Director and Assistant Commissioner (based on advice by ATO business lines).

Based upon information provided by the ATO, there does not appear to be specific protocols or guidance on the processes that the ATO follows when consulting on potential CRP candidates prior to a CRP decision being made.

The IGTO has also been unable to identify any guiding or procedural documentation that sets out how the ATO selects members of the Advisory Panel to consult on certain subject matters, when and how it

¹⁵³ Australian Taxation Office, 'IGTO Information Request 9', 30 November 2022; Email from the ATO to the DESE, 'Update on SWP ATO guidance', 23 October 2020.

determines that targeted stakeholder consultation is needed, and which specific stakeholders or groups are invited to consult.

Similarly, there is limited public information about the ATO CRP consultation before a CRP decision is made. For example:

- the ATO webpage ‘Commissioner’s remedial power’ provides a general summary about its CRP consultation process but only in relation to public consultation on the CRP legislative instruments and consultation with the CRP Advisory Panel. It does not refer to any early consultation with other stakeholders such as professional bodies and impacted industry groups. The section ‘Consultation on CRP legislative instruments’ on the ATO’s CRP webpage¹⁵⁴ states:

The Commissioner will consult publicly as part of exercising the [CRP] power. In addition, targeted consultation on a prospective CRP candidate is undertaken with the CRP Advisory Panel, a body comprised of private sector specialists, Treasury and ATO representatives. The Board of Taxation is also informed of relevant issues that are before the CRP Advisory Panel.

- The ATO webpage ‘When the Commissioner’s remedial power has been used’¹⁵⁵ provides links to the relevant legislative instruments and explanatory statements. The explanatory statement details the consultation undertaken for the relevant CRP modification, specifically consultation with the CRP Advisory Panel and the Board of Taxation. It is otherwise not specific or exhaustive as to what other targeted consultation occurred. For example:
 - In relation to CRP 2020/1,¹⁵⁶ the ATO consulted with members of the Tax Practitioners Stewardship Group, but the explanatory statement for the legislative instrument does not refer to any ATO targeted consultation; and
 - In relation to CRP 2020/2,¹⁵⁷ the ATO consulted with the Australian Medical Association and the Motor Trades Association of Australia, but the explanatory statement for the legislative instrument only refers to the ATO’s consultation with the Australian Medical Association.
- The ATO webpage ‘When the Commissioner’s remedial power hasn’t been used’¹⁵⁸ describes the CRP issues considered by the Commissioner and why the CRP was not used. It does not explain what consultation has occurred.

¹⁵⁴ Australian Taxation Office, ‘Commissioner’s remedial power’ (Last modified 27 August 2020)

<<https://www.ato.gov.au/general/ato-advice-and-guidance/commissioner-s-remedial-power/>>.

¹⁵⁵ Australian Taxation Office, ‘When the Commissioner’s remedial power has been used’ (Last modified 21 June 2023)

<<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-has-been-used/>>.

¹⁵⁶ Taxation Administration (Remedial Power - Disclosure of Protected Information by Taxation Officers) Determination 2020.

¹⁵⁷ Taxation Administration (Remedial Power - Certificate for GST-free supplies of Cars for Disabled People) Determination 2020.

¹⁵⁸ Australian Taxation Office, ‘When the Commissioner’s remedial power hasn’t been used’ (Last modified 12 December 2022)

<<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-hasn-t-been-used/>>.

As part of this review investigation, several stakeholders have raised concern about the lack of CRP consultation by the ATO. The lack of documentation, or similar public guidance and information about the CRP consultation may have contributed to stakeholders' concern about the lack of consultation. It is understandable that stakeholders who have never been approached to participate in consultation would be unaware that the ATO does undertake targeted early consultation during the CRP assessment process.

The IGTO considers that it would be useful for the ATO to provide further information on the CRP webpage about its consultation processes and approaches. The IGTO also considers that in the interests of transparency, the public should be advised of instances where the ATO has undertaken targeted consultation with stakeholders and details of the consultation. For example, information on the consultation held by the ATO in relation to a CRP candidate could be included on the webpages that outline when the CRP has been used and when the CRP has been considered but not applied, as relevant.

Furthermore, there would be benefit in the ATO developing formal documentation to outline its governance of the CRP, including Charters that outline the role and terms of engagement (including confidentiality agreements) for the CRP Advisory Panel (i.e. the ATO, Treasury and external Panel members) as well as engagement with the Board of Taxation and other government agencies. Such documents would provide greater transparency on its governance of the CRP and how the ATO approaches consultation with these groups, in what circumstances discretion may be exercised to invite certain members to consult and the mutual obligations of the ATO officers and the groups or members being consulted. Similarly, the ATO should also develop guidelines on the circumstances where it would undertake targeted consultation with stakeholders or industry groups, and the steps it takes to identify relevant representative bodies or members within those groups for consultation.

The IGTO also considers that there could be benefits for greater awareness of CRP issues being considered by the CRP Secretariat, specifically amongst ATO stewardship groups. This would include:

- GST Stewardship Group
- Individual Stewardship Group
- Large Business Stewardship Group
- National Tax Liaison Group
- Not-for-profit Stewardship Group
- Small Business Stewardship Group
- Superannuation Industry Stewardship Group
- Tax Practitioner Stewardship Group

This should give the ATO an opportunity to hear feedback or input from relevant and interested stakeholders on CRP candidates, which in turn ensures that identified CRP issues are fully explored and appropriately considered through the CRP process.

Recommendation 4.3

The IGTO recommends that the ATO enhance its consultation in relation to the CRP by:

- (a) developing guiding documents, protocols or charters to inform its consultation with the CRP Advisory Panel (including processes for refreshing or expanding the Panel¹⁵⁹), the Board of Taxation, other Government organisations and specific stakeholders;
- (b) leveraging its existing consultation and stewardship forums to consult on potential CRP candidates that are under consideration; and
- (c) publishing information about the consultation that the ATO undertakes in relation to each CRP matter published on the ATO website.

4.6. Refreshing or broadening of CRP Advisory Panel membership

4.6.1. Stakeholder concerns and suggestions

Stakeholders who lodged submissions to this review investigation are aware that there is a CRP Advisory Panel, and its membership had not, at the time of those submissions, been changed since its inception.¹⁶⁰ Whilst the stakeholders recognise the value of retaining the same Panel members for their experience and knowledge of the history of the CRP, they consider that it is also important to allow fresh perspectives and views that challenge the status quo. The stakeholders suggest that membership of the CRP Advisory Panel could be broadened, refreshed or subject to term limits to enable a rotation of expertise through the Panel.

4.6.2. ATO Information

In 2023, the ATO undertook a process to refresh the external membership of the CRP Advisory Panel. Four previous Panel members have executed new contracts to continue on the Panel until 31 May 2024 (with an option of 2 further 12-month extensions). Two new Panel members have been engaged for the same period. The refreshed Panel includes barristers, a retired judge, an academic and law firm partners. Each member has significant experience in the tax industry.

4.6.3. IGTO observations

The IGTO considers that external and independent expert inputs and perspectives are important to ensure that the CRP candidate assessment process is robust and provide additional level of transparency

¹⁵⁹ Refer to Chapter 4.6 for discussion about the refreshing or broadening of the CRP Advisory Panel membership.

¹⁶⁰ When these submissions were initially made, the ATO had not finalised its refresh of the Panel membership. The CRP Panel membership has now been refreshed and with new members.

and oversight of the ATO's CRP decisions. Accordingly, external membership of the CRP Advisory Panel is an important part of the CRP process.

The IGTO observes that the recent refresh of the external membership of the CRP Advisory Panel resulted in the engagement of two new members who will introduce fresh perspectives and challenge the status quo. While this is a beneficial change that will address some of the stakeholder concerns, there is currently no formalised or established process for refreshing the CRP Advisory Panel. For example, it is not altogether clear how often the ATO will refresh the Panel, or the rotation requirements for its members.

In the IGTO's view, a Charter to govern the objectives and membership of the CRP Advisory Panel, including rotation requirements is an important feature to ensure transparency and accountability. The IGTO refers the ATO to our earlier recommendation 4.3 regarding the development of guiding documents, protocols or charters to inform its consultation with the CRP Advisory Panel (amongst other stakeholders). The IGTO recommends that the ATO include in these guiding documents the process for refreshing membership of the CRP Advisory Panel.

4.7. Timeframes for CRP decisions to be made and actioned

4.7.1. Stakeholder concerns and suggestions

Stakeholders have expressed concern about the time taken for CRP candidates to progress through the process towards final determination, leaving potential anomalies or unintended outcomes in the law unaddressed.

In respect of timeframes, stakeholders have highlighted examples where timeframes involved have been short and the process has been efficient, between the issue being identified, considered and finally determined with a legislative instrument issued.

At the other end of the spectrum, examples were also raised with the IGTO about lengthy timeframes and issues where the CRP consideration was suspended pending other- legislative fixes that took many years to pass.

Additionally, stakeholders have observed that, where a candidate has been deemed suitable for exercise of the CRP, it can take some time for the CRP legislative instrument to be enacted. This may be due to the public consultation period required for the draft legislative instrument and the requirement for disallowable legislative instruments to be tabled in both Houses of Parliament for a period of 15 sitting days before it comes into effect.¹⁶¹ These are statutory requirements set out in the *Legislation Act 2003* and section 370-20 of Schedule 1 to the TAA 1953 and beyond the scope of the IGTO review.

¹⁶¹ *Legislation Act 2003* s 42; *Taxation Administration Act 1953* sch 1 s 370-20.

4.7.2. ATO information

The time taken to make a decision on and action a CRP candidate can vary considerably depending on a number of factors. Factors that can influence the length of time taken to approve or decline a candidate, and exercise the CRP where the candidate has been approved, include:

- the level of urgency in resolving the issue raised which may lead to prioritisation (or de-prioritisation) of a candidate;
- the level of business line and technical expert engagement required;
- resource demands which impact when a CRP costing may be received;
- CRP Secretariat and Advisory Panel availability; and
- Parliamentary sittings which can affect the length of disallowance periods.

For unsuccessful CRP candidates, the time taken to finalise an assessment, will also depend on the stage at which the consideration of the candidate ends (i.e. when an unfavourable decision is made by the CRP Secretariat or Advisory Panel, after receiving an adverse costing outcome or otherwise on notification from Treasury that an MTA will be pursued instead).

The ATO was unable to provide data on the timeframes for key milestones in the CRP process for all candidates to date as requested by the IGTO, as the data was not readily available. Due to the presence of outlier candidates where resolution was either expedient or drawn-out, and the complexity of having many different finalisation stages for unsuccessful candidates, the ATO considers there may be difficulties in drawing meaningful conclusions about the timeframes for considering CRP candidates.

The ATO has provided to the IGTO the dates of each key stages in the CRP consideration process for the seven (7) candidates sampled. The number of days taken to progress through each stage is shown below for sampled candidates that were unsuccessful, successful and progressed to MTA respectively.

Table 4.1: CRP decision timeframes for unsuccessful candidates

Stage of the CRP consideration process	Days taken for each candidate		
	No. 16	No. 50	No. 58
Initial assessment of candidate by the PAL CRP team	2	463	4
Decision made by CRP Secretariat on whether to proceed with candidate	N/A	9	0
ATO initiates costing request	N/A	N/A	N/A
Outcome of ATO costing request received	N/A	N/A	N/A
Candidate submitted to the CRP Advisory Panel for consideration	N/A	N/A	1
Decision made by CRP Panel on whether CRP candidate is approved	N/A	N/A	8
Decision on CRP candidate issued to the applicant	0	103	40
TOTAL DAYS TAKEN FOR ALL STEPS	2	575	53

Table 4.2: CRP decision and implementation timeframes for successful candidates

Stage of the CRP consideration process	Days taken for each candidate	
	No. 35	No. 44
Initial assessment of candidate by the PAL CRP team	19	102
CRP consideration placed on hold pending MTA process ¹⁶²	917	
Decision made by CRP Secretariat on whether to proceed with candidate	7	8
ATO initiates costing request	21	13
Outcome of ATO costing request received	127	6
Candidate submitted to the CRP Advisory Panel for consideration	26	8
Decision made by CRP Panel on whether CRP candidate is approved	6	4
Decision on CRP candidate issued to the applicant	0	1
Commencement of public consultation for CRP legislative instrument (LI)	28	34
End of public consultation for CRP legislative instrument	28	25
CRP legislative instrument is made	4	24
Legislative instrument is registered	14	16
Legislative instrument takes effect	103	107
TOTAL DAYS TAKEN FOR ALL STEPS	1,300	348
Days Legislated CRP modification in place for	388	1,042

Table 4.3: CRP decision and implementation timeframes for candidates that progressed to MTA

Stage of the CRP consideration process	Days taken for each candidate	
	No. 33	No. 55
Initial assessment of candidate by the PAL CRP team	35	8
Decision made by CRP Secretariat on whether to proceed with candidate	6	1
ATO initiates costing request	176	N/A
Outcome of ATO costing request received	24	N/A
Candidate submitted to the CRP Advisory Panel for consideration	N/A	18
Decision made by CRP Panel on whether CRP candidate is approved	N/A	9
Decision on CRP candidate issued to the applicant	140	27
Commencement of public consultation for MTA	2	15
MTA introduced to Parliament	281	50
MTA receives Royal Assent	200	166
TOTAL DAYS TAKEN FOR ALL STEPS	864	294

¹⁶² Refer to Chapter 5 Section 2.3.2 for more detail about this candidate.

4.7.3. IGTO observations

There are clearly significant variances in the timeframes taken for each CRP candidate to be considered and finalised. This is somewhat intuitive, having regard to the bespoke nature of each issue under consideration and the additional steps necessary for successful candidates. Those that are considered unsuccessful are likely to have shorter lifespans than those that are successful and need to progress through to development, consultation, and tabling of a legislative instrument.

Similarly, where solutions such as the MTA process are pursued instead of the CRP, they will attract their own additional timeframes which fall largely outside the CRP process and control of the ATO. The interaction between the MTA process and the CRP process will be discussed in more depth in Chapter 5.

Due to the small sample size and the lack of automated, consistent reportable data in relation to timeframes, the IGTO has not drawn any conclusion from the data constructed in the tables above.

Whilst acknowledging that each CRP candidate is, in its own way, bespoke and in need of a flexible process to explore the issues under consideration, delay in the resolution of these matters appears to run contrary to the intended purpose of the CRP which is to provide timelier resolution of anomalies and unintended consequences in the law for taxpayers.

The IGTO's recommendation for the ATO to consolidate and improve its system for capturing, tracking and reporting on the process of CRP candidates (i.e. Recommendation 3.3), will assist the ATO to identify trends in timeframes and hotspots where lengthy time commitments are needed to identify opportunities to address them.

In the interim, the IGTO considers that there are two areas upon which the ATO could improve to better manage stakeholder expectations regarding timeframes.

Firstly, the ATO could consider whether it should implement service standards for each of the main stage gates of the CRP pathway process to enable an estimate of the time and resources likely to be taken by a CRP candidate. At present, the IGTO has been unable to identify any timeframe expectations of when each main stage of the CRP process is expected to be completed, making it impossible for the IGTO to determine whether a particular CRP has progressed efficiently or not. It is also likely difficult for the ATO to undertake similar analysis without supporting evidence.

Secondly, upon receipt and initial consideration of a CRP candidate, the ATO should undertake an assessment of the likely timeframe it will require to finalise and inform the stakeholder that raised the issue of that estimated timeframe. Where, as the CRP candidate progresses further through the process, the estimated timeframe appears likely to be materially extended, the ATO should proactively update the stakeholder of the changed timeframe and the reasons why this is likely to occur.

Recommendation 4.4

The IGTO recommends that the ATO develop internal service standards for each main stage of the CRP process pathway and measure its performance against these service standards.

5

THE INTERACTION BETWEEN THE CRP AND LAW CHANGE

This chapter explores the differences between the CRP
and minor technical (legislative) amendment

5. The interaction between the CRP process and law change

5.1. The ATO's CRP Process: Interaction with law change

As mentioned in Chapter 4.1, there are two ways in which a CRP candidate can progress through to legislative change:

- a. a candidate may be assessed as suitable for the exercise of the CRP and the proposed modification proceeds as a legislative instrument that is tabled in the Australian Parliament (which is discussed in Section 4.1.6); or
- b. the CRP is not exercised, including where there is in fact an unintended or inadvertent consequence in the operation of the tax law, but the ATO considers that the issue is systemic and engages with Treasury about the possibility of pursuing a legislative amendment (such as through the MTA process).

This Chapter discusses stakeholder feedback, relevant ATO information and the IGTO's observations in relation to the intersections between the CRP process and law change as described in paragraph (b) above.

5.2. Managing issues that are not addressed by the CRP

5.2.1. Stakeholder concerns and suggestions

As discussed in Section 4.7.1, some stakeholders observed that potential CRP issues have been unable to progress through the process because an alternate option to address the matter (such as the MTA process) has been identified and pursued. Stakeholders observed that they had little insight or input into this decision process and were unsure when and how the CRP Secretariat considered the issue and why an alternative option was chosen.

An example of this concerned Candidate 33 titled *Debit value capped for certain defined benefit income streams*¹⁶³ (discussed in detail later in this chapter at section 5.2.3) which the ATO noted related to amendments that took effect on 1 July 2017.

Although the issue had been identified for CRP consideration, such consideration was suspended as a legislative solution was pursued instead in 2018 and relevant legislative changes were passed in 2020.

¹⁶³ Australian Taxation Office, 'Commissioner's remedial power not applied – superannuation' (Last modified 7 February 2023) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-hasn-t-been-used/Commissioner-s-remedial-power-not-applied---superannuation/>>.

The stakeholder who raised the matter with the IGTO observed that there are ongoing issues in this area which have not been addressed by the law change. It is noted that consultation on further legislative changes commenced in December 2021, however, as of 3 May 2023, no further law changes have been enacted to resolve these ongoing issues.

Stakeholders also advised that where alternative processes to the CRP are employed (such as the MTA process), there appears to be limited options for the ATO to revisit the CRP issues when the alternative processes are taking longer than anticipated (or indeed may not progress as was hoped).

5.2.2. ATO Information

In response to enquiries from the IGTO, the ATO has provided the following explanation of when a matter may be dealt with via legislative amendment rather than the CRP¹⁶⁴:

When an issue cannot be resolved using the CRP, the ATO may consider whether an administrative or interpretative solution can be implemented to temporarily address the issue. Separately and alternatively, the ATO may engage with Treasury to pursue a legislative amendment. However, the ATO will only generally seek to address issues that cannot be resolved using the CRP via a legislative amendment where there is a systemic issue that affects a class of taxpayers or many taxpayers.

Where a CRP candidate can only be resolved via law change, the legislative priorities of Treasury and the Government more generally will also impact the consideration, development and enactment of any legislative amendment. Ultimately the policy decision of whether to proceed with an amendment lies with the Government.

The majority of issues which have been raised for CRP consideration have not revealed systemic issues that the ATO considers would necessitate consideration of law change.

According to the last step of the ATO's CRP process pathway¹⁶⁵, if a candidate is found to be unsuitable for the exercise of the CRP, the ATO is required to consider whether the candidate can be addressed through the MTA process:

12. Can it be actioned via a miscellaneous technical amendment (MTA)? This is also considered for candidates finalised as unsuitable.

Yes – we work with Treasury to consider whether issue should be resolved by MTA.

No – we consider other processes to raise the issue with Treasury if needed.

¹⁶⁴ Australian Taxation Office, 'IGTO Information Request 4 – Terms of Reference No. 2', 13 July 2022.

¹⁶⁵ Australian Taxation Office, 'Commissioner's remedial power process pathway' (Last modified 27 August 2020) <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/Commissioner-s-remedial-power---process-pathway/>>.

The MTA process is defined as follows:

Miscellaneous and technical amendments are periodically made to Treasury portfolio legislation to correct drafting errors, repeal inoperative provisions, address unintended outcomes and make other technical changes. The amendments are part of the Government's ongoing commitment to the care and maintenance of Treasury portfolio legislation.

*The miscellaneous and technical amendments process was first supported by a recommendation of the 2008 Tax Design Review Panel, which was appointed to examine how to reduce delays in the enactment of tax legislation and improve the quality of tax legislation. The miscellaneous and technical amendments process has since been expanded to all Treasury portfolio legislation.*¹⁶⁶

Based upon the IGTO's analysis of the ATO's Master Candidate List of CRP candidates:

- Five (5)¹⁶⁷ candidates were assessed as not suitable for the exercise of the CRP, and were subsequently addressed (or were escalated to be addressed) by the MTA process;
- Six (6)¹⁶⁸ candidates were considered as potentially not suitable for the exercise of the CRP. The CRP process was suspended to pursue MTA.
- Three (3)¹⁶⁹ candidates were considered as potentially suitable for the exercise of the CRP; however, the CRP process was suspended in favour of pursuing the MTA process;
- Two (2)¹⁷⁰ candidates were identified as meeting all CRP legislative criteria, however, the ATO deferred their resolutions to the Government; and
- Four (4)¹⁷¹ candidates did not complete the CRP assessment because the MTA process was pursued instead.

5.2.3. IGTO observations

Addressing an issue caused by the unintended operation of the tax law through legislative change provides the greatest amount of certainty for taxpayers and their advisers. However, it is not always possible to change the law as soon as an unforeseen issue is identified.

¹⁶⁶ Explanatory Memorandum, Treasury Laws Amendment (Miscellaneous and Technical Amendments) Bill 2022 paras 1.3-1.4.

¹⁶⁷ Candidates 21, 25, 30, 55 and 61.

¹⁶⁸ Candidates 5, 26, 27, 29, 46 and 60.

¹⁶⁹ Candidates 1, 33 and 54.

¹⁷⁰ Candidates 17 and 58.

¹⁷¹ Candidates 8, 14, 45 and 53.

The challenges associated with effecting primary law change was reflected in the following remarks by the Minister for Small Business and Assistant Treasurer in her second reading speech regarding the CRP¹⁷²:

Unintended outcomes may be addressed through changes to the primary law. However, law change is resource intensive and is undertaken to give effect to the full range of government priorities. It can therefore be ill-suited to resolving smaller unintended outcomes.

The challenge of effecting primary law change is illustrated by the 92 announced changes to the tax law that had not been enacted at the time this government was elected. Had the remedial power existed, it would have been expected to have been able to address some of these smaller unintended outcomes. This also would have allowed constrained legislative resources to deal with more significant primary law changes.

In most situations, the best outcome for the tax system would be for the CRP to be exercised to provide a temporary but timely solution to the unintended outcome, and for law change to occur subsequently and in line with technical amendment opportunities and timetables to reduce the immediate burden on Parliamentary resources. By providing a timelier alternative to law change, the exercise of the CRP enables the amendment of tax legislation to be spread out over time, so that legislative resources can be prioritised towards more significant and necessary law changes.

As we have mentioned throughout this report, the purpose of the CRP is to provide a timelier option to address unintended and inadvertent outcomes and to enhance the capacity of existing legislative mechanisms to consider more significant taxation law changes. The IGTO considers the CRP process should either take priority over the pursuit of legislative change, or at the very least, be undertaken in parallel. This is consistent with the ATO's CRP process pathway, which contemplates that the ATO should first consider whether the CRP is able to be exercised in respect of the issue and only where it is determined not to be appropriate (Step 5) should the MTA process or other legislative change be considered (Step 12). This is also consistent with the terms of Division 370 as enacted.

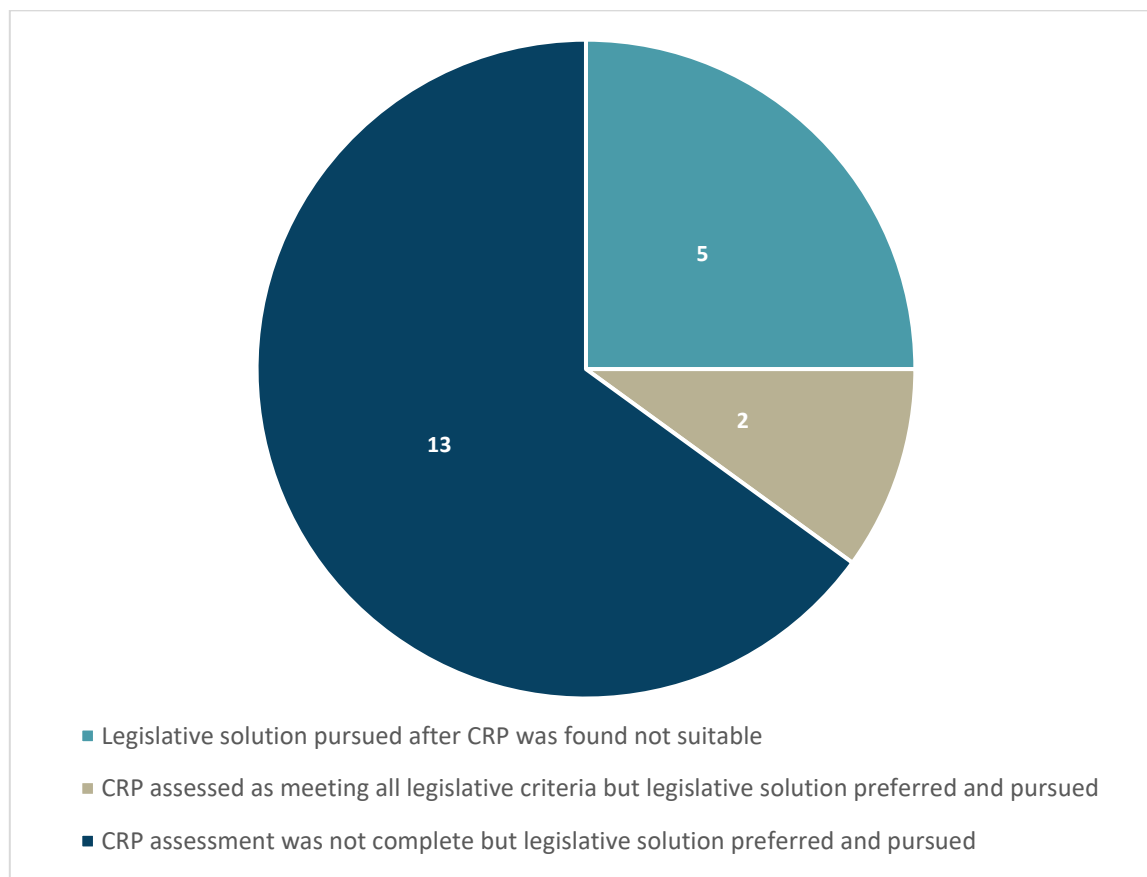
5.2.3.1. Suspending consideration of a CRP candidate so that law change can be pursued is inconsistent with the purpose for which the CRP was introduced and may result in avoidable delays in treating issues caused by the unintended operation of tax laws.

In some of the examples examined by the IGTO as part of our case sampling, consideration of the CRP was suspended midway through the process so that the matter could be pursued through the MTA process instead. This not only appears to be contrary to the ATO's own process pathway but is also inconsistent with the purpose for which the CRP was introduced.

¹⁷² Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 14 September 2016, pp 860-861 (The Hon Kelly O'Dwyer MP).

Of the 68 total CRP candidates, legislative change was pursued in 20 cases. Figure 5.1 below and Table 5.1 following provide an overview of the resolution outcome for these 20 cases.

Figure 5.1 20 CRP candidates which legislative change was pursued



Source: IGTO based on ATO data.

Table 5.1: 20 CRP candidates which legislative change was pursued

Status of CRP cases	Identified by the ATO	Identified by external stakeholder	Total	%
Legislative solution pursued after CRP was found not suitable	2	3	5	25%
Sub-total - Legislative solution pursued after CRP assessment	2	3	5	25%
CRP assessed as suitable (i.e. meeting all CRP legislative criteria) but legislative solution pursued and/or enacted	1	1	2	10%

Status of CRP cases	Identified by the ATO	Identified by external stakeholder	Total	%
CRP assessment was not completed but legislative solution pursued and/or enacted	10	3	13 ¹⁷³	65%
Sub-total - Legislative solution preferred at first instance	11	4	15	75%
Total	13	7	20	100%

The IGTO considers it reasonable for the ATO to pursue legislative change where issues could not be resolved via the CRP (i.e. because the candidates did not meet the CRP legislative criteria). However, there have been 15 cases where the ATO seemed to have ceased the CRP process in favour of legislative change.

The IGTO has calculated the time elapsed since these 15 issues were raised with the ATO for CRP consideration and their resolution through legislative amendment in Tables 5.2 and 5.3 below.

Table 5.2: CRP assessed as suitable but legislative solution pursued and/or enacted

	Candidates	Date issue was raised	Date issue was resolved	Time elapsed
1	Candidate No.17: Definition of 'ineligible annuity' and deferred life annuities	28/8/2017	Item 30 of Part 6 of Schedule 8 to the <i>Treasury Laws Amendment (2018 Measures No 4) Act 2019</i> . Royal Assent: 1 Mar 2019	1 year 6 months
2	Candidate No.58: First Home Saver Superannuation Scheme	18/6/2021	Resolved via <i>Treasury Laws Amendment (2023 Measures No. 3) Act 2023</i>	2 years 3 months

Table 5.3: CRP assessment was not completed but legislative solution pursued and/or enacted

	Candidates	Date issue was raised	Date issue was resolved	Time elapsed
1	Candidate No.1: Early stage investors in innovation	September 2016 (*)	Item 12 of Part 2 of Schedule 2 to the <i>Treasury Laws Amendment (2018 Measures No 2) Act 2020</i> .	3 years 5 months

¹⁷³ This figure includes 3 CRP issues that the ATO considered to be *potentially suitable* for the CRP, 6 CRP issues that the ATO considered to be *potentially unsuitable* for the CRP and 4 CRP issues that the ATO has not made any assessment as to the candidates' suitability for the CRP.

Candidates		Date issue was raised	Date issue was resolved	Time elapsed
companies (Angel investor) - 3 year expense test			Royal Assent: 26/2/2020	
2	Candidate No.33: Debit value for certain capped defined benefit income streams	9/2/2018	Items 327 and 328 of Part 4 of Schedule 3 to the <i>Treasury Laws Amendment (2019 Measures No. 3) Act 2020</i> . Royal Assent: 22/6/2020	2 years 4 months
3	Candidate No.54: GST at Settlement Credit Mismatch	9/11/2020	Items 41-44 of Part 2 of Schedule 6 to the <i>Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023</i> Royal Assent: 20/09/2023	2 years 8 months
4	Candidate No.53: Significant Global Entities Reporting	5/2/2020	Items 3-5 of Part 1 of Schedule 3 to the <i>Treasury Laws Amendment (2021 Measures No. 5) Act 2021</i> . Royal Assent: 7/12/2021	1 year 10 months
5	Candidate No.14: Additional requirements for Early stage venture capital limited partnerships (ESVCLP) to acquire pre-owned investment	11/4/2017	Item 2 of Part 1 of Schedule 2 to the <i>Treasury Laws Amendment (2018 Measures No 2) Act 2020</i> . Royal Assent: 26/2/2020	2 years 9 months
6	Candidate No.8: Authorised deposit institutions (ADIs) – effective non-contingent obligation on Tier 2 regulatory capital	June 2014 (*)	Treasury Laws Amendment (Mutual Equity Interests) Regulations 2019. Legislative Instrument registered on 25/3/2019	4 years 8 months
7	Candidate No.5: Running Balance account (RBA)	Before March 2017 (*)	Unresolved – Treasury has paused the MTA process. ¹⁷⁴	N/A
8	Candidate No.26: FBT exemption: definition of ‘taxi’	9/8/2018	Item 63 of Part 2 of Schedule 3 to the <i>Treasury Laws Amendment (2019 Measures No 3) Act 2020</i> . Royal Assent: 22/6/2020	1 year 10 months
9	Candidate No.27: Lost and unclaimed super reporting	22/6/2017	Items 54, 59 and 60 of Part 1 of Schedule 3 of the <i>Treasury Laws</i>	3 years

¹⁷⁴ The ATO advised that Treasury had paused the MTA process for Candidate 5 having regard to other more urgent priorities, and the ATO would not continue to pursue legislative reform in this area as it does not make substantial improvement to client experience.

Candidates		Date issue was raised	Date issue was resolved	Time elapsed
			<i>Amendment (2019 Measures No. 3) Act 2020.</i> Royal Assent: 22/6/2020	
10	Candidate No.29: Third party reporting	28/10/2016 (*)	Item 62 Part 6 of Schedule 8 to the <i>Treasury Laws Amendment (2018 Measures No.4) Act 2019.</i> Royal Assent: 1/3/2019	2 years 5 months
11	Candidate No 45: Hybrid mismatch and AT1 regulatory capital	19/09/2019	Items 61 to 64 of Part 4 of Schedule 1 to the <i>Treasury Laws Amendment (2020 Measures No. 2) Act 2020</i> Royal Assent: 3/9/2020	11 months
12	Candidate No.46: Sovereign Immunity	18/10/2019	Items 125-127 of Part 2 to Schedule 3 of the <i>Treasury Laws Amendment (2019 Measures No. 3) Act 2020.</i> Royal Assent: 22/6/2020	8 months
13	Candidate 60: Exempt FBT for not-for-profit hospitals	27/7/2021	Part 3 of Schedule 4 to the <i>Treasury Laws Amendment (2022 Measures No.1) Bill 2022.</i> Royal Assent: 9/8/2022	1 year

(*) These candidates were raised with the ATO for CRP consideration prior to the enactment of the CRP (in anticipation of the CRP provisions being legislated).

Even though the ATO has not completed the CRP assessment for the 13 CRP candidates outlined in Table 5.3, the ATO explained to the IGTO that the ATO's preliminary assessment considered Candidates 1, 33 and 54 to be potentially suitable for the CRP.

Whilst it may make sense to progress systemic issues through an MTA process in situations where the CRP cannot be exercised, due to it failing to meet one of the criteria in subsection 370-5(1) of Schedule 1 to the TAA 1953, it is difficult for the IGTO to understand why consideration of the CRP is suspended to pursue law changes in other cases which do meet (i.e. Candidates 17 and 58) or may potentially meet (i.e. Candidates 1, 33 and 54) the CRP criteria. Taking the CRP process to its natural conclusion while law change is pursued through a separate (parallel) process is more likely to provide affected taxpayers with a timelier resolution.

5.2.3.1.1. IGTO review of sampled cases

The IGTO notes that there were 20 instances where legislative reform was pursued. Table 5.2 and 5.3 above summarise the time taken to achieve this legislative change.

Some candidates, including for example Candidate Number 58, were clearly time critical for taxpayers – in this case to assist them to purchase their first home. Candidate 58 arose from two complaint cases received by the IGTO. The IGTO referred Candidate 58 to the ATO.

This case also demonstrates how reliance on legislative reform can delay delivery of sensible and pragmatic outcomes for taxpayers, consistent with the intended purpose of the law.

Candidate Number 58 – First Home Saver Superannuation Scheme	
Issues prompting CRP application	<p>The First Home Super Saver Scheme (FHSSS) allows first home buyers to save for their home through the superannuation system. Currently, individuals who make errors on their FHSSS applications are unable to correct their errors. In many instances, this has resulted in FHSSS applicants accessing less money than what they are eligible to receive under the scheme to buy or construct their first home.</p> <p>In one of these cases, which arose from a complaint received by the IGTO, the complainant explained that he sought to request a FHSSS release of \$26,000¹⁷⁵ from an industry super fund account that he had opened specifically for the FHSSS. This \$26,000 was the maximum FHSSS release amount stated on the FHSSS determination that he had received from the Commissioner. The complainant experienced certain issues when completing the online FHSSS release request form, so he attempted to investigate the issues. He inputted \$1 for release on the form and selected a constitutionally protected superannuation fund, which he knew was not able to release amounts under the FHSSS, to test for the error.</p> <p>Unfortunately for him, this test application was successfully submitted. Although the constitutionally protected superannuation fund could not release any amounts under the FHSSS, the ATO would not permit the complainant to amend their release request or to submit another one nominating the \$26,000 from the industry super fund. The ATO explained that they would only issue a release authority for up to \$1 to the relevant industry superannuation fund, because of the erroneous ‘test’ request (for \$1) that the complainant had lodged. The ATO explained to the IGTO that under the current FHSSS legislation, it was not possible for the complainant or the Commissioner to correct the error.</p> <p>As part of the 2021-22 Federal Budget¹⁷⁶, the Government of the day announced, on 11 May 2021, four technical changes to the FHSSS legislation to ‘improve its operation as well as the experience of first home buyers using the scheme’. Those changes were said to assist FHSSS applicants who make errors on their FHSSS release applications by:</p> <ul style="list-style-type: none"> • <i>Increasing the discretion of the Commissioner of Taxation to amend and revoke FHSSS applications</i> • <i>Allowing individuals to withdraw or amend their applications prior to them receiving a FHSSS amount, and allow those who withdraw to re-apply for FHSSS releases in the future.</i> • <i>Allowing the Commissioner of taxation to return any released FHSSS money to superannuation funds, provided that the money has not yet been released to the individual.</i>

¹⁷⁵ This amount has been rounded for simplicity.

¹⁷⁶ Australian Government, *Budget Paper No.2: Budget Measures*, 11 May 2021, p 17 <https://archive.budget.gov.au/2021-22/bp2/download/bp2_2021-22.pdf>.

Candidate Number 58 – First Home Saver Superannuation Scheme	
	<ul style="list-style-type: none"> Clarifying that the money returned by the Commissioner of Taxation to superannuation funds is treated as funds' non-assessable non-exempt income and does not count towards the individual's contributions caps. <p>Until those changes become law, there is no relief for applicants who made errors on their FHSSS applications.</p>
CRP sought	To modify the operation of the law to allow for errors made on FHSSS applications to be corrected.
CRP Secretariat Determination	<p>On 22 June 2021, the CRP Secretariat expressed the view that the candidate was not suitable for the CRP.</p> <p>Per the CAM form¹⁷⁷ provided to the IGTO, the CRP Secretariat's reasons are as follows:</p> <p><i>... The candidate was assessed as meeting the CRP legislative criteria. However, the Commissioner decided it would not be appropriate to exercise the CRP given law change implementing the proposed modification had recently been announced in the 2021-22 Federal Budget, and the complex legislative drafting required to implement the proposed modification meant a legislative amendment to the FHSSS legislation was more appropriate than exercising the CRP. ...</i></p>
CRP Advisory Panel Consultation	<p>On 1 July 2021, the CRP Advisory Panel confirmed the decision that the candidate was not suitable for the CRP, considering the Government's recent announcement in the 2021-22 Budget.</p> <p>With the respect to the general principle when an exercise of the CRP may relate to an announced but unenacted policy measure, an external Panel member offered the following opinion:¹⁷⁸</p> <p><i>... if a legislative change to address an issue has been announced the Commissioner should not exercise the CRP to modify the law to address the same issue, except in two situations –</i></p> <p><i>(1) If the announcement was made some time ago, and it appears doubtful whether the proposed amendment will be enacted.</i></p> <p><i>(2) If the modification is required urgently to deal with an issue that is having a significant impact on taxpayers and it appears unlikely that Parliament can quickly amend the law.</i></p> <p>Another external Panel member added the following opinion, with respect to the first exception outlined by the first Panel member, as reproduced above:¹⁷⁹</p>

¹⁷⁷ Australian Taxation Office, 'Commissioner's Remedial Power Assessment Methodology Form – Amending First Home Super Saver Scheme Applications' (Internal ATO document, undated).

¹⁷⁸ Email from Panel member to the ATO, 'RE: Commissioner's Remedial Power – First Home Super Saver Scheme', 24 June 2021.

¹⁷⁹ Email from Panel member to the ATO, 'RE: Commissioner's Remedial Power – First Home Super Saver Scheme', 28 June 2021.

Candidate Number 58 – First Home Saver Superannuation Scheme	
	... [If the announcement was made some time ago, and it appears doubtful whether the proposed amendment will be enacted] <i>the CRP would only then be exercised if the Commissioner could be satisfied that it remained consistent with the policy intent of the relevant measure. In other words, [...] where the legislative measure did not proceed because there was a lack of clarity about the underpinning policy for the measure in its original form, which then emphasises the difficulty for the Commissioner in discerning the original policy intent.</i>
Treasury's budget impact advice	On 6 August 2021, the Treasury expressed the view that the candidate would have a negligible budget impact.
Law change progress	Following the ATO's decision not to exercise the CRP on 10 August 2021, an MTA addressing the issues raised in this candidate was scheduled to be included in an omnibus Treasury bill in late 2022. However due to limited drafting resources, the expected timing was delayed. The Bill (i.e. Treasury Laws Amendment (2023 Measures No. 3) Bill 2023) was then introduced into Parliament in June 2023 and passed both Houses in September 2023.

The current situation

On 14 June 2023, Treasury Laws Amendment (2023 Measures No. 3) Bill 2023, which contains the technical amendments as announced in the 2021-22 Budget, was introduced in the House of Representatives and the second reading was moved.

The Bill subsequently passed both Houses of Parliament on 6 September 2023 and received Royal Assent on 20 September 2023. For over two (2) years since the announcement of the FHSSS technical changes by the former Government, there was no relief for impacted first home buyers.

This case study is particularly apt in highlighting the consequences for taxpayers if the ATO decides to wait for legislative change rather than proceeding to exercise the CRP. As timeframes for legislative change can often be unpredictable, a decision not to exercise the CRP can leave taxpayers without relief for extended periods of time. This is especially problematic for issues such as the FHSSS, where time is clearly of the essence for affected taxpayers, who are left unable to complete the purchase of their first home. Furthermore, this case study highlights the need for there to be a monitoring mechanism in place for the PAL CRP team to ensure that, where the legislative amendment processes are delayed or will require more time, the CRP can be reconsidered to provide timely relief to taxpayers in the interim.

The following case demonstrates how the process for law change and the CRP process can operate in parallel.

Candidate Number 17 – Definition of ‘ineligible annuity’ and deferred life annuities	
Issues prompting CRP application	Under existing definition of ‘ineligible annuity’, annuities issued by life assurance companies to complying superannuation funds to meet their liabilities to provide deferred superannuation income streams may be subject to double taxation during the accumulation (pre-retirement) phase.
CRP sought	To modify the operation of the law to allow the definition of ‘ineligible annuity’ to include annuities that are issued by a life assurance company to a complying superannuation fund for the sole purpose of the fund meeting its liabilities to provide a deferred superannuation income stream to its members.
CRP Secretariat Determination	On 7 September 2017, the CRP Secretariat expressed the view that the candidate was suitable for the CRP.
CRP Advisory Panel Consultation	On 28 November 2017, the CRP Advisory Panel confirmed the decision that the candidate was suitable for the CRP
Treasury’s budget impact advice	On 30 October 2017, the Treasury expressed the view that the candidate would have a negligible budget impact
MTA progress	<p>The CRP issue was addressed by item 30 of Part 6 of Schedule 8 to the Treasury Laws Amendment (2018 Measures No 4) Act 2019.</p> <ul style="list-style-type: none"> • 28 March 2018: the MTA was introduced to Parliament. The MTA was not announced or released for consultation prior to introduction into Parliament. • 25 June 2018: the third reading agreed to in the House of Representatives. On the same day, the bill was introduced in the Senate and read a first time. • 5 December 2018: second and third readings in the Senate. • 12 February 2019: the House agreed to Senate amendments. • 12 February 2019: the MTA was passed by Parliament. • 1 March 2019: the MTA received Royal Assent. • 1 April 2019: the MTA took effect.
Other relevant matters	<p>On 28 November 2017, following the CRP Advisory Panel decision, the ATO agreed with the Treasury to progress the issue via the CRP process and the MTA process concurrently.</p> <p>On 30 January 2018, the ATO had developed the first draft of the LI and had circulated it to internal stakeholders for comment.</p> <p>On 4 April 2018, following the introduction of the bill containing the MTA to Parliament, the ATO decided to discontinue the CRP process given the anticipated law fix.</p>

While both candidate 58 and candidate 17 involve situations where the candidate had met all the CRP criteria, a key difference in the approach to candidate 17 is that the ATO had decided to continue with the CRP process until a bill containing an MTA was introduced to Parliament. The ATO’s decision to discontinue the CRP at that point was perhaps understandable as law change appeared to be on the horizon. Regrettably, there was some delay in enacting the law, which did not take effect until almost a year after the bill was introduced to Parliament. Whilst delays in enacting law change are possible and

perhaps probable given the full range of competing legislative priorities, the timeline for this candidate highlights the often unpredictable nature of the law change process and the risk associated with anticipating a timely legislative fix.

While candidates 58 and 17 are examples of where the ATO did not exercise the CRP despite the candidates meeting all the legislative criteria, the IGTO has also identified 4 additional candidates where the ATO abandoned the CRP assessment midway to instead pursue law change via the MTA process. In the IGTO's view, this is similarly problematic and can delay delivery of sensible and pragmatic outcomes for taxpayers, consistent with the intended purpose of the law. Candidate 33 is described below, while candidates 45, 54 and 60 are summarised in Appendix J.

Candidate Number 33 - Debit value capped for certain defined benefit income streams	
Issues prompting CRP application	<p>Effective from 1 July 2017, a 'transfer balance cap' was introduced that limits the amount an individual can have in retirement phase that supports a superannuation income stream and is subject to exempt current pension income rules.</p> <p>A problem arose with determining the debit value for certain income superannuation streams, referred to as capped defined benefit income streams, where it was commuted. This resulted in a nil debit value on the account while the rollover would result in a credit, leading to an apparent excess of credits when the new market linked pension commenced.</p>
CRP sought	To modify the operation of the provision so that a debit will result on the account when a market linked pension is commuted.
CRP Secretariat Determination	On 22 March 2018, the candidate was deemed suitable to proceed to the CRP Panel.
CRP Advisory Panel Consultation	No, CRP consideration was put on hold on 26 November 2018 due to Treasury announcement of a legislative fix.
MTA progress	<p>The CRP issue was addressed by items 327 and 328 of Part 4 of Schedule 3 to the <i>Treasury Laws Amendment (2019 Measures No. 3) Act 2020</i>.</p> <ul style="list-style-type: none"> • 30-31 October 2018: Treasury announced that the issue would be addressed via MTA. • 27 February 2019: Public consultation on the MTA commenced. • 5 December 2019: MTA introduced to Parliament. • 22 June 2020: MTA receives Royal Assent.
Other relevant matters	<ul style="list-style-type: none"> • When the CRP candidate was put on hold on 26 November 2018, the ATO agreed to re-assess the candidate in February 2019. • The ATO re-assessed the candidate on 25 February 2019 and discussed the following: <ul style="list-style-type: none"> - the Exposure Draft was close to being released for public consultation, but Treasury has suggested that the Minister has other higher priorities - the ATO was currently addressing the issue using an administrative approach

Candidate Number 33 - Debit value capped for certain defined benefit income streams	
	<ul style="list-style-type: none"> - relevant consideration as to whether the candidate would be suitable for the CRP was the time passed since original legislation was enacted and the potential revenue impacts • ATO records dated 17 April 2019 indicate that the measure was on hold until Parliament returns following election.

The IGTO considers there may be various explanations as to why consideration of several CRP candidates was suspended to pursue legislative change. One is simply a preference for law change – noting this does provide better certainty and without a mandatory lapsing date (a sunset date). Another is that there may be some level of confusion as to the relationship between the CRP process and the process for law change. While the CRP is often described as a measure of last resort that should only be considered after the ATO has exhausted all other opportunities, the intention was never for the CRP process to be subservient to the process of law change. Some of the ATO's internal documents may have contributed to this confusion. For example, the following instructions are provided to ATO officers in the ATO's CRP internal form (Appendix F):

You should also consider whether the issue you seek to resolve through the use of the CRP is better suited to the advocacy process.

Another possible explanation is a desire to avoid duplication. From a practical perspective, it is understandable that the ATO would not want to exercise the CRP if the issue is likely to be later resolved by the MTA process or another form of legislative change. At the same time, the avoidance of duplication should not be a major consideration for the ATO since the drafters of the CRP legislation had always envisaged that there *would* be duplication in any exercise of the CRP. The CRP was always meant to be an interim, timely and temporary solution to address an unintended outcome and will almost always need to be followed by legislative change, which serves as the more permanent solution. If the avoidance of duplication was necessary, the CRP would never be exercised since by design it has a mandatory sunset date.

In the IGTO's view, subject to the comments below (see 5.2.3.2), the ATO should not suspend consideration of a CRP candidate to commence a law change process since this is inconsistent with the purpose of the CRP. Furthermore, if a CRP candidate is submitted after an MTA process has already commenced, the CRP process should also not be suspended but should be progressed in parallel with the MTA process. As the IGTO's case sampling has shown, the law change process can be unpredictable and time-consuming. In Candidate 33, for example, over two (2) years elapsed between the issue being identified and the law change being effected, with almost 500 days being spent on seeking legislative change through the MTA process after consideration of the CRP had been suspended. While the timeframes in this case were not typical and were affected by external factors such as the proroguing of Parliament ahead of the 2019 election, this sort of unpredictable delay was precisely what the CRP was introduced to address.

The ATO's policies should be updated to explicitly state that the CRP process should not be suspended in favour of a law change process, such as the MTA, except in the very exceptional and limited circumstances – as discussed in the next section.

5.2.3.2. It is reasonable to pause CRP consideration where legislation addressing a CRP issue is likely to be introduced before the CRP consideration process concludes

There may be situations where the law change process is so advanced that there is little merit in continuing the CRP process. For example, the ATO may have received information from Treasury to the effect that law change through the MTA process is likely to be introduced before the CRP consideration process can conclude. In such a situation, it is reasonable to pause the CRP process because progressing the CRP process concurrently with the MTA process will likely result in less timely duplication that does not provide any extra value to the taxpaying community. Any such decision to pause CRP consideration should be clearly explained and documented.

In addition, no matter what advanced stage the legislative amendment process is at, the passage of a legislative amendment will ultimately depend on the collective decision of the Australian Parliament. As such, it is also important that the ATO has processes in place to monitor the legislative resolution progress of paused CRP matters and resume CRP consideration when it has information which suggests likely delays in the legislative process. This enables CRP issues to be addressed and timely relief provided to impacted taxpayers in the interim.

The timeline of events in candidate number 35, initially discussed in chapter 4, is particularly illustrative of the IGTO's views communicated throughout this chapter.

Candidate Number 35 – Ensuring the supply of cars for use by disabled people remains GST-free	
Issues prompting CRP application	In June 2015, the company nominated by law to disability certificates (a government owned corporation) was privatised and sold the division responsible for issuing the certificates to another entity.
CRP sought	The CRP was sought to modify the operation of section 38-510 of the <i>A New Tax System (Good and Services Tax) Act 1999</i> to substitute a medical practitioner in place of the 'nominated company' (as defined) which was no longer eligible to issue the required 'disability certificate' that allowed eligible disabled individuals to acquire certain cars and car parts GST-free.
CRP Secretariat Determination	On 7 June 2017, the CRP Team provided its initial assessment to the CRP Secretariat. Consideration of the candidate was then placed on hold for 3 years. On 7 May 2020, a subsequent assessment was provided to the CRP Secretariat. On 14 May 2020, the CRP Secretariat agreed to progress the candidate.
CRP Advisory Panel Consultation	On 15 June 2020, the CRP Advisory Panel made its decision to endorse the candidate.
Treasury's budget impact advice	On 2 November 2017, the Treasury expressed the view that the candidate would have a negligible budget impact.
MTA progress	The relevant ATO business line was prioritising the development of a legislative amendment via the MTA process and was engaging with Treasury to progress this.

Candidate Number 35 – Ensuring the supply of cars for use by disabled people remains GST-free	
	<p>Because this was occurring, the ATO decided not to pursue the matter concurrently via the CRP process, which was put on hold.</p> <p>There were ultimately significant delays in progressing this candidate via the MTA process. For instance, it was necessary to undertake substantial consultation on the proposed design, implementation and administration of the modification, including with key stakeholders such as the Department of Health, Australian Medical Association, and Motor Trades Association of Australia. There were also delays as a result of disruptions to Treasury's legislative agenda, including from the proroguing of Parliament ahead of the 2019 federal election.</p> <p>The Treasury Laws Amendment (2021 Measures No. 5) Bill 2021, which contains the MTA addressing the issue, was introduced to Parliament on 24 June 2021. It received royal assent on 7 December 2021.</p>
Other relevant matters	<p>Due to the delays associated with the law change process, the candidate was reconsidered for the exercise of the CRP in May 2020. Exercise of the CRP was endorsed and the relevant legislative instrument was registered on 28 August 2020 and took effect on 9 December 2020. It was eventually repealed on 1 January 2022 following the completion of the MTA process and the enactment of the <i>Treasury Laws Amendment (2021 Measures No. 5) Act 2021</i>.</p> <p>To resolve issues for taxpayers during this period of delay, the ATO had adopted an administrative solution based on its GPA, that remained in place until 9 December 2020.</p>

Consistent with the IGTO's observations throughout this chapter, the IGTO considers the decision to suspend the CRP process in order to pursue law change to be inconsistent with the purpose of the CRP. The CRP was designed to provide a temporary but timely solution to unintended outcomes in the tax law, as the process for law change can be time-consuming and unpredictable, in this case taking over 4 years.

Although the ATO did monitor the progress of the MTA process and reconsider the CRP when it became clear that there would be continuing delays, there were still delays of approximately 3 years. Had the ATO implemented a process where the ATO checks in with the Treasury on the status of the MTA process, this may have resulted in the CRP candidate being reconsidered even sooner.

Recommendation 5.1

The IGTO recommends that:

- (a) the ATO update its policy to ensure that the CRP process is not to be suspended in favour of a law change process, such as the MTA, except in very limited circumstances, such as where the ATO has received advice from Treasury that the law change is likely to occur before the CRP process can be finalised; and

- (b) where the CRP process is suspended or not pursued, so that processes such as the MTA or legislative change can run their course, the ATO should implement procedures to monitor the progress of the relevant legislative change and, in consultation with the CRP Advisory Panel, reconsider the candidate for CRP actions where appropriate (that is, the initial time expectations are no longer realistic).

5.3. Sunsetting of CRP determinations and further actions to amend legislation

5.3.1. Stakeholder concerns and suggestions

The IGTO did not receive any specific stakeholder concerns on this issue other than to note that some CRP legislative instruments had lengthy sunset clauses, adopting the standard default period of 10 years as set out in section 50 of the *Legislation Act 2003*.

5.3.2. ATO Information

In response to an enquiry from the IGTO, the ATO provided the following explanation of factors taken into consideration when determining sunset clauses for CRP legislative instruments¹⁸⁰:

The Commissioner is guided by the following factors in determining the appropriate date to set for the repeal of a CRP legislative instrument:

- 1) *The views of the [Senate Standing Committee for the Scrutiny of Delegated Legislation] (as stated in Principle (I) of the principles that guide its scrutiny) – ..., the Committee considers that where a legislative instrument seeks to modify the operation of primary legislation, it should cease to operate no more than three years after its commencement. After considering the Committee's views, the Commissioner inserted repealing provisions into both the GST-free Cars Determination and the SWP Determination so that these instruments ceased to operate approximately three years after they took effect. The Commissioner will continue to consider the Committee's views, especially Principle (I) in determining the appropriate period of operation for future CRP legislative instruments.*
- 2) *The availability of resources to legislate a CRP legislative instrument using the MTA process – ultimately, the ATO seeks to legislate CRP legislative instruments well ahead of them sunset, and our approach is now to engage with Treasury during the development of a CRP legislative instrument to also determine the first available opportunity the CRP modification could be legislated using the MTA process. Advice from Treasury about the approximate time a CRP modification may take to be*

¹⁸⁰ Australian Taxation Office, 'IGTO Information Request 3', 10 June 2022.

legislated assists the Commissioner in determining the appropriate length of time a CRP legislative instrument should remain in force after it is made.

In circumstances where a CRP legislative instrument is approaching its sunset date without a clear pathway to legislative amendment, the ATO has advised the IGTO that it is open to the Commissioner to remake and reissue the Legislative Instrument although this would be considered a fresh exercise of the CRP and therefore attract the requirements for the tabling and disallowance period pursuant to section 42 of the *Legislation Act 2003*. The ATO has advised the IGTO that, in practice, it seeks to work with the Treasury to enable the CRP modification to be legislated ahead of its sunset.

5.3.3. IGTO observations

An exercise of the CRP is only ever intended to operate as a temporary and interim measure and should therefore not be relied upon to provide long-term relief for taxpayers in lieu of legislative change. The IGTO had some initial concerns about the adoption of the default sunset period of 10 years for the early exercises of the CRP, especially where such a long period may de-prioritise CRP issues for legislative change. However, it would appear that the issue has been somewhat addressed by the Senate Standing Committee for the Scrutiny of Delegated Legislation's updated Principle (I) which was issued in February 2022. The Committee's approach outlined in updated Principle (I): Modification of primary legislation¹⁸¹ is that any legislative modifications contained in a delegated legislation should not operate for more than 3 years without sufficient reasons.

The IGTO considers the period of 3 years to be appropriate to allow the ATO to effectively engage with the Treasury to ensure that the CRP modification is adopted through legislative change as expeditiously as possible.

In the IGTO's view, even though the Committee's updated Principle (I) allows for the option to adopt a longer sunset period subject to reasons being provided, the ATO should not do so unless there are very clear reasons why a longer timeframe than 3 years is necessary. Ultimately, the ATO should be guided by advice from Treasury on the approximate time the CRP modification may take to be legislated. The IGTO now understands that the Treasury has provided advice to the ATO that a sunset period of 5 years is appropriate and generally allows sufficient time for an issue to be resolved via amendments to legislation.

¹⁸¹ Commonwealth of Australia, *Standing Committee for the Scrutiny of Delegated Legislation – Guidelines*, (2nd Edition, February 2022) p 36

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines>.

6

PARLIAMENTARY OVERSIGHT AND INTERNATIONAL

This chapter provides some information about the oversight of CRP instruments by Parliament, as well as international comparisons of similar approaches.

6. Parliamentary oversight and international approaches

6.1. Parliamentary Committee views and scrutiny of CRP Determinations

The Senate Standing Committee for the Scrutiny of Bills scrutinised the proposed legislation to enact the CRP. The Senate Standing Committee for the Scrutiny of Delegated Legislation provides ongoing scrutiny of exercises of the CRP.

6.1.1. The Senate Standing Committee for the Scrutiny of Bills

6.1.1.1. Functions of the committee

The Senate Standing Committee for the Scrutiny of Bills (the **Scrutiny of Bills Committee**) was established in 1981. Its functions, which are set out in Senate Standing Order 24, are to assess bills against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, the rule of law and on parliamentary scrutiny.¹⁸²

The Scrutiny of Bills Committee reports¹⁸³ whether a relevant bill or Act, by express words or otherwise:

- *trespass unduly on personal rights and liberties;*
- *make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;*
- *make rights, liberties or obligations unduly dependent upon non-reviewable decisions;*
- *inappropriately delegate legislative powers; or*
- *insufficiently subject the exercise of legislative power to parliamentary scrutiny.*

6.1.1.2. Scrutiny of the proposed CRP legislation

The committee reviewed the proposed CRP (Division 370) in the Tax and Superannuation Laws Amendment (2016 Measures No.2) Bill 2016 and noted, in its report to the Government on 9 November 2016,¹⁸⁴ that:

¹⁸² Parliament of Australia, 'Senate Standing Committee for the Scrutiny of Bills'

<https://www.apph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills>.

¹⁸³ Parliament of Australia, *Standing Orders*, para 23

<https://www.apph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/b00>.

¹⁸⁴ Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2016* (9 November 2016) p 505

<https://www.apph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Reports/2016/index> .

- *The remedial power is an extraordinary power. It confers legislative power on an unelected official to modify the operation of significant primary legislation. (p.505)*
- *In principle, the committee agrees that the complexity of taxation laws may give rise to unintended outcomes. It is also accepted that where the only response available is to amend the primary legislation this may (properly) involve a lengthy process. In light of these reasons and points offered in justification of the overall approach noted above, the committee considers that the remedial power may have the potential to be a plausible policy response to a practical problem encountered in the administration of taxation laws. (p. 506)*

The committee raised several concerns and observations for the Government's consideration. A summary of those concerns and observations and the Government's responses is outlined below.¹⁸⁵

Concerns and observations raised by the Scrutiny of Bills Committee	Minister's responses
<ul style="list-style-type: none"> ▪ The full breadth of the CRP may not be necessary (i.e. the proposed CRP could be limited to those areas of taxation law and administration where the problem of unintended consequences regularly arises). ▪ There is scope for further legislative guidance as to the circumstances where parliamentary amendment of the primary legislation would be required (rather than use of the CRP). ▪ There is nothing in the proposed amendments to ensure that the CRP would be used in practice to complement rather than substitute ordinary processes to modify primary legislation. 	<ul style="list-style-type: none"> ▪ Unintended outcomes could arise from across the full range of taxation laws. Limiting the remedial power to a specific set of taxation laws only would reduce the coverage of the power and its ability to resolve unintended issues. ▪ There would be situations where the remedial power would not be appropriate to use, for example, systemic problems and issues that evoke differing views. ▪ Prior to the Commissioner contemplating using this proposed power, he would have to exhaust his current powers, such as applying a purposive approach or his general powers of administration. Subsequent to this process, the Commissioner could only use the proposed powers if addressing the problem meets the strict limitations listed in the proposed s.370-5(1).
<ul style="list-style-type: none"> ▪ The reasonableness of the CRP modification would only be reviewable on limited grounds. The courts would not be able to review the merits of the CRP modification. ▪ In this context, whether a breach of the budget notification requirement (in proposed 	<ul style="list-style-type: none"> ▪ A breach of the budget notification requirement would invalidate the exercise of the CRP.

¹⁸⁵ Ibid pp 506-516.

Concerns and observations raised by the Scrutiny of Bills Committee	Minister's responses
<p>paragraph 370-5(1)(c)) is intended to result in the invalidity of the CRP determination.</p>	
<ul style="list-style-type: none"> ▪ Uncertainty in the application of the CRP, including the 'less favourable result' test in the proposed subsection 370-5(4), may be considered to negate any potential benefits of the proposed regime. 	<ul style="list-style-type: none"> ▪ On balance, the CRP is expected to create benefits for taxpayers that outweigh any costs of learning and understanding as well as the alternative of over or under complying with unintended tax outcomes.
<ul style="list-style-type: none"> ▪ Whether affected taxpayers in each instance would be consulted. ▪ Whether the Government has considered including more specific consultation requirements in the bill and making compliance with these requirements a condition of the validity of the CRP determination. 	<ul style="list-style-type: none"> ▪ The CRP's use would be informed by any appropriate and reasonably practicable consultation, consistent with section 17 of the <i>Legislation Act 2003</i> (LA). ▪ On balance, the favoured approach is to rely on the requirements of the LA. ▪ Creating a formal legislative requirement to consult and making its compliance a condition of the validity of the CRP would be inconsistent with wider processes for resolving tax law issues and create opportunity for disputes on issues of process to impede the CRP's use to resolve substantive issues. ▪ During the disallowance period, Parliament could disallow the CRP instrument prior to it taking effect. This period presents a further opportunity for the community to respond to the CRP instrument.
<ul style="list-style-type: none"> ▪ The CRP modification may be given retrospective application, which may undermine public confidence in the legal system, even if there are strong reasons to justify it. 	<ul style="list-style-type: none"> ▪ CRP instruments are subject to the limits in section 12 of the LA to ensure any retrospective application cannot disadvantage a person or impose on them liabilities in relation to anything that occurred prior to the instrument registration. ▪ The CRP does not apply to an entity if a modification would produce a less favourable result for that entity.
<ul style="list-style-type: none"> ▪ There should be a mandatory review and report provided to Parliament in relation to the operation of the CRP provisions within three years of their commencement. 	<ul style="list-style-type: none"> ▪ The permissive provision in the amending Bill creates the expectation a post implementation review should take place. Including a permissive rather than mandatory requirement to conduct the review provides flexibility to ensure the review takes place at a sensible time, whether that is earlier or later than contemplated in the provision.

Concerns and observations raised by the Scrutiny of Bills Committee	Minister's responses
	<ul style="list-style-type: none"> ▪ The Bill introduces changes to the <i>Taxation Administration Act 1953</i> that would require the ATO Annual Report to include information on the exercise of the remedial power during the relevant year.

Despite the Minister's responses, the committee remained concerned that:

- *The full breadth of the remedial may not be necessary and that there is scope for further legislative guidance as to the use of these powers.*¹⁸⁶
- *The question of the reasonableness of any modification to a taxation law made by the Commissioner under the proposed remedial power would only be reviewable on limited grounds (that is, courts would not be able to review the merits of these modifications).*¹⁸⁷
- *It would be appropriate to include more specific consultation requirements in the bill and make compliance with these requirements a condition of the validity of the determination.*¹⁸⁸
- *There should be a mandatory report to Parliament within three to five years of the commencement of the remedial power provisions. Such a provision would not preclude other reviews being undertaken either prior to or after this period has elapsed if this is considered necessary.*¹⁸⁹

The committee drew the above concerns to the attention of Senators and left the appropriateness of the proposed approach to the consideration of the Senate as a whole.

The IGTO observed that the proposed Division 370 passed both Houses of Parliament in its original form i.e. there were no proposed amendments to the Division after the review by the Scrutiny of Bills Committee.

6.1.2. The Senate Standing Committee for the Scrutiny of Delegated Legislation

6.1.2.1. Functions of the committee

The Senate Standing Committee for the Scrutiny of Delegated Legislation (**Scrutiny of Delegated Legislation Committee**) was originally established in 1932 as the Senate Standing Committee on Regulations and Ordinances. The committee's name was changed on 4 December 2019 to the Senate

¹⁸⁶ Ibid p 508.

¹⁸⁷ Ibid p 509.

¹⁸⁸ Ibid p 513.

¹⁸⁹ Ibid p 515.

Standing Committee for the Scrutiny of Delegated Legislation, to more accurately reflect the nature and scope of the committee's work. Its functions, which are set out in Senate Standing Order 23, are to assess delegated legislation against a set of scrutiny principles that focus on compliance with statutory requirements, the protection of individual rights and liberties, and principles of parliamentary oversight.¹⁹⁰

The Scrutiny of Delegated Legislation Committee scrutinise each delegated instrument as to whether:¹⁹¹

- *it is in accordance with its enabling Act and otherwise complies with all legislative requirements;*
- *it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;*
- *it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;*
- *those likely to be affected by the instrument were adequately consulted in relation to it;*
- *its drafting is defective or unclear;*
- *it, and any document it incorporates, may be freely accessed and used;*
- *the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;*
- *it trespasses unduly on personal rights and liberties;*
- *it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;*
- *it contains matters more appropriate for parliamentary enactment;*
- *in the case of an instrument exempt from sunset, it is appropriate for the instrument to be exempt from sunset;*
- *in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and*

¹⁹⁰ Australian Government, 'Scrutiny of Delegated Legislation' (Last modified 15 August 2022)

<<https://www.directory.gov.au/commonwealth-parliament/parliamentary-committees/parliamentary-scrutiny-committees/scrutiny-delegated-legislation>>.

¹⁹¹ Parliament of Australia, *Standing Orders*, para 23

<https://www.apf.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/b00>.

- *it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.*

6.1.2.2. Scrutiny of CRP instruments

The committee has examined the CRP instruments issued by the Commissioner and sought the Government's advice in relation to their concerns identified in two CRP instruments, being the:

- Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020 (**CRP 2020/2**);¹⁹² and
- Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020 (**CRP 2020/3**).¹⁹³

Concerns raised by the Scrutiny of Delegated Legislation Committee	Minister's responses
<ul style="list-style-type: none"> ▪ General observation as per those raised previously by the Scrutiny of Bills Committee in their review of the proposed Division 370: provisions of delegated legislation that modify the operation of primary legislation may limit parliamentary oversight and may subvert the appropriate relationship between Parliament and the executive. 	
CRP 2020/2 <ul style="list-style-type: none"> ▪ The modification appears to be intended to remain in force for at least 10 years. ▪ Provisions which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence, to ensure a minimum degree of regular parliamentary oversight. ▪ The committee requested the Minister's advice as to: <ul style="list-style-type: none"> ○ Whether there are plans to include the modification implemented by the 	<p>An amendment in line with the modification by CRP 2020/2 to paragraph 38-510(1)(a) of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> is currently on the Treasury's Miscellaneous and Technical Amendments (MTA) Register.</p> <p>The amendment was intended to be included in the final MTA Bill for the year however due to other drafting priorities this did not occur.</p> <p>It is expected that the amendment will form part of a future MTA Bill.</p> <p>Until that time, the Determination would allow the continuity of access to GST-free supplies of cars and</p>

¹⁹² Letter from the Senate Standing Committee for the Scrutiny of Delegated Legislation to The Hon Michael Sukkar MP, 12 November 2020

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index/Index_2020>.

¹⁹³ Letter from the Senate Standing Committee for the Scrutiny of Delegated Legislation to The Hon Josh Frydenberg MP, 18 February 2021

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index/Index_2021>.

Concerns raised by the Scrutiny of Delegated Legislation Committee	Minister's responses
<p>instrument in future amendments to the GST Act; and</p> <ul style="list-style-type: none"> ○ Whether the instrument could be amended to specify that it ceases to operate three years after it commences. 	<p>car parts for people who live with disabilities and meet the criteria in the Determination.</p> <p>CRP 2020/2 will be amended to specify that it ceases three years after commencement. *</p>
<p>CRP 2020/3</p> <ul style="list-style-type: none"> ▪ The explanatory statement explains that, had the circumstances and policy intent of the instrument been considered when the primary Act was drafted, then the law would have been drafted differently. ▪ This explanation indicates that it would be more appropriate to amend the primary legislation to provide for the intended policy change rather than leaving these matters to delegated legislation. <ul style="list-style-type: none"> ○ The committee requested the Minister's advice as to whether the primary Act would be amended to provide for the changes to tax policy. 	<ul style="list-style-type: none"> ▪ The Government will consider whether the amendments to the primary law are necessary and appropriate. In the meantime, the use of the CRP allows for a timely and effective solution to be put in place to ensure affected individuals are not subjected to higher tax rates and required to lodge an income tax return.

* CRP 2020/2 was modified to state that it is repealed at the start of 1 April 2024 (i.e. just over three years from its commencement).

6.2. International comparisons

There are few jurisdictions that have provisions analogous to the CRP. The IGTO has identified New Zealand (NZ) and the United Kingdom (UK) as having provisions that appear to align in form and/or intent with the CRP.

6.2.1. New Zealand – sections 6C-G of the *Taxation Administration Act 1994*

In June 2019, the *Taxation Administration Act 1994* (NZ) was amended to extend the Commissioner of Inland Revenue's (CIR) duty of care and management of the taxes covered by the Inland Revenue Acts,¹⁹⁴ by providing a remedial power to temporarily address legislative anomalies or unintended outcomes that do not reflect the clear policy intent of a provision.¹⁹⁵

¹⁹⁴ Inland Revenue Acts is defined in the *Taxation Administration Act 1994* (NZ) to mean the Acts specified in Schedule 1 of that Act. The specified Acts include those in relation to income tax, duty, goods and services tax, child support, student loan, etc.

¹⁹⁵ Taxation (Annual Rates for 2019–20, GST Offshore Supplier Registration, and Remedial Matters) Bill 2018 (NZ); *Tax Administration Act 1994* (NZ) ss 6C-6G.

The remedial power allows the CIR to either:

- modify how certain provisions of the Inland Revenue Acts are to apply (through an Order in Council made by the Governor-General on the recommendation of the Minister of Revenue); or
- grant an exemption from those provisions.

The modification and exemption only apply for a limited time and taxpayers can choose whether to apply them. According to Inland Revenue's Tax Technical webpage¹⁹⁶, the use of the remedial power will be published there. As at 30 November 2023, there is no publication of the use of the remedial power on that webpage and the IGTO is not aware of any instances in which New Zealand Inland Revenue has exercised this power.

There are similarities and differences between the NZ remedial power and the Australian CRP.

Notably, the remedial powers in both jurisdictions:

- are exercised by way of disallowable legislative instruments.
- allow modification to the operation of a provision of a relevant law as defined.
- provides that a modification (including an exemption in the case of NZ remedial power) applies generally unless it is stated that it only applies to a class of entities or particular circumstances.
- require that the modification (including an exemption in the case of NZ remedial power) is not inconsistent with the intended purpose or object of the relevant provision.
- require that:
 - the modification (or exemption in the case of NZ remedial power) would have a negligible budget / fiscal impact (note – the fiscal implication requirement does not apply to a modification under the NZ remedial power); and
 - the modification (including exemption in the case of NZ remedial power) is reasonable having regard to the intended purpose or object of the provision.¹⁹⁷

¹⁹⁶ Inland Revenue, 'Legislation modification power' <<https://www.taxtechnical.ird.govt.nz/en/apply-for/apply-for-legislative-modifications/legislation-modification-power>>.

¹⁹⁷ Under the NZ remedial power, one of the requirements for the Commissioner to grant an exemption (or for the Minister of Revenue to recommend a modification) is if they are satisfied that the exemption (or modification) is reasonably necessary to do one or more of the following:

- (a) to remedy or mitigate the effect of an obvious error in a provision of the Inland Revenue Acts.
- (b) to give effect to the intended purpose or object of a provision of the Inland Revenue Acts, or to resolve ambiguity.
- (c) to reconcile an inconsistency between certain provisions of the Inland Revenue Acts, or between the relevant provision and an administrative practice of the Commissioner.

Tax Administration Act 1994 (NZ) ss 6D-6E.

Some key differences are:

Australia	New Zealand
<ul style="list-style-type: none"> There are no specific consultation requirements in Division 370 of the <i>Taxation Administration Act 1953</i> (AU). Consultation on CRP instruments is undertaken in line with section 17 of the <i>Legislation Act 2003</i>, which broadly requires rule-makers to consult before making legislative instruments. 	<ul style="list-style-type: none"> The requirement for consultation on a proposed exercise of the remedial power and the consultation process, including the minimum period of consultation, are prescribed in section 6F of the <i>Taxation Administration Act 1994</i> (NZ).
<ul style="list-style-type: none"> An entity <i>must</i> treat a CRP modification as not applying to it and any other entity if the modification would produce a less favourable result for the first entity. 	<ul style="list-style-type: none"> Application of a modification or exemption under the remedial power is optional i.e. a person may choose to disregard the modification or exemption if it is unfavourable.
<ul style="list-style-type: none"> The Australian CRP provisions do not have expressed sunset requirement. Accordingly, a CRP instrument may be in effect for up to 10 years (subsection 50(1) of the <i>Legislation Act 2003</i>). Nonetheless, the IGTO observes that the two most recent CRP instruments have a sunset clause that repeals them by a specified date that is less than 4 years from their registration. 	<ul style="list-style-type: none"> A modification or exemption must specify a period for which it applies, which must be no more than 3 income years.
<ul style="list-style-type: none"> There is no restriction regarding retrospective application of a CRP modification. 	<ul style="list-style-type: none"> A modification may apply retrospectively for up to five income years prior to the income year in which the modification comes into effect. An exemption may apply retrospectively to the beginning of the income year in which the exemption comes into effect.

6.2.2. United Kingdom – extra-statutory concessions

The UK does not provide the Commissioners of Revenue and Customs with a specific legislated power to modify provisions of the tax law. Instead, the HM Revenue & Customs (**HMRC**) publishes ‘extra-statutory concessions’, which are statements as to how the ‘collection and management’ function will be exercised in relation to circumstances affecting a group of taxpayers.¹⁹⁸ The ‘collection and management’ function is set out in section 5 of the *Commissioners of Revenue and Customs Act 2005* (UK):

¹⁹⁸ His Majesty’s Revenue and Customs, ‘Admin Law Manual ADML4000 - Extra-statutory concessions’ (Last modified 10 February 2022) <<https://www.gov.uk/hmrc-internal-manuals/admin-law-manual>>.

Commissioners' initial functions

- (1) *The Commissioners shall be responsible for*
- (a) *the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,*
 - (b) *the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and*
 - (c) *the payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section.*

The collection and management function is comparable to the Commissioner's GPA in Australia and provides the Commissioners of Revenue and Customs with a 'managerial discretion as to the best means of obtaining for the national exchequer the highest net return that is practicable having regard to the staff available to them and the cost of collection'¹⁹⁹. HMRC's ability to make ESCs stems directly from this managerial discretion, which, in some situations will result in concessional treatment for taxpayers. Specifically:²⁰⁰

An Extra-Statutory Concession is a relaxation which gives taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law. Most concessions are made to deal with what are, on the whole, minor or transitory anomalies under the legislation and to meet cases of hardship at the margins of the code where a statutory remedy would be difficult to devise or would run to a length out of proportion to the intrinsic importance of the matter.

The concessions ... are of general application, but it must be borne in mind that in a particular case there may be special circumstances which will need to be taken into account in considering the application of the concession. A concession will not be given in any case where an attempt is made to use it for tax avoidance.

Unlike the exercise of the CRP, which is made via legislative instruments, ESCs do not form part of either primary or subsidiary legislation. However, ESCs are highly formalised, formally categorised and

¹⁹⁹ *CIR v National Federation of Self-Employed and Small Businesses Ltd* [1982]; *R (Wilkinson) v Commissioners of Inland Revenue* [2003] EWCA Civ 814 at 43.

²⁰⁰ His Majesty's Revenue and Customs, *Extra-Statutory Concessions – Concessions as at 6 April 2018* (2018) p 1 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733377/Extra_Statutory_Concessions.pdf>.

published under reference numbers. ESCs may also be challenged via judicial review. Legislative instruments setting out exercises of the CRP may also be subject of challenge by judicial review.²⁰¹

Historically, ESCs were used to fix problems in the law, however, in 2005 the House of Lords ruled in *R (Wilkinson) v Inland Revenue* [2005] UKHL 30 that the practice was not lawful:

21. It does not justify construing the power so widely as to enable the Commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant...

ESCs after this decision were limited by the above interpretation and HMRC undertook a review of its ESCs with a view to establishing whether they were compliant with the principles set out in *Wilkinson*.²⁰² For ESCs issued before 2008, section 160 of the *Finance Act 2008 (UK)* was enacted to enable these to be given statutory effect, where possible, and appropriate remaining ESCs that exceeded the scope of HMRC's discretion would be withdrawn, typically following consultation and a period of notice.²⁰³

HMRC has published an *Admin Law Manual* and dedicates a chapter to explaining how the ESC is used currently:²⁰⁴

Interpreting the legislation

If the legislation in question is unequivocal then there is no scope for any alternative interpretation. Applying an alternative interpretation would be unlawful.

If the legislation in question is ambiguous and/or is silent on minor aspects, then it is legitimate:

- *to make a purposive interpretation of the legislation which puts a construction on any ambiguities that is consistent with Parliament's intention; and*
- *to formulate policy to deal with minor legislative gaps/silences in a way that is consistent with Parliament's intention and which will avoid anomalies and cases of hardship.*
- *Such interpretations will be lawful provided they are reasonable, fair and proportionate and, where relevant, do not create distortions of competition or*

²⁰¹ Australian Government Solicitor, *Legislative Instruments – Issues in Design* (26 February 2014) <<https://www.ag.gov.au/publications/legal-briefing/br102>>.

²⁰² His Majesty's Revenue and Customs, *Withdrawal of extra-statutory concessions: Summary of responses* (July 2015) para 1.1. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/446438/Withdrawal_of_extra-statutory_concessions_-_summary_of_responses.pdf>.

²⁰³ Ibid para 1.2.

²⁰⁴ His Majesty's Revenue and Customs, 'Admin Law Manual ADML4300 - Extra-statutory concessions: Deciding whether an extra-statutory concession can be made' (Last modified 10 February 2022) <<https://www.gov.uk/hmrc-internal-manuals/admin-law-manual>>.

amount to State Aid. These interpretations are generally not strictly concessions and might best be published as Statements of Practice.

- *Matters of statutory construction require the advice of HMRC's Solicitors Office.*
- *Similarly, where legislation is or appears to be silent, the question of whether the apparent gap can be filled as a matter of statutory interpretation is complex and legal advice must be sought.*
- *Policy owners contemplating a purposive interpretation on the ground that the legislation is ambiguous or has minor gaps should also seek Solicitors' advice. Subject to that advice, policy owners may then legitimately make a purposive interpretation of the legislation or formulate policy to deal with minor legislative gaps or silences.*

...

Concessions from the strict letter of the law

The circumstances in which policy owners will consider making ESCs will vary widely. All proposed concessions must comply with the following requirements.

- *The concession must not amount to the Commissioners refraining from collecting taxes and duties that Parliament has decreed shall be paid merely because it might seem unfair or objectionable to collect the tax.*
- *The concession can only provide for policy issues in the interstices of tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins, or cases where a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time.*
- *The Commissioners managerial discretion extends to cover a concession which will deliver the best means of obtaining the highest net return to the Exchequer that is practicable, having regard to the staff available to them and the cost of collection*
- *The concession does not in any way purport to allow the Commissioners to act in any way contrary to the intention of Parliament.*

7

CONCLUDING REMARKS

7. Concluding remarks

At the time of its passage through Parliament, the Minister for Small Business and Assistant Treasurer made the following remarks in her second reading speech regarding the CRP:²⁰⁵

Taxation laws are very complex. The nature and volume of taxation law can produce unforeseen and unintended outcomes in its application.

These outcomes can result in taxpayers generating tax liabilities where this was not intended, or taxpayers being subject to record keeping or other compliance requirements that were not intended or are no longer necessary. These outcomes can create significant uncertainty and compliance costs.

The commissioner endeavours to interpret the law to give effect to its purpose or object, but instances remain where this is not possible. For example, this can occur when dealing with new scenarios, or scenarios which were not contemplated when the provisions were drafted.

Unintended outcomes may be addressed through changes to the primary law. However, law change is resource intensive and is undertaken to give effect to the full range of government priorities. It can therefore be ill-suited to resolving smaller unintended outcomes.

The challenge of effecting primary law change is illustrated by the 92 announced changes to the tax law that had not been enacted at the time this government was elected. Had the remedial power existed, it would have been expected to have been able to address some of these smaller unintended outcomes. This also would have allowed constrained legislative resources to deal with more significant primary law changes.

...

The proposed power is to be used as a power of last resort, when unintended consequences cannot be ameliorated by the commissioner in any other way.

In the past, there have been instances where there has been a misalignment between the stated purpose of a particular provision and the technical language adopted in the legislation. In these instances the commissioner has not been able to address these issues or administer the legislation in a way that gives effect to its intended object or purpose.

²⁰⁵ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 14 September 2016, pp 860-861 (The Hon Kelly O'Dwyer MP).

This measure provides an avenue for efficient resolution of these issues, as and when they arise and fits well with the existing commitment by the commissioner to administer taxation legislation in accordance with the stated policy intent.

The measure will allow a smooth administration of the taxation and superannuation laws, in particular, when dealing with smaller unintended or unforeseen outcomes. This measure will assist in cutting red tape and provide greater support for taxpayers all across Australia.

In its Regulatory Impact Statement (RIS), the Treasury stated:²⁰⁶

1.152 It is estimated that the Commissioner may use the Remedial Power to modify the operation of the law up to ten times per annum.

In two examples that were given in the RIS, the Treasury estimated the regulatory savings to be \$330,000 and \$335,000 per annum, although it noted that actual regulatory savings would vary depending on the nature of the issue being addressed by the CRP.²⁰⁷

It is evident based on the discussions earlier in this report that the number of actual exercises of the CRP has been well-short of Treasury's estimates. Since its enactment, the CRP has been exercised seven (7) times from a pool of some 68 candidates brought to the Commissioner's attention for consideration.

The low usage rate of the CRP is not necessarily a problem in and of itself, as consideration of the CRP is only one aspect in a broader 3-step process for resolving issues caused by the unintended operation of tax laws. If the CRP was not exercised because the ATO was able to resolve most of the issues that they had encountered via purposive interpretation of the law or via the application of administrative solutions (by using the GPA and other discretionary powers), that would be entirely appropriate.

However, what we have observed in this investigation is that there have been occasions where the ATO has suspended or discontinued its consideration of the CRP in order to pursue legislative change through the MTA process. While the CRP is a discretionary power of last resort, it was not intended for the power to be subservient to the process of legislative change. To do so would be inconsistent with the statutory objective and reason why the CRP was introduced, which was to provide a 'timelier option to address smaller unintended outcomes that cannot be resolved administratively' and 'enhance the capacity of existing legislative mechanisms to consider more significant taxation law change'²⁰⁸. As noted in the explanatory memorandum:²⁰⁹

The process of effecting law change can take up to and sometimes more than two years between the identification and resolution of a problem. Minor unintended outcomes can

²⁰⁶ Explanatory Memorandum, Tax and Superannuation Laws Amendment (2016 Measures No 2) Bill 2016, para 1.152.

²⁰⁷ Ibid.

²⁰⁸ Ibid para 1.91.

²⁰⁹ Ibid para 1.104.

sometimes wait several years until they are prepared to be properly considered by the public and the Parliament.

Similarly, the RIS noted:²¹⁰

It can take up to two years to amend the taxation law to resolve an unintended outcome. Where amendments are particularly complex or are of a lower priority vis-à-vis other law changes on the whole of government legislative agenda, it can take even longer. Complex changes would take longer to draft, while minor changes would rarely warrant a standalone place on the legislative program. Instead, minor changes would be combined with other measures into a single Bill that gave effect to multiple different law changes. This increases the time in which minor changes can be addressed through law change, as they must await a place in a suitable Bill and wait for other changes in that Bill to be properly consulted on and prepared ready for introduction to Parliament. Any delays in enacting other measures in the Bill will also impact on the minor change. This makes the resolution of minor changes through law change lengthy and unpredictable.

In some cases, such as the CRP Candidate 33, titled *Debit value capped for certain defined benefit income streams*, more than two (2) years elapsed between the issue being identified and the law change being affected. Almost 500 days was spent on seeking legislative change through the MTA process after consideration of the CRP had been suspended. Similarly, in CRP Candidate 35, consideration of the CRP was suspended for over 900 days to pursue the MTA process, before the candidate was reconsidered and the CRP exercised in recognition of the significant delays that were affecting the MTA process. While the timeframes in these cases are not typical, and were affected by external factors such as lengthy consultations and the proroguing of Parliament ahead of the 2019 election, these sorts of unpredictable delays were precisely what the CRP was introduced to address. If consideration of the CRP in these cases had not been treated as being subservient to the process of legislative change, the CRP might have been exercised to provide affected taxpayers with a timelier resolution to the unintended outcome while law change was pursued through a separate (but parallel) process. The fact that the ATO had chosen to suspend consideration of the CRP in these cases and others indicates that the CRP was not exercised to the extent that it could have been.

This raises the interesting question of whether we can observe the prioritisation of the law change processes over consideration of the CRP elsewhere in the ATO. As the scope of the IGTO's investigation is focussed on the ATO's administration of the CRP, we have not sought to examine cases that the ATO has raised with the Treasury for potential legislative amendment through the MTA process. Accordingly, we are unable to discern whether there is a significant population of cases that could have been appropriate for an exercise of the CRP but were instead resolved through law change without ever being submitted as a CRP candidate. This may potentially be an area that is suitable for further examination by the ATO.

²¹⁰ Ibid para 1.149.

Whilst early consultations with stakeholders raised concerns that a core reason for CRP candidates being rejected was a failure to meet the requirement that any exercise of the CRP has a negligible impact on Commonwealth revenue, the IGTO's findings do not bear this out. By and large, the majority of CRP candidates failed because they were considered to be inconsistent with the intended policy objectives of the provisions sought to be modified,²¹¹ which may be symptomatic of a lack of understanding about the nature of the CRP, its criteria, and its intended purpose.

Accordingly, several of the recommendations in this report have the aim of improving awareness by ATO officers and the broader community of the CRP, as the exercise of the power is ultimately dependent on the quality and quantity of candidates presented for consideration. Increasing awareness may improve the quantity of candidates submitted for consideration while increasing understanding may increase the quality.

Furthermore, it is important to remember that the CRP is merely the final step in the ATO's broader process for resolving issues caused by the unintended operation of tax laws. The ATO's internal instructions require Officials to consider purposive interpretation of the legislation (a statutory requirement of the *Acts Interpretation Act 1901*) as well as administrative solutions such as those under the Commissioner's GPA before the CRP should be considered. Several recommendations aimed at clarifying the Commissioner's GPA and improving how it is administered, which may enhance the early steps prior to the CRP needing to be relied upon, have been made in the IGTO's Review report on the Exercise of the Commissioner's General Powers of Administration. Improvements to the manner in which these earlier steps are understood and administered by the ATO is also expected to pay dividends for the quality of candidates submitted for CRP consideration.

The IGTO has not sought, in this investigation, to examine the tax administration policy underpinnings the CRP nor to make policy recommendations. The RIS contemplated that the Minister could request a review be undertaken within 3 to 5 years of the CRP amendments being enacted to assess their operation. Following the Minister's consideration of this IGTO report, the Minister may wish to direct a further review be undertaken to examine whether the policy considerations and framework for implementation of the CRP are operating effectively. That is, whether further regulatory savings are possible. Where necessary, it may be prudent to revisit the criteria that may be limiting the operation of the CRP with a view to either broadening the intended scope or to provide greater legislative or Executive clarification (for example, by way of statements of expectations from the Minister) about the CRP.

²¹¹ Budget impact assessments are often not sought in relation to candidates which the CRP Secretariat and Advisory Panel consider to be inconsistent with the intended purpose or object of the relevant provisions. Accordingly, some of the candidates assessed as failing the intended purpose or object criteria may also have failed the budget impact criteria, if a budget impact assessment had been sought.



8

APPENDICIES

Appendix A — Terms of reference

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 world²¹² with over 14,000 pages of legislation, intended to deliver different policy outcomes for different taxpayers in different situations²¹³. The Commissioner of Taxation has administration, or partial administration, of 34 primary pieces of legislation (not counting delegated legislation).²¹⁴ 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 Administration²¹⁵ (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

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

²¹² 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.

²¹³ The Treasury, *Complexity – a sketch in five slides* (2015) <<https://treasury.gov.au/review/tax-white-paper/in-five-slides>>.

²¹⁴ Inspector-General of Taxation and Taxation Ombudsman, *Corporate Plan 2021-22* (2021) p 44.

²¹⁵ 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'.

(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:²¹⁶

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:²¹⁷

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.

²¹⁶ 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>>.

²¹⁷ Explanatory Memorandum to the Tax and Superannuation laws Amendment (2016 Measures No. 2) Bill 2016, para 1.12.

Appendix A — Terms of reference

Furthermore, the Explanatory Memorandum makes clear that the CRP is a power of last resort and notes:²¹⁸

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:²¹⁹

...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 withholding²²⁰
- Small business restructure roll-over²²¹
- Disclosure of Protected Information by Taxation Officers²²²
- Certificate for GST-free supplies of Cars for Disabled People²²³

²¹⁸ Ibid, para 1.13.

²¹⁹ *Alcan (NT) Alumina Pty Ltd V Commissioner of Territory Revenue (NT)* [2009] HCA 41 at [47].

²²⁰ *Taxation Administration (Remedial Power-Foreign Resident Capital Gains Withholding) Determination 2017.*

²²¹ *Taxation Administration (Remedial Power - Small Business Restructure Roll-over) Determination 2017.*

²²² *Taxation Administration (Remedial Power - Disclosure of Protected Information by Taxation Officers) Determination 2020.*

²²³ *Taxation Administration (Remedial Power - Certificate for GST-free supplies of Cars for Disabled People) Determination 2020.*

- Seasonal Labour Mobility Program²²⁴

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.²²⁵

TERMS OF REFERENCE

Through the IGTG'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.²²⁶

The IGTG'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 CRP²²⁷;
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

²²⁴ *Taxation Administration (Remedial Power - Seasonal Labour Mobility Program) Determination 2020*.

²²⁵ 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/>>.

²²⁶ 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.

²²⁷ 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.

Appendix A — Terms of reference

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.

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

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.

Appendix B — ATO response

Second Commissioner of Taxation



Australian Government
Australian Taxation Office

Karen Payne
Inspector-General of Taxation and Taxation Ombudsman
GPO Box 551
Sydney NSW 2001

Dear Karen,

Re: Review on the Administration of the Commissioner's Remedial Power

We welcome the finalisation of your review of the administration of the Commissioner's Remedial Power (CRP) and thank you for the opportunity to provide a response to the final draft of your report.

We are pleased that your report does not identify any significant systemic concerns around the ATO's administration of the CRP. Since its enactment, the Commissioner has sought to administer the CRP robustly and with integrity. The CRP is a relatively unique power that permits the Commissioner to modify the operation of the primary law. The Parliament deliberately enacted strict statutory criteria governing its exercise. The fact that that none of the legislative instruments made by the Commissioner pursuant to the CRP have been disallowed reflects the appropriate and measured approach the Commissioner has taken to its exercise.

That said, while the CRP has only been exercised on 7 occasions, the ATO has found it to be a useful tool to resolve unintended consequences arising from taxation laws. A recent example of this was the *Taxation Administration (Remedial Power – Work Test for Personal Superannuation Contributions) Determination 2023*. By making that determination, we were able to quickly resolve an unintended consequence of legislative amendments made in 2022, to ensure that certain individuals could continue to claim a deduction for their personal superannuation contributions.

We appreciate the recommendations made in the report directed to improving some aspects of our processes. We also recognise that greater awareness and understanding of the CRP and how it operates may result in a greater number of issues being identified as suitable for resolution via the CRP. We look forward to continuing to build on our strong administration of the CRP, with the benefit of your recommendations.

We acknowledge that there remain differences in our respective views about the extent to which the ATO can 'rescope' the issues presented by CRP candidates to overcome advice from the Department of the Treasury that a proposal would not have a negligible budget impact.

Our detailed response to your recommendations is attached, and we value the insights you have provided via these recommendations and your comprehensive report.

Appendix B — ATO response

Finally, we would like to acknowledge the efforts of everyone involved in undertaking this review, and thank you and your team for the collaborative and professional way the review was undertaken.

Yours sincerely

A handwritten signature in black ink, appearing to be 'KF', with a large, sweeping loop on the left side.

Kirsten Fish

Second Commissioner of Taxation

6 November 2023

IGTO Review – The Administration of the Commissioner’s Remedial Power

ATO responses to IGTO final draft report recommendations

Final Draft Report Recommendation	ATO Response
<p>Recommendation 3.1</p> <p><i>The IGTO recommends that the ATO consider additional channels and opportunities to:</i></p> <p><i>a) communicate with stakeholders about the existence of the CRP, the process to request an exercise of the CRP, its purpose and how it can be utilised to address unintended consequences; and</i></p> <p><i>b) bolster community awareness through guidance and information, including that which is already published and available on the ATO website.</i></p>	<p>Recommendations 3.1(a) and (b) – Agree</p> <p>The ATO agrees to consider additional channels and opportunities to communicate with stakeholders and bolster community awareness of the CRP.</p>

Final Draft Report Recommendation	ATO Response
<p>Recommendation 3.2</p> <p><i>The IGTO recommends that the ATO consider strategies to improve the level of staff awareness and understanding of the CRP and how it operates within the broader 3-step process for resolving unforeseen issues that may arise in the administration of tax law, particularly for ATO officers in CEG and LDP who engage frequently with taxpayers and tax practitioners.</i></p>	<p>Recommendation 3.2 – Agree</p> <p>The ATO agrees to consider strategies to improve the level of awareness of the CRP amongst relevant ATO staff.</p>
<p>Recommendation 3.3</p> <p><i>The IGTO recommends that the ATO consolidate and improve its system for capturing, tracking and reporting on the progress of CRP candidates, to reduce duplications and minimise the need for manual inputs and ensure that there is a complete record of relevant communications and deliberations for all CRP candidates.</i></p>	<p>Recommendation 3.3 – Agree</p> <p>The ATO agrees to improve how it captures, tracks and reports on the progress of CRP candidates to streamline reporting and recordkeeping.</p>

Final Draft Report Recommendation	ATO Response
<p>Recommendation 3.4</p> <p><i>The IGTO recommends that the ATO:</i></p> <ul style="list-style-type: none"> <i>a) develop guidelines or a set of criteria that clearly define the circumstances in which an approach or enquiry made to the CRP team is formally recorded as a CRP candidate for consideration and ensure there is a consistent treatment of all approaches made to the CRP team; and</i> <i>b) provide periodic progress updates to CRP applicants, or alternatively, clearly inform CRP applicants that they can contact the ATO to receive progress updates if the ATO does not provide updates to CRP applicants automatically.</i> 	<p>Recommendation 3.4(a) – Agree</p> <p>The ATO agrees to develop guidelines or criteria that clearly define the circumstances in which an approach or enquiry made to the PAL CRP team is formally recorded as a CRP candidate.</p> <p>Recommendation 3.4(b) – Agree in part</p> <p>The ATO agrees to inform the entity or person that makes a CRP application that they can contact the ATO to receive a progress update on the consideration of the application, and how this should be done.</p> <p>We note that periodic progress updates may be unnecessary in some circumstances, for example, where a CRP application is progressed swiftly, or is raised by an internal ATO business line.</p>

Final Draft Report Recommendation

ATO Response

Recommendation 4.1

The IGTO recommends that:

- a) unless there are clear reasons why it would be inappropriate to do so, the ATO consult with the CRP Advisory Panel on each CRP candidate, providing a full analysis of the reasons for its view in each case, before a final decision as to the suitability of the candidate for exercising the CRP is made;*
- b) where the ATO determines that it would be inappropriate to consult on a particular CRP Candidate, ensure that the decision is carefully considered, approved and documented; and*
- c) when documenting the ATO's consideration of whether a proposed CRP modification is 'not inconsistent with the intended purpose or object of the provision', for consultation with the CRP Advisory Panel, the ATO document its conclusion of the policy intent before explaining its decision on whether the proposed CRP modification is or is not inconsistent with the intended policy intent.*

Recommendation 4.1(a) – Agree

The ATO agrees to consult with the CRP Advisory Panel and provide it with a full analysis of our views on the suitability of each candidate before a final decision is made, unless consultation with the Panel would be inappropriate in a particular case.

Recommendation 4.1(b) – Agree

The ATO agrees that any decision not to consult with the CRP Advisory Panel on a particular CRP candidate will be carefully considered, approved and documented.

Recommendation 4.1(c) – Agree

The ATO agrees to document its understanding of the intended purpose or object of relevant provision/s in any analysis that it provides to the CRP Advisory Panel.

Final Draft Report Recommendation	ATO Response
<p>Recommendation 4.2</p> <p><i>The IGTO recommends that:</i></p> <p>a) <i>the ATO CRP assessment processes are reviewed and revised, as necessary, to ensure that in scoping a CRP candidate there is a fulsome consideration of the potential scope of application and legislative parameters by the Secretariat with input from the Advisory Panel at the outset in accordance with section 370-5(3), including identifying opportunities for the Secretariat and the Advisory Panel to revisit and review the scope of a candidate which may fail the budget impact criterion, but otherwise satisfy all the other criteria for the exercise of the CRP; and</i></p> <p>b) <i>the ATO, in consultation with the Treasury and the Department of Finance, consider what further information may be published about the CRP costing process generally as well as the costings of CRP candidates, both successful and unsuccessful, where the negligible budget impact criterion is considered.</i></p>	<p>Recommendation 4.2(a) – Disagree</p> <p>The ATO already carefully considers the parameters of each CRP candidate at the outset, to ensure it is assessed against the relevant statutory criteria (including the budget impact criterion) appropriately. This includes exploring alternative ways that issues raised by an applicant might meet the statutory criteria. For example, where an application effectively raises more than one issue and the likelihood of each of the issues meeting the statutory criteria differs, the ATO will treat and assess as discrete candidates.</p> <p>If an issue raised affects all taxpayers, or a particular cohort of taxpayers, the ATO considers that this is the most appropriate basis on which it is assessed.</p> <p>We note that it is highly unlikely that changes to the 'scope' of a candidate would have a material impact on the ability to quantify a revenue impact. Further, the ATO considers a modification to the law to address an issue only for some affected taxpayers is unlikely to be 'reasonable' (as required by paragraph 370-5(1)(b) of Schedule 1 to the <i>Taxation Administration Act 1953</i>, and may also be inconsistent with the intended purpose or object of the relevant provision (see paragraph 370-5(1)(a)).</p> <p>Recommendation 4.2(b) – Agree in part</p> <p>The ATO agrees to consult with Treasury and the Department of Finance to consider what further information about the CRP costing process generally may be published, noting this process applies to all Government costings, not just to costings undertaken as part of considering CRP candidates.</p> <p>The ATO also agrees to consult with Treasury and the Department of Finance regarding information that may be published regarding costings of CRP candidates that have not met the negligible budget impact criterion. However, the ATO does not consider it necessary or appropriate to publish costing information for candidates where the CRP is exercised.</p>

Final Draft Report Recommendation	ATO Response
<p>Recommendation 4.3</p> <p><i>The IGTO recommends that the ATO enhance its consultation in relation to the CRP by:</i></p> <ul style="list-style-type: none"> <i>a) developing guiding documents, protocols or charters to inform its consultation with the CRP Advisory Panel (including processes for refreshing or expanding the Panel), the Board of Taxation, other Government organisations and specific stakeholders;</i> <i>b) leveraging its existing consultation and stewardship forums to consult on potential CRP candidates that are under consideration; and</i> <i>c) publishing information about the consultation that the ATO undertakes in relation to each CRP matter published on the ATO website.</i> 	<p>Recommendation 4.3(a) – Agree</p> <p>The ATO agrees to develop a document that details its general approach to consultation with the CRP Advisory Panel, the Board of Taxation, as well as other Government organisations and specific stakeholders. The ATO also agrees to include information about refreshing or expanding Panel membership in this document.</p> <p>Recommendation 4.3(b) – Agree in principle</p> <p>The ATO agrees to consider how it can better utilise existing ATO consultation and stewardship forums to consult on future CRP candidates.</p> <p>Recommendation 4.3(c) – Agree</p> <p>The ATO agrees to publish high-level information about its consultation process for CRP candidates published on the ATO website, where public and/or targeted consultation has been undertaken (noting that public consultation is routinely undertaken for successful CRP candidates, but not for unsuccessful candidates).</p>
<p>Recommendation 4.4</p> <p><i>The IGTO recommends that the ATO develop internal service standards for each main stage of the CRP process pathway and measure its performance against these service standards.</i></p>	<p>Recommendation 4.4 – Agree in principle</p> <p>The ATO agrees to develop internal 'best practice' service standards for each main stage of the CRP process, and measure its performance against these service standards. However, there will need to be some flexibility in any service standards to recognise the role of various external parties in the CRP process, and the fact the ATO cannot control the timing of the actions of those parties.</p>

Final Draft Report Recommendation

ATO Response

Recommendation 5.1

The IGTO recommends that:

- a) the ATO update its policy to ensure that the CRP process is not to be suspended in favour of a law change process, such as the MTA, except in very limited circumstances, such as where the ATO has received advice from Treasury that the law change is likely to occur before the CRP process can be finalised; and*
- b) where the CRP process is suspended or not pursued, so that processes such as the MTA or legislative change can run their course, the ATO should implement procedures to monitor the progress of the relevant legislative change and, in consultation with the CRP Advisory Panel, reconsider the candidate for CRP actions where appropriate (that is, the initial time expectations are no longer realistic).*

Recommendation 5.1(a) – Agree

The ATO agrees to update and document its policy on the limited circumstances in which it is appropriate to suspend the CRP process in favour of a legislative amendment. The ATO notes that its policy will take into account factors beyond whether law change is likely to occur before the CRP process can be finalised.

Recommendation 5.1(b) – Agree in principle

In the limited circumstances where the CRP process is suspended or not pursued because legislative change is being progressed, the ATO agrees to monitor the progress of relevant legislative change.

If the ATO becomes aware that initial time expectations for legislative change are no longer realistic, the ATO agrees to consider whether to resume consideration of the CRP candidate via its ordinary process for handling CRP candidates.

Appendix C — IGTO case sampling review of candidates assessed by the ATO through their CRP process pathway

Appendix C — IGTO case sampling review of candidates assessed by the ATO through their CRP process pathway

[Due to the size of the Appendix, it has been attached in full behind this cover page]

CRP Candidate		16. Accessing Managed Investment Trusts (MIT) withholding rate for a chain of entities simplified reporting	33. Debit value for certain capped defined benefit income streams	35. GST - ensuring the supply of cars for use by disabled people remains GST-free	44. Deceased estates-covered entity	50. Veteran payment issues	55. Loss carry back tax offset	58. First home super saver superannuation scheme
CRP Issue raised by		Tax agent, via email	Internal ATO business line, via internal ATO CRP form	Internal ATO business line, via external CRP webform	Professional accounting association, via email	Internal ATO business line, via email	Professional accounting association, via email	Taxpayer (through the IGTO), via email
Date issue was first raised		22/05/2017	9/02/2018	19/05/2017	21/06/2019	20/08/2019	16/02/2021	18/06/2021
Date issue was resolved		24/05/2017	26/11/2018 - CRP suspended. 22/06/2020 - MTA Bill passed.	9/12/2020 - CRP effective date 7/12/2021 - MTA Bill passed	15/05/2020 - CRP effective date 7/12/2021 - MTA Bill passed	4/12/2020	20/4/2021 - CRP outcome 7/12/2021 - MTA Bill Assented	1/07/2021 - CRP outcome
Was CRP Exercised?		No	No	Yes	Yes	No	No	No
Was the CRP Panel consulted?		No > ATO process at the time was not to consult the CRP Panel for potentially unsuitable candidates	No > CRP process ceased prior to CRP Panel consideration	Yes, on 9/6/2020 > Number consulted: 6 (3 ATO members, 1 Treasury member and 2 external members)	Yes, on 17/10/2019 > Number consulted: 7 (3 ATO members, 1 Treasury member, and 3 external members)	Not as part of the CRP assessment. > The Panel was provided with a summary of the candidate on 7/9/2022 prior to its publication on ATO Website. The ATO did not require the Panel's agreement or comment on the summary, but welcomed suggestions or questions from the Panel if there are any. > The summary was provided to 8 Panel members (1 ATO member, 1 Treasury member, and six external members)	Yes, on 15/3/2021 > Number consulted: 9 (2 ATO members, 1 Treasury member, and six external members)	Yes, on 23/6/2021 > Number consulted: 9 (2 ATO members, 1 Treasury member, and six external members)
If Yes, did the CRP Panel agree with the ATO's CRP conclusion?		N/A	N/A	Yes	Yes	The ATO did not receive any comments or questions from the Panel	Yes - responses from four external members and one ATO member	Yes - responses from four external members and one ATO member
ATO's assessment of the intended purpose or object of the relevant provision	Was the intended purpose or object	No	Yes	Yes	Yes	No	No	Yes
	What materials did the ATO consider to ascertain the intended purpose or object of the provision?	Not stated	> section 294-145 of the ITAA 1997 > EM to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 > Verbal advice from Treasury that the policy outcome was unintended	> Section 38-510 of the GST Act 1999 > the EM accompanied the Bill that introduced section 38-510	> Subdivision 355-B of the TAA 1953 > The EM and second reading speeches to the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 > The inquiry into the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 and the submissions > The former taxation secrecy provision and the EM relating to those bills containing the provisions > The consultation paper on 'The Review of Taxation Secrecy and Disclosure Provisions' and the submissions relating to this paper > The submissions relating to the exposure draft of the Confidentiality of Taxpayer Information Bill. > Advice from Treasury	> Section 59-30 of the ITAA 1997 > EM to the Taxation Laws Amendment Bill (No. 4) 2003 which inserted section 59-30 > The legislative history of section 59-30, including: - the relevant EM. - the associated Bills Digest - Media Release by the then Assistant Treasurer on 1 August 2001 in relation to 'Taxation Treatment of Compensation Payments to Members of the Australian Defence Force and of Income Which is Repaid' > Macquarie Dictionary definition of the word 'repay'. > Thieiss v Collector of Customs (2014) 250 CLR 664, in which the High Court held that dictionary meanings need to be considered in light of the purpose of a statute.	> Division 160 of the ITAA 1997 > The EM to the Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020 > Comparison with another provision in the ITAA 1997 (i.e. Division 36) that also allows a corporate tax entity to carry forward tax losses, which has a mechanism to amend a choice and a recalculation procedure	> The 2021-22 Federal Budget - Part 1 of Budget Paper No.2 > The EM of the Bill to the <i>Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No.1) Act 2017</i> . > The texts of the relevant provisions
	Did the ATO consider materials other than those prescribed in subsection 15AB(2) of the AIA 1901?	Not stated	Yes - Treasury advice	No	Yes > The former taxation secrecy provision and the EM relating to those bills containing the provisions > Treasury advice	Yes > The legislative history of section 59-30 > Media Release by the then Assistant Treasurer on 1 August 2001 in relation to 'Taxation Treatment of Compensation Payments to Members of the Australian Defence Force and of Income Which is Repaid' > Macquarie Dictionary definition of the word 'repay'. > Thieiss v Collector of Customs (2014) 250 CLR 664, in which the High Court held that dictionary meanings need to be considered in light of the purpose of a statute.	Yes > Comparison with another provision in the ITAA 1997 (i.e. Division 36) that also allows a corporate tax entity to carry forward tax losses	Yes > The 2021-22 Federal Budget - Part 1 of Budget Paper No.2
	Was the ATO's consideration of policy intent primarily based on extrinsic materials and not the text of the legislation?	Unclear	Yes	Yes	Yes	No The IGTO observed that the ATO's consideration focused on the interpretation or meaning of the word 'repay' in the provision, as opposed to the intended purpose of the provision itself.	Unclear The ATO considered that it would not be inconsistent with the policy intent for the loss carry back choice to be modified so that it can be revoked or changed, however, the ATO then considered that drafting machinery provisions to enable that modification would be inconsistent with the policy intent due to lack of guidance in EM or other extrinsic materials	Yes

CRP Candidate			16. Accessing Managed Investment Trusts (MIT) withholding rate for a chain of entities simplified reporting	33. Debit value for certain capped defined benefit income streams	35. GST - ensuring the supply of cars for use by disabled people remains GST-free	44. Deceased estates-covered entity	50. Veteran payment issues	55. Loss carry back tax offset	58. First home super saver superannuation scheme
ATO's assessment of CRP Candidates against CRP Criteria	CRP Criterion 1: The modification is not inconsistent with the intended purpose or object of the provision	The ATO's decision	Criterion not met	Criterion met	Criterion met	Criterion met	Criterion not met	Criterion not met	Criterion met
	CRP Criterion 2: The modification is reasonable having regard to the intended purpose or object of the provision and compliance cost	The ATO's decision	Consideration not necessary	N/A - CRP process suspended and MTA was pursued instead	Criterion met	Criterion met	Consideration not necessary	Consideration not necessary	Criterion met
		Additional matters considered by the ATO in making this decision	N/A	N/A	> Consultation with the Australian Medical Association > Whether certificate issued by a medical practitioner will allow integrity of the concession to be maintained	> The administrative burden placed on deceased estates > Whether the disclosure provisions in s 355-10 of Schedule 1 of the TAA could be used instead > Who should be considered as a representative ie. Included BAS agents but not guardians > Whether the modification produces a less favourable result for any entities	N/A	N/A	>The extent to which the modification is favorable to entities > The modification offers more flexibility to address errors than the present mechanism under the law > There is no suggestion that the current law is imposing disproportionate compliance costs on FHSSS applications to achieve its intended purpose or object
	CRP Criterion 3: Budget impact would be negligible	Budget impact outcome	Consideration not necessary	Criterion met	Criterion met	Criterion met	Consideration not necessary	Consideration not necessary	Negligible
		Was the outcome supported by advice from Treasury / Finance?	N/A	No - CRP process suspended and MTA was pursued instead.	Yes	Yes	N/A	N/A	Yes
	Any other reasons to not exercise the CRP?			The proposed modification only benefits one taxpayer rather than a class of taxpayers	In October 2018, Treasury announced that the issue was to be addressed via legislative change.	N/A	N/A	No	No
If CRP was not exercised, was there an alternate solution? What was it?			The ATO referred the applicant to the relevant ATO business line for an early engagement discussion.	Yes - issue was resolved via an MTA.	N/A (as CRP was exercised, noting that the issue was subsequent addressed via an MTA)	N/A (as CRP was exercised, noting that the issue was subsequent addressed via an MTA)	An administrative solution is being used	Issue was resolved through legislative amendment. See items 32-33 of Part 1 of Schedule 3 to the <i>Treasury Laws Amendment (2021 Measures No. 5) Act 2021</i>	Issue was resolved via <i>Treasury Laws Amendment (2023 Measures No. 3) Act 2023</i>

Appendix D — CRP candidates assessed by the ATO as at 30 September 2023

Note – This Appendix is compiled by the IGTO based on ATO information. The ATO has not verified the accuracy of this Appendix.

[Due to the size of the Appendix, it has been attached in full behind this cover page]

No.	Candidate	Date CRP issue was first raised	CRP issue raised by	Date CRP decision was made	Was CRP Exercised?	CRP Panel consultation?	ATO reason for not exercising the CRP	If CRP was not exercised, how is the issue being managed?	Has CRP outcome been published on ATO website?	Candidates sampled by the IGTO against the CRP process pathway?	Candidates which the IGTO sought clarification on specific matters
1	Early stage investors in innovation companies (Angel investor)- 3 year expense test	9/9/2016 (Pre-CRP commencement)	Internal ATO business line	IGTO did not sight this data	No CRP	No	Provisions governing the CRP had not commenced. Issue was subsequently resolved via legislative amendment	Resolved via MTA See Item 12 of Part 2 of Schedule 2 to the <i>Treasury Laws Amendment (2018 Measures No 2) Act 2020</i> . The originating Bill received Royal Assent on 26/2/2020.	Yes	No	Resolution of issue raised (where CRP is not used)
2	Fringe Benefits Tax (FBT) outdated census data	Pre-CRP commencement	Internal ATO business line	24/10/2016 (Pre-CRP commencement)	No CRP	No	Not beneficial to taxpayers	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
3	Foreign resident capital gains tax withholding regime	29/8/2016 (Pre-CRP commencement)	Internal ATO business line	17/10/2017 (CRP effective date)	Yes	Yes 24/3/2017	Not applicable - CRP exercised	Not applicable - CRP exercised	Yes	No	
4	Income Tax: Division 50 Special Conditions (Not-for-profit (NFP) exemption from income tax)	31/10/2016 (Pre-CRP commencement)	Internal ATO business line	IGTO did not sight this data	No CRP	No	Inconsistent with policy intent	Administrative solution applied	Yes	No	Resolution of issue raised (where CRP is not used)
5	Running Balance account (RBA)	Pre-CRP commencement	Internal ATO business line	15/09/2016 (Pre-CRP commencement)	No CRP	No	Inconsistent with policy intent	No further ATO action (issue has low impact on taxpayers) - issue was going to be addressed through MTA but Treasury has paused the MTA process.	No - Issue will not be published as it was not formally submitted for CRP consideration	No	Resolution of issue raised (where CRP is not used)
6	Small business restructure roll-over not applying to depreciating assets	7/9/2016 (Pre-CRP commencement)	Internal ATO business line	8/5/2018 (CRP effective date)	Yes	Yes 24/3/2017	Not applicable - CRP exercised	Not applicable - CRP exercised	Yes	No	
7	Interest on overpayments (IOP) of withholding tax (WHT) by non-residents	Pre-CRP commencement	Internal ATO business line	21/12/2015	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
8	Authorised deposit institutions (ADIs) – effective non-contingent obligation on Tier 2 regulatory capital	22/6/2014 (Pre-CRP commencement)	Internal ATO business line	IGTO did not sight this data	No CRP	No	Provisions governing the CRP had not commenced. Issue was subsequently resolved via legislative amendment	Resolved - see Treasury Laws Amendment (Mutual Equity Interests) Regulations 2019 (registered on 25/03/2019)	Yes	No	Resolution of issue raised (where CRP is not used)
9	Asbestos insulation buybacks - CGT replacement asset rollover relief	Pre-CRP commencement	Internal ATO business line	20/06/2015 (Pre-CRP commencement)	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
10	Exempting certain individuals from the 5-year record-keeping requirement	Pre-CRP commencement	Internal ATO business line	10/1/2017 (Pre-CRP commencement)	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
11	PAYG high instalments	Pre-CRP commencement	Internal ATO business line	Pre-CRP commencement)	No CRP	No	Budget impact not negligible (ATO internal assessment only)	Administrative solution applied	Yes	No	Resolution of issue raised (where CRP is not used) Budget impact assessment
12	Discretion to allow Taxation of Financial Arrangements (TOFA) foreign exchange election to apply retrospectively	24/04/2017	Tax agent and Internal ATO business line	IGTO did not sight this data	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)

No.	Candidate	Date CRP issue was first raised	CRP issue raised by	Date CRP decision was made	Was CRP Exercised?	CRP Panel consultation?	ATO reason for not exercising the CRP	If CRP was not exercised, how is the issue being managed?	Has CRP outcome been published on ATO website?	Candidates sampled by the IGTO against the CRP process pathway?	Candidates which the IGTO sought clarification on specific matters
13	CGT - use of discretion to classify properties as pre-CGT assets where the transaction spans the introduction of CGT regime	11/04/2017	Tax agent	IGTO did not sight this data	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
14	Additional requirements for Early stage venture capital limited partnerships (ESVCLP) to acquire pre-owned investment	11/04/2017	Tax agent	IGTO did not sight this data	No CRP	No	Treasury agreed to address the issue via an MTA.	Resolved via MTA See Item 2 of Part 1 of Schedule 2 to the Treasury Laws Amendment (2018 Measures No 2) Act 2020. Originating Bill received Royal Assent on 26/02/2020.	Yes	No	Resolution of issue raised (where CRP is not used)
15	The provision of transitional Capital Gains Tax (CGT) relief for unsegregated super funds	10/05/2017	Professional association & tax agent	18/05/2017	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
16	Accessing Managed Investment Trusts (MIT) withholding rate for a chain of entities simplified reporting	22/05/2017	Tax agent	24/05/2017	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	Yes	Resolution of issue raised (where CRP is not used) ATO CRP decision ATO communication to CRP applicant
17	Definition of 'ineligible annuity' and deferred life annuities	28/08/2017	Internal ATO business line	4/04/2018	No CRP	Yes (Panel considered candidate suitable for CRP)	MTA process was able to be legislated prior to the completion of the CRP process	Resolved via MTA See Item 30 of Part 6 of Schedule 8 to the Treasury Laws Amendment (2018 Measures No 4) Act 2019. (Assented 1 Mar 2019). Originating Bill received Royal Assent on 1/3/2019.	Yes	No	Resolution of issue raised (where CRP is not used)
18	Inheritance taxing point – CGT event E7	11/08/2017	Tax agent	7/09/2017	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
19	Taxation of funds received as a result of a compensation payout	30/04/2018	Taxpayer	28/06/2018	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used) ATO CRP decision
20	GST on property transactions subject to pre- existing long-term lease	17/04/2018	Taxpayer	8/06/2018	No CRP	Not when CRP decision was made. Panel was notified of ATO's decision prior to publication on ATO website	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used) ATO consultation with the CRP Advisory Panel
21	Division 768-A application to dual residents	15/06/2018	Internal ATO business line	28/11/2018	No CRP	Yes (Panel considered candidate suitable for CRP, subject to budget impact)	Budget impact not negligible (per Treasury advice)	Resolved via MTA Item 113 of Part 2 of Schedule 3 to the Treasury Laws Amendment (2019 Measures No 3) Act 2020. Originating Bill received Royal Assent on 22/6/2020.	Yes	No	Budget impact assessment
22	CGT carve-out where income from rental property not received but assessed	14/06/2018	Taxpayer	IGTO did not sight this data	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)

No.	Candidate	Date CRP issue was first raised	CRP issue raised by	Date CRP decision was made	Was CRP Exercised?	CRP Panel consultation?	ATO reason for not exercising the CRP	If CRP was not exercised, how is the issue being managed?	Has CRP outcome been published on ATO website?	Candidates sampled by the IGTO against the CRP process pathway?	Candidates which the IGTO sought clarification on specific matters
23	Extension of main residence exemption for destroyed dwelling	30/04/2018	Tax agent	IGTO did not sight this data	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used) ATO communication to CRP applicant
24	Single Touch Payroll Engagement Authority	3/09/2018	Internal ATO business line	20/11/2018	No CRP	No	Inconsistent with policy intent	Administrative solution applied	No	No	Resolution of issue raised (where CRP is not used)
25	Interposition of new head company- CoT losses	31/08/2018	Tax agent	1/02/2019	No CRP	No	Budget impact not negligible (per Treasury advice)	Resolved via MTA See item 80-83 of Part 2 of Schedule 3 to the Treasury Laws Amendment (2019 Measures No 3) Act 2020. Originating Bill received Royal Assent on 22/6/2020.	Yes	No	Budget impact assessment
26	FBT exemption: definition of 'taxi'	9/08/2018	Taxpayer	IGTO did not sight this data	No CRP	No	Inconsistent with policy intent	Resolved via MTA See item 63 of Part 2 of Schedule 3 to the Treasury Laws Amendment (2019 Measures No 3) Act 2020. Originating Bill received Royal Assent on 22/6/2020.	No	No	Resolution of issue raised (where CRP is not used)
27	Lost and unclaimed super reporting	22/06/2017	Internal ATO business line	18/07/2018	No CRP	No	Inconsistent with policy intent	Resolved via MTA See items 54, 59 and 60 of Part 1 of Schedule 3 of the Treasury Laws Amendment (2019 Measures No. 3) Act 2020. Originating Bill received Royal Assent on 22/6/2020.	Yes	No	
28	Excess non-concessional contributions rules – appropriateness of associated earnings formula	20/03/2017	Taxpayer via IGTO	14/12/2017	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
29	Third party reporting	28/10/2016 (Pre-CRP commencement)	Internal ATO business line	IGTO did not sight this data	No CRP	No	Not beneficial to taxpayers	Resolved via MTA See item 62 Part 6 of Schedule 8 to the Treasury Laws Amendment (2018 Measures No.4) Act 2019. Originating Bill received Royal Assent on 1/3/2019. Legislative amendments passed to clarify the intended operation of the law only.	No	No	Resolution of issue raised (where CRP is not used)
30	NFP- spreading deduction for gift of property in particular circumstances	9/11/2018	Internal ATO business line	IGTO did not sight this data	No CRP	No	Budget impact not negligible (per Treasury advice)	Legislative solution is being considered	No	No	Resolution of issue raised (where CRP is not used)
31	Refund of amounts garnisheed- Commissioner obtains new information after issuing	27/11/2018	Internal ATO business line	Issue withdrawn	Issue Withdrawn	N/A	Not applicable - Application withdrawn by applicant	Issue Withdrawn by applicant	Not applicable	No	
32	ITX- Chain leasing	30/05/2018	Internal ATO business line	Issue withdrawn	Issue Withdrawn	N/A	Not applicable - Application withdrawn by applicant	Issue Withdrawn by applicant	Not applicable	No	

No.	Candidate	Date CRP issue was first raised	CRP issue raised by	Date CRP decision was made	Was CRP Exercised?	CRP Panel consultation?	ATO reason for not exercising the CRP	If CRP was not exercised, how is the issue being managed?	Has CRP outcome been published on ATO website?	Candidates sampled by the IGTO against the CRP process pathway?	Candidates which the IGTO sought clarification on specific matters
33	Debit value for certain capped defined benefit income streams	9/02/2018	Internal ATO business line	26/11/2018 (CRP process abandoned)	No CRP	No	Treasury agreed to address the issue via an MTA.	Resolved via MTA See items 327 and 328 of Part 4 of Schedule 3 to the Treasury Laws Amendment (2019 Measures No. 3) Act 2020. Originating Bill received Royal Assent on 22/6/2020.	Yes	Yes	ATO communication to CRP applicant
34	Scrip for scrip rollover- carve- out for trust scheme	15/05/2018	Tax agent	IGTO did not sight this data	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
35	GST- ensuring the supply of cars for use by disabled people remains GST-free	19/05/2017	Internal ATO business line	9/12/2020 (CRP effective date)	Yes	Yes	Not applicable - CRP exercised	Not applicable - CRP exercised	Yes	Yes	ATO communication to CRP applicant ATO consultation with stakeholders
36	Definition of GST joint venture	Pre-CRP commencement	Internal ATO business line	Issue Withdrawn	Issue Withdrawn	N/A	Not applicable - Application withdrawn by applicant	Issue Withdrawn by applicant	Not applicable	No	
37	GST/indirect tax assessment amended by ADR/settlement – TIOPEA interest	Pre-CRP commencement	Internal ATO business line	24/11/2015 (Pre-CRP commencement)	No CRP	Not when CRP decision was made. Panel was notified of ATO's decision prior to publication on ATO website	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used) ATO consultation with the CRP Advisory Panel
38	CGT relief for trustee of a testamentary trust (deceased estate)	Pre-CRP commencement	Internal ATO business line	5/04/2016 (Pre-CRP commencement)	No CRP	No	Not beneficial to taxpayers	No further ATO action - no formal CRP application received.	No	No	ATO CRP decision
39	Assessment of debt account discharge liability (DADL) amount	17/3/2016 (Pre-CRP commencement)	Internal ATO business line	IGTO did not sight this data	No CRP	No	Inconsistent with policy intent	No further ATO action - no formal CRP application received.	No	No	ATO CRP decision
40	Division 83-unused leave entitlements	Pre-CRP commencement	Internal ATO business line	20/10/2015 (Pre-CRP commencement)	No CRP	Not when CRP decision was made. Panel was notified of ATO's decision prior to publication on ATO website	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used) ATO consultation with the CRP Advisory Panel
41	Division 293- application to constitutionally protected state higher level office holders	11/08/2017	Internal ATO business line	7/09/2017	No CRP	Not when CRP decision was made. Panel was notified of ATO's decision on 7/9/2022, prior to its publication on the ATO website	Resolved via administrative solution	Administrative solution applied	Yes	No	Resolution of issue raised (where CRP is not used) ATO consultation with the CRP Advisory Panel
42	WET quoting-industry issue	29/05/2018	Tax agent and Internal ATO business line	IGTO did not sight this data	No CRP	No	Inconsistent with policy intent	No further ATO action as no systemic issues identified	No	No	Resolution of issue raised (where CRP is not used)
43	Substituted account method- ride sharing	5/04/2019	Internal ATO business line	Issue Withdrawn	Issue Withdrawn	N/A	Not applicable - Application withdrawn by applicant	Issue Withdrawn by applicant	No	No	

No.	Candidate	Date CRP issue was first raised	CRP issue raised by	Date CRP decision was made	Was CRP Exercised?	CRP Panel consultation?	ATO reason for not exercising the CRP	If CRP was not exercised, how is the issue being managed?	Has CRP outcome been published on ATO website?	Candidates sampled by the IGTO against the CRP process pathway?	Candidates which the IGTO sought clarification on specific matters
44	Deceased estates-covered entity	21/06/2019	Professional association	15/5/2020 (CRP effective date)	Yes	Yes	Not applicable - CRP exercised	Not applicable - CRP exercised	Yes	Yes	ATO communication to CRP applicant ATO consultation with the Board of Taxation
45	Hybrid Mismatch and AT1 Regulatory Capital	19/09/2019	Internal ATO business line	15/10/2019 (CRP process suspended)	No CRP	Not when CRP decision was made. Panel was notified of ATO's decision on 19/4/2021, prior to its publication on the ATO website	CRP process suspended while MTA progressed	Resolved via MTA See items 61 to 64 of Part 4 of Schedule 1 to the Treasury Laws Amendment (2020 Measures No. 2) Act 2020. Originating Bill received Royal Assent on 3/9/2020.	Yes	No	
46	Sovereign Immunity	18/10/2019	Internal ATO business line	IGTO did not sight this data	No CRP	IGTO did not sight this data	Inconsistent with policy intent	Resolved via MTA See items 125-127 of Part 2 to Schedule 3 of the Treasury Laws Amendment (2019 Measures No. 3) Act 2020. Originating Bill received Royal Assent on 22/6/2020.	Yes	No	
47	Significant Global Entities (SGE) Penalties	12/11/2019	Internal ATO business line	IGTO did not sight this data	No CRP	IGTO did not sight this data	Inconsistent with policy intent	No further ATO action as no systemic issues identified	No	No	Resolution of issue raised (where CRP is not used)
48	Base Rate Entity Passive Income (BREPI) and dividends	25/11/2019	Tax agent	IGTO did not sight this data	No CRP	IGTO did not sight this data	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
49	Early Stage Venture Capital Limited Partnership Tax Offset	5/12/2019	Taxpayer	13/02/2020	No CRP	Yes	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
50	Veteran Payment Issues	20/08/2019	Internal ATO business line	4/12/2020	No CRP	Not when CRP decision was made. Panel was notified of ATO's decision on 7/9/2022, prior to its publication on the ATO website	Inconsistent with policy intent	Administrative solution applied	Yes	Yes	Resolution of issue raised (where CRP is not used) ATO consultation with the CRP Advisory Panel ATO communication to CRP applicant
51	Expansion of sole trader eligibility for the JobKeeper payment	25/04/2020	Taxpayer	10/06/2020	No CRP	Yes	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used)
52	Seasonal Worker Program temporary visa changes	26/08/2020	Internal ATO business line	14/5/2021 (CRP effective date)	Yes	Yes	Not applicable - CRP exercised	Not applicable - CRP exercised	Yes	No	ATO consultation with stakeholders and the Board of Taxation
53	Significant Global Entities Reporting	5/02/2020	Internal ATO business line	IGTO did not sight this data	No CRP	Not when CRP decision was made. Panel was notified of ATO's decision on 7/9/2022, prior to its publication on the ATO website	Treasury agreed to address the issue via an MTA.	Resolved via MTA See items 3-5 of Part 1 of Schedule 3 to the Treasury Laws Amendment (2021 Measures No. 5) Act 2021. Originating Bill received Royal Assent on 7/12/2021.	Yes	No	ATO consultation with the CRP Advisory Panel

No.	Candidate	Date CRP issue was first raised	CRP issue raised by	Date CRP decision was made	Was CRP Exercised?	CRP Panel consultation?	ATO reason for not exercising the CRP	If CRP was not exercised, how is the issue being managed?	Has CRP outcome been published on ATO website?	Candidates sampled by the IGTO against the CRP process pathway?	Candidates which the IGTO sought clarification on specific matters
54	GST at Settlement Credit Mismatch	9/11/2020	Internal ATO business line	IGTO did not sight this data	No CRP	No	CRP process suspended while MTA progressed	Resolved via MTA See items see items 41-44 of Part 2 of Schedule 6 to the Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023, which received Royal Assent on 20 September 2023.	No	No	
55	Loss Carry Back tax offset	16/02/2021	Professional association	20/04/2021	No CRP	Yes	Inconsistent with policy intent	Resolved via MTA See items 32-33 of Part 1 of Schedule 3 to the Treasury Laws Amendment (2021 Measures No. 5) Act 2021. Originating Bill received Royal Assent on 7/12/2021.	Yes	Yes	ATO communication to CRP applicant
56	Early Release of Superannuation Extra Discretion	1/05/2021	Taxpayer	22/06/2021	No CRP	Yes	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	ATO consultation with the CRP Advisory Panel
57	First Home Saver Superannuation Scheme	24/05/2021	Taxpayer via IGTO	13/07/2021	No CRP	Yes	Inconsistent with policy intent	No further ATO action as no systemic issues identified	No	No	Resolution of issue raised (where CRP is not used)
58	First Home Saver Superannuation Scheme	18/06/2021	Taxpayer via IGTO	10/08/2021	No CRP	Yes	Law change implementing the proposed modification had recently been announced in the 2021-22 Federal Budget; and Legislative drafting required to implement the proposed modification is complex.	Resolved via MTA Treasury Laws Amendment (2023 Measures No.3) Bill 2023, which contains the technical changes announced in the 2022-23 Budget) received Royal Assent on 20/9/2023	No	Yes	ATO communication to CRP applicant
59	Medicare Levy exemption for Jobseeker payments	2/07/2021	Taxpayer	IGTO did not sight this data	No CRP	Yes	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used) ATO consultation with the CRP Advisory Panel
60	Exempt FBT for not for profit hospitals	27/07/2021	Taxpayer	12/10/2021 (CRP process abandoned)	No CRP	No	Budget impact not negligible (ATO internal assessment only)	Resolved via MTA See Part 3 of Schedule 4 to the Treasury Laws Amendment (2022 Measures No.1) Bill 2022. Originating Bill received Royal Assent on 9/8/2022.	No	No	Budget impact assessment
61	Income tax deductions for certain GST reverse charges	29/09/2021	Professional association	23/03/2023	No CRP	Yes	Budget impact not negligible (per Treasury advice)	Treasury has consulted on a draft MTA	No	No	
62	Associated earnings formula	25/10/2021	Tax agent	IGTO did not sight this data	No CRP	Yes	Inconsistent with policy intent	No further ATO action as no systemic issues identified	Yes	No	Resolution of issue raised (where CRP is not used) ATO consultation with the CRP Advisory Panel
63	Automated bulk remission	1/12/2021	Internal ATO business line	13/06/2023 (CRP Determination made)	Yes	Yes	Not applicable - CRP exercised	Not applicable - CRP exercised	Yes	No	
64	Legal Personal Representative definition extension	3/02/2022	Tax agent	19/05/2022	No CRP	Yes	Inconsistent with policy intent	No further ATO action - The PAL CRP team is not aware of any solutions being pursued by relevant ATO business lines to manage the issue raised.	Yes	No	ATO consultation with the CRP Advisory Panel

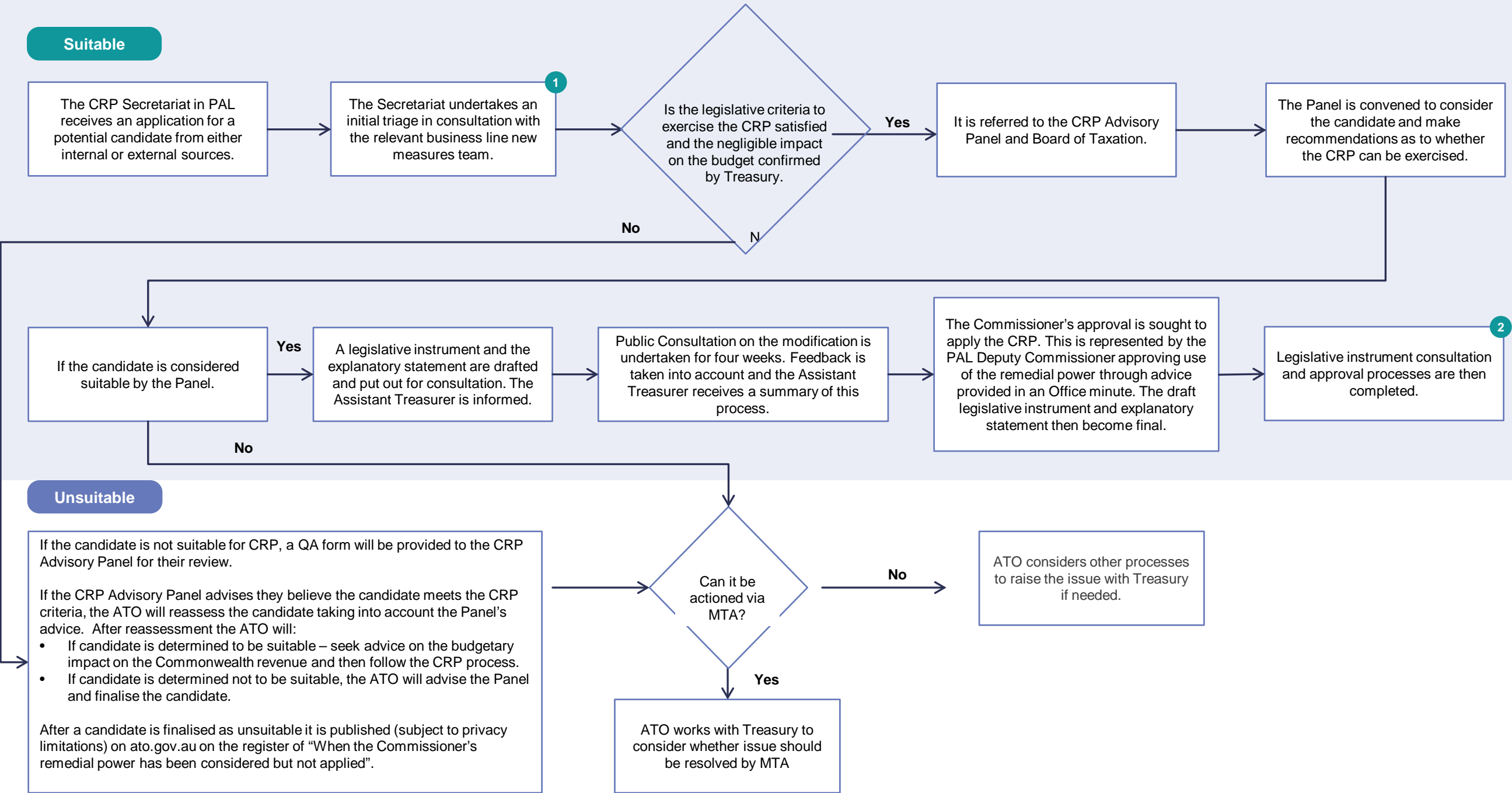
No.	Candidate	Date CRP issue was first raised	CRP issue raised by	Date CRP decision was made	Was CRP Exercised?	CRP Panel consultation?	ATO reason for not exercising the CRP	If CRP was not exercised, how is the issue being managed?	Has CRP outcome been published on ATO website?	Candidates sampled by the IGTO against the CRP process pathway?	Candidates which the IGTO sought clarification on specific matters
65	Age restrictions on salary sacrificed contributions	27/04/2022	Taxpayer	12/12/2022	No CRP	Yes	Modification is not to a provision of a tax law	No further ATO action - The PAL CRP team is not aware of any solutions being pursued by relevant ATO business lines to manage the issue raised.	No	No	
66	Denial of income tax deductions for GST amounts under Division 72 and 105 of GST Act	29/09/2021	Professional association	23/03/2023	No CRP	Yes	Inconsistent with policy intent	No further ATO action - The PAL CRP team is not aware of any solutions being pursued by relevant ATO business lines to manage the issue raised.	No	No	
67	GST concession on importation of classic cars by deductible gift recipients	12/10/2022	Tax agent	10/03/2023	No CRP	Yes	Inconsistent with policy intent	No further ATO action - The PAL CRP team is not aware of any solutions being pursued by relevant ATO business lines to manage the issue raised.	No	No	
68	Relocation of personal superannuation contributions work test	15/02/2023	Internal ATO business line	10/05/2023 (CRP Determination made)	Yes	Yes	Not applicable - CRP exercised	Not applicable - CRP exercised	Yes	No	

Appendix E — ATO CRP process pathway

[Due to the size of the Appendix, it has been attached in full behind this cover page]

COMMISSIONER'S REMEDIAL POWER (CRP)

The CRP process pathway



1 The CRP Advisory Panel is made up of external expert consultants.

The CRP Secretariat is made up of internal business line representatives who are CRP experts.

CRP Secretariat decision making process:

The CRP Secretariat assess each candidate against the following criteria. The candidate must:

- Not be inconsistent with the intended purpose or object of the provision being modified
- Be considered reasonable having regard to the intended

purpose or object of the provision and whether compliance costs are disproportionate to the intended purpose or object

- Have a negligible impact on the Commonwealth budget, as advised by the Secretary of the Treasury, the Secretary of the Department of Finance or an authorised APS employee of either department

Each assessment involves questioning the relevant experts, seeking further information if necessary and ensuring that all other avenues have been exhausted, for example, administrative solutions.

2 The legislative instrument and explanatory statement are then registered and tabled in Parliament.

The legislative instrument takes effect after the full parliamentary disallowance period of 15 sitting days has expired.

The legislative instrument is then published on ATOLaw and ato.gov.au, as a formal determination by the PAL Deputy Commissioner under section 370-5 of Schedule 1 to the Taxation Administration Act 1953.

Legend:

PAL- Policy, Analysis & Legislation business line

QA- Quality assurance

MTA- Miscellaneous Technical Amendment

Appendix F — Internal ATO CRP application form



Australian Government
Australian Taxation Office

Commissioner's Remedial Power - Internal Application Form

Instructions

The CRP is a discretionary power with limitations on when it can be used. It is used as a last resort, short of amending the law, and is to be considered after we have exhausted opportunities to resolve a matter using the general powers of administration and purposive interpretation of the relevant law. You should also consider whether the issue you seek to resolve through the use of the CRP is better suited to the advocacy process.

In using the Commissioner's Remedial Power, the modification must:

1. Not be inconsistent with the intended purpose or object of the relevant law (Section D);
2. Be reasonable, having regard to the intended purpose or object of the relevant law and whether compliance costs are disproportionate to achieving that purpose or object (Section E);
3. Have no more than a negligible budget impact (Section F); and
4. Does not produce a less favourable result for the entity (Section H).

With consideration of these factors, please provide a response to each section below. Once completed, please remove the instructions and email this form to the [CRP Secretariat](#).

Application form

A. Background

Please provide a broad outline of what this issue is about including the relevant legislative framework and legislative issues. Describe the impact of the issue on entities and the ATO with examples if applicable.

B. How is the ATO currently managing the issue?

Describe how the ATO is currently managing the issue, including any administrative work-around that has been developed. Information about the existing compliance behaviour of entities in relation to the issue will also assist in assessing the budget impacts of any modification to the operation of a provision (question x below).

C. What is the modification we are seeking?

Outline the modification proposed to the particular provisions.

Appendix F — Internal ATO CRP application form

D. What is the intended purpose of the provision to be modified?

In determining the intended purpose or object of the provision, the Commissioner must consider certain documents, such as the explanatory memorandum, second reading speech, relevant committee reports, and other contemporary documents evidencing the intention of Parliament (see the list at subsection 15AB(2) of the Acts Interpretation Act 1901).

Consideration may also be given to other material such as the legislative provisions themselves or a relevant Government announcement. Unlike statutory interpretation approaches, primacy is not required to be given to the text of the relevant provisions when ascertaining their intended purpose or object for the purpose of using the remedial power.

E. How is the proposed modification reasonable?

Describe how is the modification reasonable, considering the intended purpose or object of the provision to be modified and whether the cost of complying with that provision is disproportionate to achieving that intended purpose or object. In some cases, one of the factors may be a more relevant consideration than the other. Other matters which go to reasonableness include: the extent to which the modification is favourable to entities, has any adverse impact on the tax liability of a third party, or any current judicial interpretation of the relevant law. A modification may not be reasonable if there is a systemic issue with the law, differing views on how the issue should be resolved, or the modification would result in asymmetrical tax outcomes.

F. What is the budget impact of the proposed modification?

Although the assessment of budget impacts will be determined by the Treasury or the Department of Finance, Revenue Analysis Branch (RAB) will assist in this process. Please include any information that would assist RAB in preparing a cost assessment of budget impacts of the modification. For example, a description of the population of entities affected, and whether the issue has been costed previously.

G. Would the modification produce a less favourable result for entities?

As the remedial power is a discretionary power, the Commissioner will take into account the extent of favourable impacts when deciding whether it would be appropriate to use the power. Although the Commissioner may validly make a modification to the operation of a provision that is not favourable to some entities, the modification will simply not apply to these entities. This can take into account both tax liability and compliance costs, which may to a certain extent cancel each other out.

H. Have all other avenues been explored to address this issue?

Please outline what other options have been considered to address this issue, including administrative remedies.

I. Additional Information

Do you have any additional information that has not been stated elsewhere in this application form?

J. Contact Officer

Business Line:
Contact Officer Name:
Contact Officer Phone:

Once completed, please remove the instructions and email this form to the [CRP Secretariat](#).

Appendix G — External CRP application form



Commissioner's Remedial Power

Please use this form to submit potential candidates for resolution using the Commissioner's remedial power (CRP) (<http://www.ato.gov.au/crp>). The remedial power is subject to certain limitations on its use. The information you provide through this form will help to assess whether the remedial power can be used to resolve the issue you have identified.

This form allows external stakeholders to suggest candidates for the potential application of the CRP. The CRP provides the Commissioner of Taxation with limited powers to modify the operation of the tax law in circumstances where entities will benefit, or at least be no worse off, as a result of the modification. The CRP is designed only to remediate situations where the law is not operating as intended by Parliament. It is not an alternative to lodging a complaint (<http://www.ato.gov.au/complaint>), appeal or objection (<http://www.ato.gov.au/objection>) if you are unhappy with a decision the Commissioner has made in relation to your tax affairs.

A. What is the issue?

Clearly articulate the issue. Describe the impact of the issue on the community. Short examples may assist.

Feedback

B. Background

Provide relevant background information relating to how the issue has arisen and a broad outline of the relevant legislative provision(s) the issue relates to.

**C. How is the issue currently being managed?**

Describe how the issue is currently being managed, including any administrative solutions that have been developed, such as practical compliance guidelines or ATO rulings. Has any guidance been provided for this issue?

**D. What is the modification that should be made?**

Outline the modification proposed to the particular provision(s), and how the modification would resolve the issue.



E. How is the proposed modification not inconsistent with the intended purpose or object of the provision?

The intended purpose or object of the provision might be shown in certain documents, such as the explanatory memorandum, second reading speech, relevant committee reports, and other contemporary documents that accompanied the original introduction or subsequent amendments to the relevant provision.

Consideration may also be given to other material such as the legislative provisions themselves or relevant Government announcements. Unlike statutory interpretation approaches, primacy is not to be given to the text of the relevant provision when ascertaining the intended purpose or object of a provision for the purpose of using the remedial power.



F. How is the proposed modification reasonable?

Describe how the suggested modification would be considered reasonable.

Modifications made using the remedial power must be reasonable, having regard to the intended purpose or object of the provision to be modified and whether the cost of complying with that provision is disproportionate to achieving that intended purpose or object.

Other matters which go to reasonableness include:

- the extent to which the modification is favourable to entities;
- whether the modification would result in any adverse impacts on the tax liability of a third party or asymmetrical tax outcome;
- any current judicial interpretation of the relevant law;
- whether the modification would address a discrete or systemic issue with the law; and
- whether there are any differing stakeholder views on the issue.



G. What might the budget impact of the proposed modification be?

The assessment of budget impacts will be determined by the Treasury or department of Finance. Please include any information that would assist in preparing an assessment of budget impacts of the modification. For example, a description of the population of entities affected, or whether the change would provide greater access to a tax benefit such as a deduction, offset or tax exemption.



H. Have all other avenues been explored to address this issue?

Provide an outline of the other options that have been considered, including changes in administrative practices or issuing new public guidance material.



I. Additional Information

Provide any additional information that may assist.

Appendix G — External CRP application form

**J. Contact Details**

Name *

Phone *

Email *

Our commitment to you

We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we will take that into account when determining what action, if any, we should take.

Some of the information on this website applies to a specific financial year. This is clearly marked. Make sure you have the information for the right year before making decisions based on that information.

If you feel that our information does not fully cover your circumstances, or you are unsure how it applies to you, contact us or seek professional advice.

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Appendix H — ATO Internal CRP Guide

[Due to the size of the Appendix, it has been attached in full behind this cover page]



Australian Government
Australian Taxation Office

CRP GUIDE

A guide to the Commissioner's Remedial Power (CRP)
Process

Contents

1. INTRODUCTION	4
1.1 WHAT IS THE CRP PROCESS?	4
1.2 WHO SHOULD USE THIS GUIDE?	4
1.3 PAL'S ROLE IN THE CRP PROCESS	4
2. THE CRP PROCESS	5
2.1 WHAT IS THE CRP PROCESS?	5
2.2 STEP 1: RECEIPT OF CRP CANDIDATES	5
2.3 STEP 2: ASSESSMENT OF CRP CANDIDATES	5
2.4 STEP 3: PREPARATION OF CRP CANDIDATE FOR TABLING IN PARLIAMENT	6
2.5 STEP 4: DURATION OF CRP MODIFICATION	7
3. CRP CRITERIA	8
3.1 OVERVIEW	8
3.2 MODIFICATION IS NOT INCONSISTENT WITH INTENDED PURPOSE OR OBJECT OF THE PROVISION	8
3.3 COMMISSIONER MUST BE SATISFIED THE MODIFICATION IS REASONABLE	10
3.4 TREASURY OR FINANCE ADVISES THE BUDGET IMPACT IS NEGLIGIBLE	12
4. COMPLETING A CRP APPLICATION FORM	13
4.1 OVERALL DESIGN OF THE CRP APPLICATION FORM	13
4.2 BACKGROUND	13
4.3 HOW THE ATO IS CURRENTLY MANAGING THE ISSUE	14
4.4 THE MODIFICATION BEING SOUGHT	14
4.5 THE INTENDED PURPOSE OR OBJECT OF THE PROVISION TO BE MODIFIED	14
4.6 HOW THE PROPOSED MODIFICATION IS REASONABLE	15
4.7 THE BUDGET IMPACT OF THE PROPOSED MODIFICATION	15
4.8 WHETHER THE MODIFICATION WOULD BE LESS FAVOURABLE TO ENTITIES	15
4.9 ADDRESSING OTHER AVENUES	16
4.10 ADDITIONAL INFORMATION AND CONTACT OFFICER DETAILS	16

4.11	SUBMIT YOUR FORM AND FOLLOW UP	16
5.	ADDITIONAL INFORMATION	17
5.1	TIPS ON PREPARING YOUR CRP APPLICATION	17
5.2	CONTACT DETAILS	18

1. INTRODUCTION

1.1 WHAT IS THE CRP PROCESS?

The Commissioner's Remedial Power (CRP) is a discretionary power that allows the Commissioner to make one or more modifications to the operation of a provision of a taxation law or superannuation law administered by the Commissioner by a disallowable legislative instrument. The remedial power does not allow the Commissioner to make a textual amendment to the relevant law, or to alter the purpose or object of the law. It only allows the Commissioner to modify the operation of a provision of a taxation law where the modification satisfies the limitations in subsection 370-5(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). The power is designed to address unforeseen or unintended policy outcomes in the taxation or superannuation law to provide greater certainty for taxpayers about the operation of these laws.

Issues may be considered for resolution using the CRP throughout the year. Policy, Analysis and Legislation (PAL) manages the CRP process.

1.2 WHO SHOULD USE THIS GUIDE?

This guide is designed to provide information to ATO staff on the CRP process. It will also be used by PAL staff to assess CRP proposals and their suitability for the CRP process.

1.3 PAL'S ROLE IN THE CRP PROCESS

PAL is responsible for managing all aspects of the CRP process. In particular, PAL chairs the CRP Secretariat and CRP Advisory Panel:

- The CRP Secretariat is a group of ATO experts on the CRP that assesses each candidate against the legislative criteria to determine its suitability for the CRP process. Each assessment involves discussing the candidate with the relevant business line subject matter experts, seeking further information where necessary and ensuring interpretative and administrative approaches have been fully considered to resolve the issue.
- The CRP Advisory Panel is a technical advisory group comprising private sector experts, and ATO and Treasury representatives that considers the candidate and recommends to the Commissioner whether or not the CRP should be exercised.

PAL will assist business lines in identifying other options for law change where the CRP process is not appropriate. These options include:

- identifying whether a candidate is suitable for the miscellaneous technical amendments (MTA) process; and/or
- advocating to Treasury for law change.

More information on the MTA process may be found on the [PAL SharePoint site](#).

2. THE CRP PROCESS

2.1 WHAT IS THE CRP PROCESS?

The CRP was legislated by [Schedule 1 of the Tax and Superannuation Laws Amendment \(2016 Measures No. 2\) Act 2017](#) and came into effect on 1 March 2017. The CRP process has been designed by PAL to ensure that rigorous assessment and governance arrangements are in place for the assessment of all CRP candidates and implementation of suitable candidates.

2.2 STEP 1: RECEIPT OF CRP CANDIDATES

PAL receives CRP candidates either from members of the community or business lines. To date, the main source of candidates has been from business lines that apply the law every day and may notice technical issues in the law preventing it from being applied as intended. Anyone can submit a CRP candidate at any time.

When submitting a CRP candidate, you need to ensure that you complete the entire CRP application form available from the [PAL SharePoint site](#) as this information is used by PAL and the CRP Secretariat in assessing CRP candidates. A new application form is needed for each CRP candidate.

Before submitting a CRP candidate, you need to consider the following:

- Is the issue arising because of the law or is it our processes or systems creating the issue? If it is the latter, consider what changes can be made internally to resolve the issue.
- Can we administer or interpret around the issue?

You may need to discuss these questions with TCN, OPAL, other business lines or your technical leadership and advice area.

These options must be exhausted to manage the issue identified before submitting a CRP candidate.

2.3 STEP 2: ASSESSMENT OF CRP CANDIDATES

A CRP candidate is assessed by the CRP Secretariat and CRP Panel.

CRP Secretariat

The CRP Secretariat will assess each CRP candidate submitted against the CRP criteria outlined in section 3 of this guide and whether administrative or interpretative approaches have been exhausted. Business line representatives are invited to attend a CRP Secretariat meeting to present the candidate and answer questions from CRP Secretariat members to assist the CRP Secretariat in their assessment.

If the CRP Secretariat considers that a CRP candidate **meets all** of the CRP criteria and that the CRP may otherwise be an appropriate mechanism to resolve the issue, the candidate will continue in the CRP process. At this stage, PAL's Revenue Analysis Branch (RAB) is engaged

to prepare a costing to assess the budget impact of the proposed modification. RAB's costing must be approved by the Department of the Treasury (Treasury) before the outcome is confirmed and official.

If the CRP Secretariat considers that a CRP candidate **does not meet** all of the CRP criteria, the decision and reasons of the CRP Secretariat will be captured in a candidate assessment methodology (CAM) form, which will then be reviewed by the CRP Panel:

- If the CRP Panel agrees with the decision of the CRP Secretariat, the candidate is deemed unsuitable, and will not progress through the CRP process.
- If the CRP Panel disagrees with the decision of the CRP Secretariat, the candidate is reassessed by the CRP Secretariat, taking into account feedback provided by the CRP Panel. If the CRP Secretariat subsequently considers the candidate suitable after taking into account this feedback, advice on the budgetary impact of the proposed modification will then be sought, and the remainder of the CRP process will be followed.

For a candidate finalised as unsuitable for resolution under the CRP process, other pathways will be considered to resolve the issue, including the MTA process and advocacy.

CRP Panel

Candidates assessed as suitable by the CRP Secretariat are then prepared for consideration by the CRP Panel. This involves PAL in collaboration with the relevant business line subject matter experts preparing a submission outlining the CRP candidate and designing the text of a proposed modification. The CRP Panel makes a final assessment of the candidate and recommends to the Commissioner whether or not the CRP should be exercised. Advice from the Board of Taxation is also sought, which is also considered by the CRP Panel in making its recommendations.

If the CRP Panel considers that a CRP candidate **meets all** of the CRP criteria and the CRP is considered an appropriate mechanism to resolve the issue, it will recommend the CRP be exercised, and a legislative instrument will be drafted to implement the CRP modification. If the CRP Panel considers a candidate **does not meet all** of the CRP criteria and is unsuitable, the Panel's advice will be considered in resolving any issues raised and the CRP Panel reconvened to consider the candidate in light of any revisions made for any issues raised. If the CRP Panel's view is unchanged, it will not be possible to progress the issue through the remainder of the CRP process. In these cases, other pathways for resolving the technical issue raised by the candidate will be considered, including the MTA process and advocacy.

2.4 STEP 3: PREPARATION OF CRP CANDIDATE FOR TABLING IN PARLIAMENT

PAL, in partnership with the responsible business line, will draft a legislative instrument and accompanying explanatory statement to implement the CRP modification. A legislative instrument is the mechanism that is used to legislate a CRP modification.

Once drafted, the legislative instrument and accompanying explanatory statement are released for a public consultation period of approximately 4 weeks. This period allows the

public and other interested stakeholders to comment on the CRP modification. The entire CRP Panel and Board of Taxation are also consulted. Any comments received are considered and the legislative instrument is refined in response to those comments.

After the legislative instrument is finalised, it is reviewed and approved by the Deputy Commissioner, PAL as the Commissioner's delegate for registration with the Office of Parliamentary Counsel (OPC). Once registered, the legislative instrument is tabled in Parliament no later than six days after the registration date.

Once the legislative instrument is tabled in Parliament, 15 parliamentary sitting days must pass before the legislative instrument comes into effect. This time provides Parliament with the opportunity to review and potentially disallow the instrument. If the instrument is disallowed, six months must pass before the instrument can be tabled in Parliament again.

When the legislative instrument passes the parliamentary disallowance period, it takes effect the next day.

2.5 STEP 4: DURATION OF CRP MODIFICATION

CRP legislative instruments, like other legislative instruments will operate for a period of 10 years before sunseting. PAL will consider, on a case-by-case basis, including a self-repealing provision in a CRP legislative instrument so it operates for a specified period of time.

PAL's practice is to use the MTA process to legislate a CRP modification after a period of time, generally five years after the modification takes effect.

3. CRP CRITERIA

- 3.1 Overview
- 3.2 Modification must be not inconsistent with the intended purpose or object of the provision
- 3.3 Commissioner must be satisfied the modification is reasonable
- 3.4 Treasury or Finance advises the budget impact is negligible

3.1 OVERVIEW

In order for the CRP to be exercised, there are three criteria that must be satisfied that are legislated under [subsection 370-5\(1\) of Schedule 1 to the TAA 1953](#):

- 1) The modification is not inconsistent with the intended purpose or object of the provision;
- 2) 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
- 3) Treasury or the Department of Finance advises the Commissioner that the impact of the modification on the Commonwealth budget is negligible. ‘

Any modification is made by the Commissioner using a disallowable legislative instrument.

3.2 MODIFICATION IS NOT INCONSISTENT WITH INTENDED PURPOSE OR OBJECT OF THE PROVISION

A modification to the operation of a provision of a taxation law will only be valid where the modification is not inconsistent with the intended purpose or object of the provision the subject of the modification. This is an objective test that is determined with reference to materials intrinsic and extrinsic to the provision sought to be modified. As the focus of the test is on ascertaining the intended purpose or object of the provision (when considered in a broader context beyond the text of the legislation), weight does not need to be given to the text of the provision.

To ascertain the intended purpose or object of the provision that you are seeking to be modified:

- Consideration **must** be given to any documents that may be considered under subsection 15AB(2) of the *Acts Interpretation Act 1901* (or that subsection as applied by section 13 of the *Legislation Act 2003*). These documents include:
 - Any parts of an Act that do not form part of the Act but are set out in the text of the Act as printed by the Government Printer;
 - Any report of a Royal Commission, Law Reform Commission, committee of inquiry or similar body that was tabled in Parliament before the provision was enacted;
 - Any report of a parliamentary committee (House, Senate or Joint Committee) made to Parliament or that House of Parliament before the provision was enacted;

- Any treaty or other international agreement referred to in the Act;
- Any explanatory memorandum relating to the Bill containing the provision, or any other relevant document tabled in either House of Parliament by a Minister before the provision was enacted;
- The Minister's second reading speech of the Bill containing the provision;
- Any document that is declared by the Act to be a relevant document for interpreting the Act; and
- Any relevant material in the Journals of the Senate, Votes and Proceedings of the House of Representatives or the Parliamentary Hansard.
- Consideration **may** be given to any other material that may assist in ascertaining the intended purpose or object of the provision sought to be modified, whether that material forms part of the provisions in question or not. This material can include:
 - Any press or media release issued by a Minister relating to the provision;
 - Any budget announcement issued by the relevant Minister relating to the provision; and
 - Any publication written or issued by the Government relating to the provision.

In most cases, explanatory memoranda, second reading speeches and press/media releases are the main materials that are available to assist in ascertaining the intended purpose or object of a provision. However, the availability of materials may differ depending on the age of the provision at issue.

Where relevant, it is necessary to analyse the full legislative history of the particular provision especially where it has been amended several times to ensure you have a holistic view of the intended purpose or object of the provision.

The test 'not inconsistent with the intended purpose or object' is broader than the expression 'consistent with the intended purpose or object'. It ensures that the CRP can be used to modify the law to cater for circumstances, arrangements or transactions that may not have been contemplated at the time the law was drafted. This test contemplates that if those circumstances, arrangements or transactions had been considered when the law was drafted, the law would have been drafted differently. Therefore, applying the law in a modified way would not be inconsistent with the intended purpose or object of the law.

Example – Seasonal Worker Program Visa Change

The Government's Seasonal Worker Program allows seasonal workers in agriculture and related industries to come into Australia on a prescribed visa and be subject to a special taxation regime.

The policy intent is for seasonal workers that hold the relevant visa prescribed by the Government to be able to enter Australia to participate in the Program and be subject to the special taxation regime. This is evident from the relevant explanatory materials.

Due to the COVID-19 pandemic, the Government allowed seasonal workers to change visa and remain in Australia but still be able to participate in the Program. However, the change in visa was never legislated. This meant that the special taxation regime could not apply to these workers after this change in eligibility.

It would not be inconsistent with the policy intent for the CRP to be exercised to change the visa to the one prescribed by the Government that workers were advised to change to because the policy intent for the special taxation regime to apply where the worker holds the relevant visa.

3.3 COMMISSIONER MUST BE SATISFIED THE MODIFICATION IS REASONABLE

The Commissioner must be satisfied that the modification is reasonable, having regard to both the intended purpose or object of the provision to be modified and whether the cost of complying with the provision is disproportionate to achieving that intended purpose or object. This requires the Commissioner to turn his or her mind to both factors in considering whether a modification would be reasonable. However, in some cases, one of the factors may be more relevant than the other. For example, if the provision to be modified does not impose compliance costs that are disproportionate to achieving the policy intent of the provision, the proportionality of compliance costs will not be relevant.

By considering whether a modification is reasonable, the Commissioner can modify the law to:

- administer the law in line with its intended purpose or object because the unmodified law does not achieve that intended outcome; or
- provide an outcome that reduces compliance costs where the outcome provided by the unmodified law is consistent with the intended purpose or object of the law, but in achieving that outcome, the law imposes compliance costs that are disproportionate to achieving its intended purpose or object.

The Commissioner may consider a range of matters and weigh them up against each other in deciding whether it would be reasonable to exercise the remedial power and make a modification. As the CRP is a discretionary power, the Commissioner may choose to consider any other relevant matters in addition to the specified legislative limitations with respect to determining whether a modification is reasonable.

These are some of the factors that may be considered.

Whether the modification is favourable to entities

The extent to which a modification would be favourable to entities may be relevant in deciding whether the proposed modification is reasonable. If a proposed modification would not be favourable to any entities, it would not be reasonable to use the CRP as the modification would have no application. Under section 370-5(4) of Schedule 1 to the TAA 1953, an entity (the first entity) must treat a modification as not applying to it or any other entity if the modification would produce a less favourable result for the first entity when compared to the unmodified law. This is done by self-assessment under the self-assessment regime. Therefore, a modification would have no effect for an entity if it would produce a less favourable result.

In the context of taxation law, favourable can mean either a tax liability or compliance costs are reduced, or that overall, taking into account the changes in tax liabilities and compliance costs, the outcome is favourable. For example, tax liability may be reduced but compliance costs have slightly increased, or tax liability is slightly increased or unchanged but compliance costs have significantly decreased.

It may also not be reasonable to use the CRP where it would lead to asymmetrical outcomes. That is, due to the application rule under section 370-5(4), a modification would apply on one side of a transaction but not the other, leading to an inappropriate asymmetrical tax outcome. For example, if a modification to the GST law meant that a supply should be treated as not being a taxable supply, it would produce a more favourable result for the supplier because there is no GST liability but a less favourable result for the acquirer because they would no longer be entitled to an input tax credit for that acquisition. Where asymmetrical outcomes cannot be reasonably managed by the modification, the Commissioner would not exercise the CRP.

Whether the modification has an adverse impact on a third party's tax liability

Where a modification would have an adverse direct impacts on the rights or obligations under the taxation law for third parties, it may not be reasonable to exercise the CRP. This would occur where the tax liability of the third party increases because of the modification.

Whether the modification impacts any current judicial interpretation of the relevant law

Where a modification would be contrary to the judicial interpretation of the law related to the provision sought to be modified, it may not be reasonable to use the CRP.

Other relevant matters

Other relevant matters may include the following:

- If a proposed modification highlights systemic issues with the law, it may not be reasonable to use the CRP to resolve the issue. In such cases, systemic issues may be more appropriately addressed by a review of the law with all affected stakeholders and a legislative amendment. This ensures that all relevant matters can be thoroughly addressed.

- Where there are differing views on how an issue may be resolved, it may be more appropriate to fully consider the issue through extensive and considered consultation and address it through a legislative amendment to the relevant law.
- Where a modification would require complex drafting or administrative arrangements to implement, it may not be reasonable to exercise the CRP as the CRP was only ever intended to resolve straightforward matters.

Example – Seasonal Worker Program Visa Change

Continuing from the previous example, the Commissioner would consider the modification to be reasonable because it would be wholly favourable to seasonal workers subject to the special taxation regime. As the special taxation regime operates as a final withholding tax, seasonal workers are not required to lodge an income tax return unless they derive other Australian-sourced income. The modification ensures that seasonal workers are not subject to this compliance burden.

Another factor the Commissioner considered in deciding the modification was reasonable was it would ensure that seasonal workers would continue to be subject to the special taxation regime that applies to seasonal workers under the Program rather than the higher marginal tax rates would otherwise apply if the modification were not in place.

3.4 TREASURY OR FINANCE ADVISES THE BUDGET IMPACT IS NEGLIGIBLE

Before the Commissioner can exercise the CRP, he or she must receive advice from the Department of the Treasury (Treasury) or the Department of Finance (Finance) that the budget impact of the proposed modification on the Commonwealth budget. In practice, this advice is sought from Treasury's Tax Analysis Division (TAD). RAB prepares the costing which is then reviewed by TAD.

Impacts on the Commonwealth budget are determined through ordinary processes and budget rules. The Guidelines issued under the *Charter of Budget Honesty Act 1998* provide further information on the considerations used when preparing costings. A variety of information sources, modelling and data analysis is used to estimate the budget impact of a CRP issue.

Any CRP costing has to focus on the financial impact on the Australian Government's key budget aggregates. These costings measure the difference in expected budgetary financial impacts under the proposed modification and the expected impacts already included in the 'forward estimates'.

CRP costings will consider the direct behavioural impacts (where practical to do so) and direct budgetary consequences of the modification.

If the Commissioner is advised that the budget impact of the proposed modification is not negligible, he or she will be unable to exercise the CRP. In that event, other pathways will be considered including the MTA process and advocacy.

4. COMPLETING A CRP APPLICATION FORM

- 4.1 Overall design of the CRP application form**
- 4.2 Background**
- 4.3 How the ATO is currently managing the issue**
- 4.4 The modification being sought**
- 4.5 The intended purpose or object of the provision to be modified**
- 4.6 How the proposed modification is reasonable**
- 4.7 The budget impact of the proposed modification**
- 4.8 Whether the modification would be less favourable to entities**
- 4.9 Addressing other avenues**
- 4.10 Additional information and contact officer details**
- 4.11 Submit your form and follow up**

4.1 OVERALL DESIGN OF THE CRP APPLICATION FORM

The CRP application form has been designed to help you provide all the information PAL should need to understand the issue and ensure the CRP proposal meets the criteria. This chapter provides an outline and instructions on completing the CRP application form. The form also provides guidance on the information we are seeking in each of the sections of the form.

4.2 BACKGROUND

The first question on the application form asks for a broad outline of the issue, an outline of the relevant legislative framework and the specific issues with the affected legislative provisions.

When providing details about the issue some things you may consider including if they are relevant are:

- if the issue affects a particular taxpayer group or all taxpayers;
- the prevalence of the issue including the affected population size, or how often it may arise in future;
- a brief history of the relevant provision causing the issue if appropriate. For example, if the issue has arisen as a result of amendments to the original provision;
- factors outside the provision that have led to the issue if appropriate. For example, a new technology may affect how the law operates, or another provision in the law that was amended has changed the way this provision operates or is meant to operate in conjunction with the other provisions to achieve a particular outcome.

When providing details of how the current law operates, explain what the legal issue is, stepping through any processes and how this applies practically. You should consider if this is a universal issue or if the issue only arises if certain circumstances or factors exist. Consider if there are instances where the law is presently working as intended.

When outlining the issue, it is important to remember that the CRP Secretariat and CRP Panel may not necessarily be experts in the area of the law this issue has arisen from. Therefore, it is important to use plain language when describing the issue and provide a concise explanation about how the relevant legislative provisions are intended to operate so it is clear what the issue is.

4.3 HOW THE ATO IS CURRENTLY MANAGING THE ISSUE

In this section, you are asked to describe how the ATO is currently managing the issue, including any administrative work-around that has been developed.

If there is an administrative solution or an interpretative approach that can be applied to resolve the issue, this needs to be exhausted first before the CRP can be considered. If an administrative solution would be too complex to implement, this should be explained here.

4.4 THE MODIFICATION BEING SOUGHT

The provision or set of provisions to be modified to resolve the issue should be specified here as well as an outline of the proposed modification. The drafting of the proposed modification should also be given here.

4.5 THE INTENDED PURPOSE OR OBJECT OF THE PROVISION TO BE MODIFIED

When discussing what the intended purpose or object of the provision to be modified is, there are several points that need to be addressed:

- Provide an outline of what the intended purpose or object of the provision is.
- Provide a reference that shows that this is the intended purpose or object of the provision. For example, the full name and paragraph reference of the explanatory memorandum. As reference must be given to materials listed under subsection 15AB(2) of the *Acts Interpretation Act 1901*, it is necessary to first consult the relevant explanatory memorandum or second reading speech when ascertaining the intended purpose or object of a provision. This can be supported by other materials after the materials listed under subsection 15AB(2) have been consulted, such as a Minister's media release.
- Consider whether the intended purpose or object of the provision has changed from any subsequent amendments to the provision at issue and make references to the appropriate extrinsic materials after first considering the relevant explanatory memorandum or second reading speech.

This is an objective test, so there should not be a discussion of what your business line or Treasury considers the intended purpose or object of the relevant provisions to be but what it is according to the extrinsic materials.

4.6 HOW THE PROPOSED MODIFICATION IS REASONABLE

In discussing how the proposed modification is reasonable, you need to consider the intended purpose or object of the provision and whether compliance costs imposed under the unmodified law are disproportionate to achieving that intended purpose or object. As previously discussed, in some cases, one of these factors may be more relevant than the other. In such instances, it is not necessary to discuss both.

Where relevant, the following factors should be discussed in showing how the proposed modification is reasonable:

- The extent to which the modification is favourable to entities.
- That the proposed modification does not have an adverse impact on the tax liability of a third party.
- The proposed modification does not impact on the current judicial interpretation of the relevant law.
- Any other relevant matter that demonstrates that the proposed modification is reasonable.

4.7 THE BUDGET IMPACT OF THE PROPOSED MODIFICATION

As the budget impact of the proposed modification is determined by Treasury, you are not required to acquire or conduct your own costing of the proposed modification. Rather, the purpose of this section is for you to provide an estimate of the budget impact of the proposed modification to assist the CRP Secretariat in its initial assessment of the candidate.

An estimate can be determined by broadly assessing how the proposed modification will impact revenue based on factors such as whether:

- the proposed modification will collect more or less revenue compared with present arrangements, and the estimated magnitude of difference.
- more or less taxpayers will be affected as a result of the proposed modification.
- administrative costs for the ATO may increase if the proposed modification were implemented.

All relevant information that would be needed for RAB to prepare a costing assessment should be specified here.

4.8 WHETHER THE MODIFICATION WOULD BE LESS FAVOURABLE TO ENTITIES

While this issue is briefly addressed in deciding whether the modification would be reasonable, the intent of this section is to elaborate on the issue of whether the modification would produce a less favourable result for entities. Here, you need to assess whether the outcome of the proposed modification is favourable based on any changes in a taxpayer's expected tax liability and compliance costs.

4.9 ADDRESSING OTHER AVENUES

This section is where you would explain what administrative solutions or interpretative approaches have been applied to resolve the issue. When describing any administrative solutions that have been considered, it is necessary to discuss in sufficient detail whether any existing administrative solutions are viable and can be applied to resolve the issue. Similarly, when discussing the interpretative approaches that have been applied, please provide reasons as to why a purposive approach to interpreting the law cannot resolve the issue.

4.10 ADDITIONAL INFORMATION AND CONTACT OFFICER DETAILS

Section I of the form should be used to include any information that you consider relevant that the CRP Secretariat should consider when assessing the candidate.

Section J of the form should be used to provide the contact details of a staff member that would be able to address any questions the CRP Secretariat may have in relation to the candidate.

4.11 SUBMIT YOUR FORM AND FOLLOW UP

The form should be emailed with any relevant attachments to the CRP Secretariat mailbox. Once a form is submitted, an acknowledgement will be sent and PAL will keep the contact officer informed about the progress of the candidate and the next steps.

5. ADDITIONAL INFORMATION

- | |
|--|
| <ul style="list-style-type: none">5.1 Tips on preparing your CRP application5.2 Contact details |
|--|

5.1 TIPS ON PREPARING YOUR CRP APPLICATION

These tips are designed to provide some high level suggestions for you to consider before completing a CRP application form.

1. Keep it simple and concise: as the CRP is generally only suitable to resolve issues that are relatively straightforward, the policy and suggested changes should be simple and easy to understand by someone that may not be familiar with the legislative provisions to be amended or have an in-depth knowledge of the revenue product or market segment that is affected by the issue. The application should be written in plain language and as concisely as possible. Use examples if this will aid the CRP Secretariat in understanding the issue but ensure they are simple and only used when necessary.
2. Consider the whole policy: when preparing a CRP application, consider not only the policy intent of the provision when it was originally inserted into the legislation but also any subsequent amendments. The intended purpose or object of the provision may have expanded or narrowed because of subsequent amendments to the provision.
3. Consider surrounding law: consider the impact the proposed modification will have on the division of the provision to be modified and any other provisions that refer to that provision. This will assist in identifying whether there are any larger ramifications that need to be factored into the modification. Larger ramifications that require the proposed modification to be more complex are a sign that the CRP may not be suitable to resolve the issue.
4. Demonstrate that administrative and interpretative approaches have been exhausted: to use the CRP, administrative and interpretative approaches cannot be available to resolve the issue. You can consult your business line technical advice team, TCN and/or OPAL about administrative and interpretative approaches short of amending the law. Note that even if an administrative approach is difficult to implement or is not the preferred approach by the business line, this is generally not enough to say that an administrative approach is unavailable. If administrative or interpretive solutions are available, any CRP proposal will be delayed until these have been fully explored.
5. Call PAL if you have any questions: if you are unsure whether a CRP proposal meets the CRP criteria, you can call the CRP team in PAL and they can discuss the CRP proposal with you before you complete a CRP application form. PAL can also provide advice on how to proceed with the CRP proposal.

5.2 CONTACT DETAILS

If you require assistance with completing the CRP application form or have a CRP proposal you would like to discuss with PAL, you can contact the [CRP Secretariat mailbox](#) or one of the members of the CRP team:

- [REDACTED] (Monday – Friday)
- [REDACTED] (Monday – Friday)
- [REDACTED] (Monday – Friday)

Appendix I — Charter of Budget Honesty Policy Costing Guidelines – Part 2

CHARTER OF BUDGET HONESTY POLICY COSTING GUIDELINES

ISSUED JOINTLY BY THE SECRETARIES
TO THE TREASURY
AND THE DEPARTMENT OF FINANCE
UNDER PART 8 OF
THE *CHARTER OF BUDGET HONESTY ACT 1998*
2021

Appendix I — Charter of Budget Honesty Policy Costing Guidelines – Part 2

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CONTENTS

INTRODUCTION	1
PART 1 – COSTING OF ELECTION COMMITMENTS: ROLES OF THE SECRETARIES AND THE PARLIAMENTARY BUDGET OFFICER.....	2
PART 2 – COSTING PROTOCOLS AND METHODS	4
PART 3 – PROCESS FOR ELECTION COSTINGS.....	8
APPENDIX A – BUDGET TREATMENT OF RELEVANT BALANCE SHEET TRANSACTIONS	11
APPENDIX B – COMMONLY USED TERMS	15
APPENDIX C – PRO-FORMA REQUEST FOR COSTING AN ELECTION COMMITMENT	17
APPENDIX D – PRO-FORMA PUBLIC RELEASE OF COSTING.....	20

INTRODUCTION

The *Charter of Budget Honesty Act 1998* (the Charter) outlines arrangements under which the Secretaries to the Treasury and the Department of Finance (the Secretaries) may be requested to cost election commitments during the caretaker period prior to a general election. The Charter also allows for the Secretaries to jointly issue written guidelines recommending approaches or methods to be used in the preparation of such costings.

The *Charter of Budget Honesty Policy Costing Guidelines* (the Guidelines) outline the process for submitting and preparing policy costings. The Guidelines focus on matters directly relating to the methods and approaches as required by subclause 30(1) of the Charter.

Information on the role of the Parliamentary Budget Office (PBO) can be accessed from the [PBO website](#).

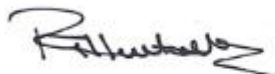
The Guidelines are consistent with the robust methods and approaches established by the Treasury and Finance for the preparation of policy costings outside of a caretaker period.

These Guidelines are similar to those released prior to the 2019 Election with the inclusion of additional information on the costing of guarantees.

We are releasing these Guidelines to provide all parties with appropriate notice of the arrangements for costing election commitments during a caretaker period.



Dr Steven Kennedy PSM
Secretary to the Treasury



Rosemary Huxtable PSM
Secretary of the Department of Finance

PART 2 – COSTING PROTOCOLS AND METHODS

The Charter, under clause 30, details how the policy costings are to be prepared. It provides for the Secretaries to issue written guidelines (this booklet) recommending approaches or methods to be used in preparing costings.⁸

DIVISION OF RESPONSIBILITIES

The Charter divides responsibility for costings between the Secretaries:

- the Secretary to the Treasury is responsible for costing policies affecting taxation revenue; and
- the Secretary of the Department of Finance is responsible for costing policies that affect government outlays and expenses and non-taxation revenue.⁹

Policies that have implications for both taxation revenue and expenses will be jointly costed by the Secretaries. The costings for these policies will separately identify the revenue and expense components.

SECRETARIES' OBLIGATIONS IN COSTING POLICIES: CLARITY AND TIMELINESS

The Secretaries will aim to be clear, transparent and timely in costing policies. In undertaking policy costings, the Secretaries will:

- endeavour to provide their best estimate of the full cost of a policy (including departmental expenses where requested and feasible);
- cost policies in a manner consistent with methodologies used to prepare the Budget statements and fiscal reports required under the Charter;
- cost Government, Opposition and minority party policies in a consistent manner;
- only provide financial costings, and not provide policy advice or assessments of the economic impact of policies; and
- produce a self-contained written report on the costing that fully justifies the published costings.

The Secretaries will endeavour to complete and release a costing within five business days of receiving a request. However, this may not be possible in the case of complex costing requests where data is difficult to obtain, or where more detailed information needs to be provided by the party. In such cases, a public statement to that effect will be made by the relevant Secretary at the outset, or when it becomes clear that the costing cannot be completed within the time frame. Where additional information is required, the five days will exclude the time taken to obtain the additional information.

For requests made after polling day, where the caretaker period extends after that day, the Secretaries are to publicly release costings as soon as practicable after the request is received.¹⁰

⁸ Subclause 30(1) of Schedule 1 to the Charter.

⁹ Subclause 30(2) of Schedule 1 to the Charter.

¹⁰ Paragraph 31A(3)(c) of Schedule 1 to the Charter.

Appendix I — Charter of Budget Honesty Policy Costing Guidelines – Part 2

COSTING VARIABLES

Policy costings will focus on the effect of a policy on the Australian Government's key Budget aggregates (both cash and accruals) and include both the estimated cost and savings associated with the proposal. The estimates of the policies will show both the impact on the underlying cash balance and the fiscal balance in current dollars, as well as the impact on the headline cash balance as appropriate.

A request for a policy costing should fully outline the design features of the policy to be costed. It will assist in the preparation of costings if detailed information is provided on the assumptions that parties may have used in making their own assessments regarding the cost of policies. If necessary, in order to fully cost a policy, the relevant Secretary may request, in writing, more information from the Prime Minister, the Leader of the Opposition or the Leader of a minority party.¹¹ Appendix C contains a pro-forma indicating the information normally required for a costing to be prepared.

Estimates are provided for the current financial year and the forward estimates period using the most recent set of published estimates under the Charter as the benchmark. For election costings, these will be the forward estimates published in the Pre-Election Economic and Fiscal Outlook (PEFO). The financial years used in costings ends in June. Where necessary, full year, part year and one off effects will be distinguished in the advice.

Where revenue and expense costs are likely to be significantly different beyond this forward estimates period – for example, because the measure is not scheduled to commence or reach 'maturity' until after the forward estimates period – it may be necessary to include a statement about the financial impact of the policy beyond the forward estimates.

In the case of costing a policy package, both the cost of individual components and the overall cost of the package will be undertaken and, where feasible to do so, the effect of one component of a package on another will be taken into account and reported.

While costings will generally be the Secretaries' best assessment of the cost of a policy, in cases where assumptions are particularly uncertain, Secretaries may choose to publish costings as a range of possible outcomes.

Public Debt Interest¹²

Costings will generally not account for the impact on Public Debt Interest (PDI) payments, unless it is an explicit policy objective to affect the level of interest payments, or the policy involves transactions of financial assets (such as loan schemes). PDI costings will normally assume no change to the debt management strategy.

Further information on the budget treatment of balance sheet transactions, including government investment funds and financial asset transactions can be found in Appendix A.

¹¹ Subclause 30(3) of Schedule 1 to the Charter.

¹² PDI is the cost of servicing the stock of Australian Government debt incurred to meet budget financing and other borrowing requirements.

Departmental expenses

Departmental expenses will be included where analysis of the policy shows that these are material. Existing programs/policies of a similar nature will be used as a guide to determining these expenses.

COSTING ASSUMPTIONS**Consistency and transparency of costing assumptions**

Any economic data or forecasts used in costings will be consistent with the most recent publicly released estimates. The PEFO will be the basis of the economic parameters used in costing election commitments.

Other assumptions used in costings (for example, the numbers of people making use of a particular rebate or estimates of taxable incomes) will be the most appropriate available, based on the best professional judgment of the Secretaries.

The nature of assumptions used will be made clear by the Secretaries when publicly releasing costings and any caveats associated with the assumptions will be outlined. To maintain consistency, assumptions used in one policy costing will generally be used again for costing similar policies.

Direct behavioural and broader economic effects

Policy costings will take into account the direct behavioural impact of a policy change when this is expected to be material to the costing. Direct behavioural impacts are the changes in the behaviour of individuals, businesses or organisations that are directly affected by a policy change, as well as the impacts on closely related industries where relevant.

Information on direct behavioural responses to a policy change is drawn from a variety of sources. These include previous experience for similar policy changes; academic and other studies of response effects or price elasticities; input from consultations or submissions; econometric modelling and studies; behavioural economics studies or trials, and sensitivity analysis estimating the scope for variations and taking a point estimate within the range.

For some policy costings, direct behavioural responses are not factored into the costing either because of a lack of information or an expectation that the magnitude of the behavioural response will be small. Both the inclusion of a behavioural response and the extent of the response in a policy costing can involve judgement.

There are also occasions where policy changes have broader economic or 'second-round' impacts. These impacts occur when a policy change has flow-on effects to the aggregate economy. Second-round impacts can include changes at the aggregate level in investment, wages, employment, prices and/or industry structure.

As a general rule, policy costings only take into account the direct behavioural effects of a policy change, and do not include broader economic or 'second-round' effects. Second-round effects are generally not included in costings for a range of reasons, including uncertainty in estimating the magnitude and timing of the effects and because generally it will be reasonable to assume that the second-round effects are likely to be small relative to the direct financial impact of a measure. Second-round effects are also likely to take longer to arise than the immediate costs of a new policy proposal, and often may not occur within the forward estimates' timeline.

Appendix I — Charter of Budget Honesty Policy Costing Guidelines – Part 2

Second-round effects have occasionally been included and separately identified in costings. Examples include: the 1994 *Working Nation* policy; the 1999 *Review of Business Taxation*; the 2000 *New Tax System*; the 2005 *Welfare to Work* package; and the 2010 *Stronger, Fairer, Simpler* package. These packages included estimates of second-round effects because the broad-based nature of the packages meant that they were expected to produce unambiguous second-round benefits for the whole economy rather than shifting resources from one activity to another. Moreover, the magnitude and timing of the reforms meant that the second-round effects were likely to be measurable over the forward estimates timeframe.

COMMONWEALTH BODIES' ASSISTANCE IN PREPARING COSTINGS

The Charter allows the Secretaries to request an Australian Government body (for example, other government departments or agencies) to provide information to assist in the costing.¹³ An Australian Government body is required by the Charter to comply with such a request in time to allow the information to be taken into account in the preparation of the policy costing, unless it is not practicable for the body to do so, or where providing the information would contravene another law of the Commonwealth.¹⁴ The Secretaries will ensure consultations take place with other relevant departments or agencies, at senior management level, as a matter of course in producing a costing, so as to help ensure the assumptions chosen are the most appropriate. However, the final responsibility for the assumptions used will remain with the Secretaries.

FURTHER INFORMATION REQUIRED FOR THE COMPLETION OF COSTINGS

If the Secretaries consider that further information is required, they may request information from the Prime Minister, the Leader of the Opposition, or the Leader of the relevant minority party, as appropriate, in writing.¹⁵ The Secretaries will endeavour to ask for such additional information within two business days of receiving the costing request. Further discussion between the Treasury and/or Finance officials and advisers in the offices of the Prime Minister or the Leader of the Opposition or the Leader of the relevant minority party may be necessary as part of that process. Additional information provided in such discussions should be followed up in writing and forwarded to the Secretaries.

Requests for clarification will be noted in the final costings advice where the information materially affects the costing outcome.

VARIATIONS IN COSTINGS FROM THOSE SPECIFIED BY PARTIES

Where there is a difference between a costing request and the publicly released policy, the Secretaries will seek to clarify the difference by seeking further information as outlined above. If that is not possible, the costing will be based on information provided in the costing request.

The difference may be due to variations between the assumptions made by the parties and those made by the Secretaries. Where a costing uses different assumptions to those specified in a party costing request, the costing advice will explain the reason for using those different assumptions.

¹³ Subclause 32(1) of the Schedule to the Charter.

¹⁴ Subclause 32(2) of the Schedule to the Charter.

¹⁵ Subclause 30(3) of Schedule 1 to the Charter.

Appendix J — Summary of Candidates 45, 54, and 60

Candidate Number 45 – Hybrid mismatch and AT1 regulatory capital

Issues prompting CRP application²²⁸	<p>Australia's hybrid mismatch rules are designed to prevent multinational corporations from exploiting differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions.</p> <p>An issue arose that impacted on an investor's ability to claim franking benefits attached to franked distributions paid on issuers of additional tier 1 (AT1) capital instruments.</p>
CRP sought	To modify the operation of the law to allow deduction for franked distributions on AT1 capital instruments.
CRP Secretariat Determination	<p>No, CRP consideration was put on hold.</p> <p>[Treasury had advised that the issue would be addressed via MTA prior to the issue being considered by the CRP Secretariat]</p>
CRP Advisory Panel Consultation	<p>No, CRP consideration was put on hold.</p> <p>[Treasury had advised that the issue would be addressed via MTA prior to the issue being considered by the CRP Secretariat]</p>
MTA progress	<p>The CRP issue was addressed by items 61 to 64 of Part 4 of Schedule 1 to the <i>Treasury Laws Amendment (2020 Measures No. 2) Act 2020</i>.</p> <ul style="list-style-type: none"> 15 October 2019: RAB informed PAL CRP team that it would cease further costing work due to Treasury's advice of resolution of this matter through MTA. 13 December 2019: Treasury commenced public consultation on the MTA. 13 May 2020: the MTA was introduced to Parliament. 25 August 2020: the MTA was passed by Parliament. 3 September 2020: the MTA received Royal Assent. 1 October 2020: the MTA took effect.
Other relevant matters	The ATO explained that it had initially pursued both the CRP and potential legislative amendment for this candidate due to its potential significant adverse effect on capital markets and certain taxpayers. The candidate was first raised with the CRP team on 19 September 2019.

²²⁸ Australian Taxation Office, Commissioner's remedial power not applied – business <<https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/When-the-Commissioner-s-remedial-power-hasn-t-been-used/Commissioner-s-remedial-power-not-applied---business/#HybridmismatchandAT1Regulatorycapital>>

	<p>On 15 October 2019, RAB advised the PAL CRP team that Treasury sought to resolve this issue via a legislative amendment. The ATO put its CRP consideration of this candidate on hold. Therefore, this candidate was not presented to either the CRP Secretariat or the CRP Advisory Panel.</p> <p>On 19 April 2021, just before the ATO included this candidate on the public register of unsuccessful CRP candidates, the ATO informed the CRP Advisory Panel of this candidate.</p>
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Candidate 54 – GST at settlement credit mismatch

Issues prompting CRP application	<p>In 2018, the Government introduced a withholding obligation for purchasers of new residential properties or subdivisions of potential residential land to remit 10% of the purchase price to the Commissioner, with the supplier of the new property entitled to the GST credit. This measure was designed to prevent illegal phoenix activity in respect of suppliers avoiding their GST liabilities.</p> <p>However, the outcome of this provision was that the supplier that receives the GST credit was not always the same entity that was liable to pay the GST.</p>
CRP sought	To modify the operation of the law so that the GST liable entity receives the credit for the GST paid.
CRP Secretariat Determination	Candidate was deemed suitable for rectification using the CRP.
CRP Advisory Panel Consultation	No, CRP consideration was put on hold.
MTA progress	MTA proposal was advanced with Treasury in 2022. MTA was initially expected to be introduced into Parliament in March 2023, but experienced some delay. The Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023 was introduced into Parliament on 14 June 2023. Items 41-44 of Part of Schedule 6 to the bill will address the issue.
Other relevant matters	<p>This issue was first raised with the CRP team on 9 November 2020.</p> <p>This issue has now been legislated. See: Treasury Laws Amendment (2023 Law Improvement Package No 1) Act 2023, Sch 6, Part 2, Items 41-44.</p>

Candidate Number 60 – Exempt FBT for not-for-profit hospitals

Issues prompting CRP application	As a result of certain amendments in the <i>Fringe Benefits Tax Assessment Act 1986</i> in 2013 (the '2013 amendments'), hospitals operated by non-profit societies or non-profit associations that are not 'rebatable employers' are no longer able to access the capped FBT exemption. This creates uncertainty and potentially severe financial consequences for not-for-profit private hospitals that otherwise would be eligible for the exemption but for the 2013 amendments.
CRP sought	To modify the operation of the law so that hospitals operated by non-profit societies or non-profit associations have access to the capped FBT exemption.

CRP Secretariat Determination	No, CRP consideration was abandoned
CRP Advisory Panel Consultation	No, CRP consideration was abandoned
MTA progress	<p>The CRP issue was addressed by Part 3 of Schedule 4 to the <i>Treasury Laws Amendment (2022 Measures No.1) Act 2022</i>.</p> <ul style="list-style-type: none"> • On 28 July 2021, the CRP team was advised that Treasury would pursue an MTA. • 2 December 2021: Treasury commenced public consultation on the MTA. • 27 July 2022: the MTA was introduced to Parliament. • 4 August 2022: the MTA was passed by Parliament. • 9 August 2022: the MTA received Royal Assent. • 1 October 2022: the MTA took effect.
Other relevant matters	<p>The ATO became aware of this issue as a result of a private binding ruling application from a taxpayer. The ATO considered the use of the CRP and potential legislative amendment concurrently to speedily resolve the issue. The issue was formally raised with the PAL CRP team on 27 July 2021. On 28 July 2021, the CRP team was advised that Treasury would pursue an MTA.</p> <p>The ATO requested RAB costing as soon as the issue was formally raised with the PAL CRP team. When RAB assessed the candidate as having a budget impact that was not negligible on 12 October 2021, the ATO abandoned the CRP process. Therefore, this candidate was not presented to either the CRP Secretariat or the CRP Advisory Panel. The ATO advised that it would inform the CRP Advisory Panel of this candidate ahead of the next update to the public register of unsuccessful CRP candidates.</p>

Appendix K — Glossary and defined terms

Abbreviation	Defined term
AAT	Administrative Appeals Tribunal
ATO	Australian Taxation Office
ATO Internal CRP Application	The CRP application form titled 'Commissioner's Remedial Power – Internal Application Form', which is available to ATO staff who wish to raise a potential candidate for CRP consideration.
BAS	Business Activity Statement
Commissioner	Commissioner of Taxation
Complaint	<p>A complaint is defined in AS/NZS 10002:2014 Guidelines for complaint management in organizations as:</p> <p><i>Expression of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</i></p> <p><i>Disputes - Unresolved complaints escalated internally or externally, or both.</i></p> <p><i>Feedback - Opinions, comments and expressions of interest or concern, made directly or indirectly, explicitly or implicitly to or about the organization, its products, services, staff or its handling of a complaint. Organizations may choose to manage such feedback as a complaint.</i></p>
CIR	Commissioner of Inland Revenue (New Zealand)
CRP	Commissioner's Remedial Power
CRP 2020/2	<i>Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020</i>
CRP 2020/3	<i>Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020</i>
EL1	APS Executive Level 1
EM	Explanatory Memorandum
entity	<p>an entity is defined in section 960-100 of the <i>Income Tax Assessment Act 1997</i> that is:</p> <ul style="list-style-type: none"> (a) an individual (b) a body corporate (c) a body politic (d) a partnership (e) any other unincorporated association or body of persons (f) a trust (g) a superannuation fund (h) an approved deposit fund

ESCs	Extra-statutory concessions
External CRP Application	The CRP application form available on the ATO website.
FY18	Financial Year ended 30 June 2018
FY19	Financial Year ended 30 June 2019
FY20	Financial Year ended 30 June 2020
FY21	Financial Year ended 30 June 2021
GST	Goods and Services Tax
HMRC	The HM Revenue & Customs (United Kingdom)
IGT Act	<i>Inspector-General of Taxation Act 2003</i>
IGTO	Inspector-General of Taxation and Taxation Ombudsman The acronym “IGTO” is used throughout the submission to denote both the “Inspector-General of Taxation”, as named in the enabling legislation, and “Inspector-General of Taxation and Taxation Ombudsman” as recently adopted due to recent calls for greater understanding and awareness of our complaints services function.
MTA	Miscellaneous Technical Amendment Miscellaneous and technical amendments are periodically made to Treasury legislation to correct any technical or drafting defects and improve the quality of laws.
NZ	New Zealand
RAB	The Revenue Analysis Branch of the ATO’s Policy, Analysis and Legislation Business Line
PAL	The ATO’s Policy, Analysis and Legislation Business Line
Scrutiny of Bills Committee	The Senate Standing Committee for the Scrutiny of Bills
Scrutiny of Delegated Legislation Committee	The Senate Standing Committee for the Scrutiny of Delegated Legislation
SES Band 1	APS Senior Executive Service Band 1
SES Band 2	APS Senior Executive Service Band 2
TAA	<i>Taxation Administration Act 1953</i>
TAD	The Treasury’s Tax Analysis Division
TCN	The Tax Counsel Network in the ATO Law Design and Practice Group
TDRP	Tax Design Review Panel
TDRP Report	The report dated 30 April 2008 prepared by the Tax Design Review Panel titled ‘Better Tax Design and Implementation – A Report to The Assistant Treasurer and Minister for Competition Policy and Consumer Affairs’
UK	United Kingdom