



Australian Government
Inspector-General of Taxation
Taxation Ombudsman



The Administration of the Commissioner's Remedial Power

A Review Investigation Report

Introduction

- Since 2017, the Commissioner of Taxation has a statutory power – the Commissioner’s Remedial Power (CRP) - to modify the operation of certain taxation law provisions that give rise to unintended or unforeseen outcomes
- CRP is a discretion
- The aim of the CRP was to enable the Commissioner to provide swift albeit temporary relief and certainty for taxpayers while more permanent, legislative resolution was being pursued
- The CRP was also aimed at reducing pressure on the legislative agenda
- It was forecasted to be used up to 10 times a year.

The CRP provisions

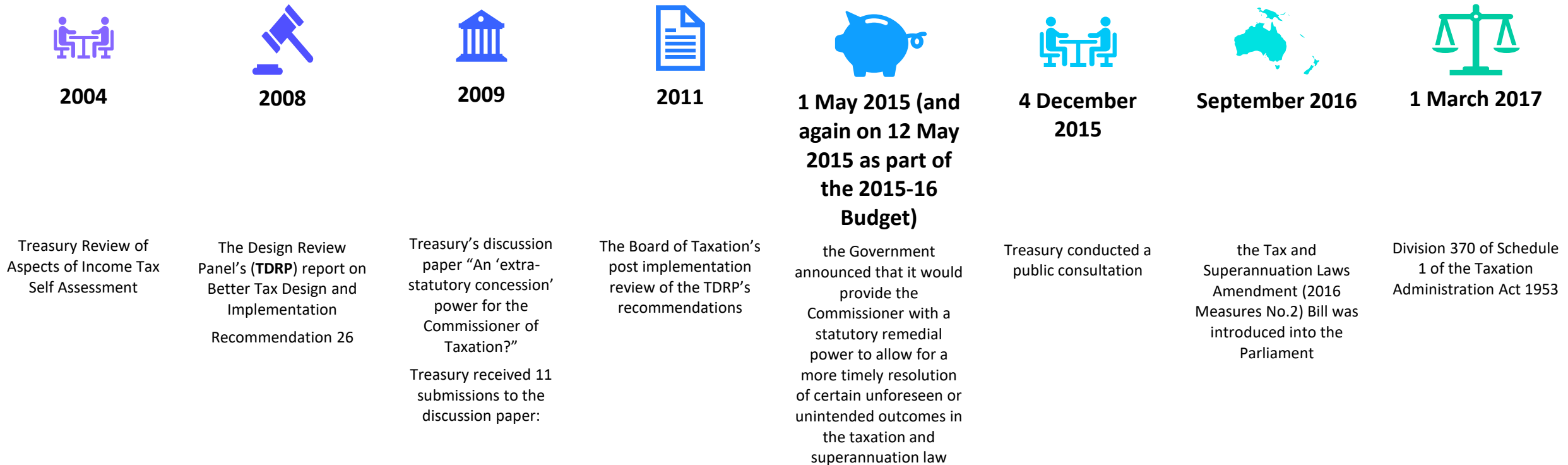
s 370-5 of Sch 1 to the TAA 1953

370-5 Commissioner's remedial power

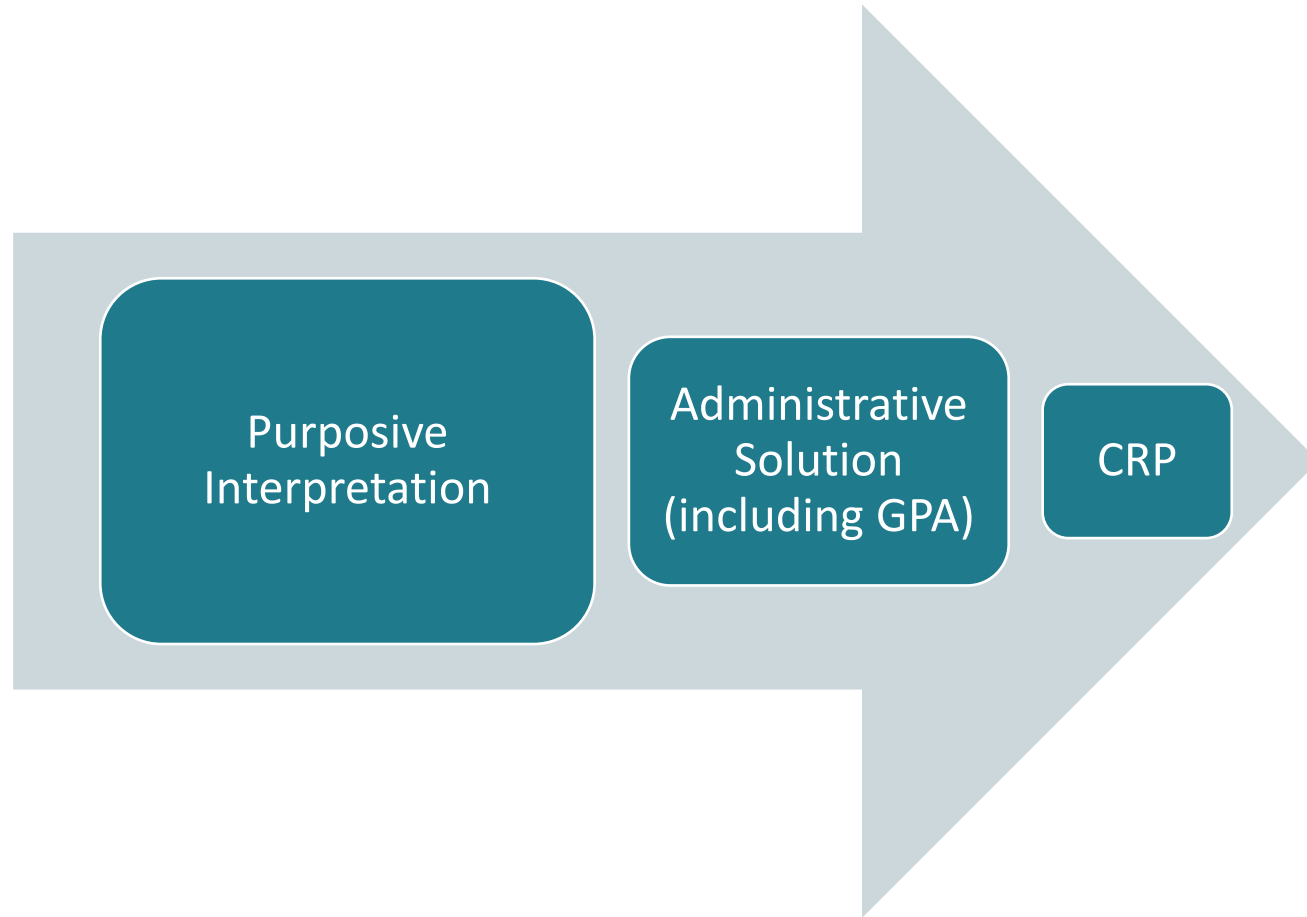
(1) The Commissioner may, by legislative instrument, determine a modification of the operation of a provision of a taxation law if:

- 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;
 - 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.

A timeline history of the CRP

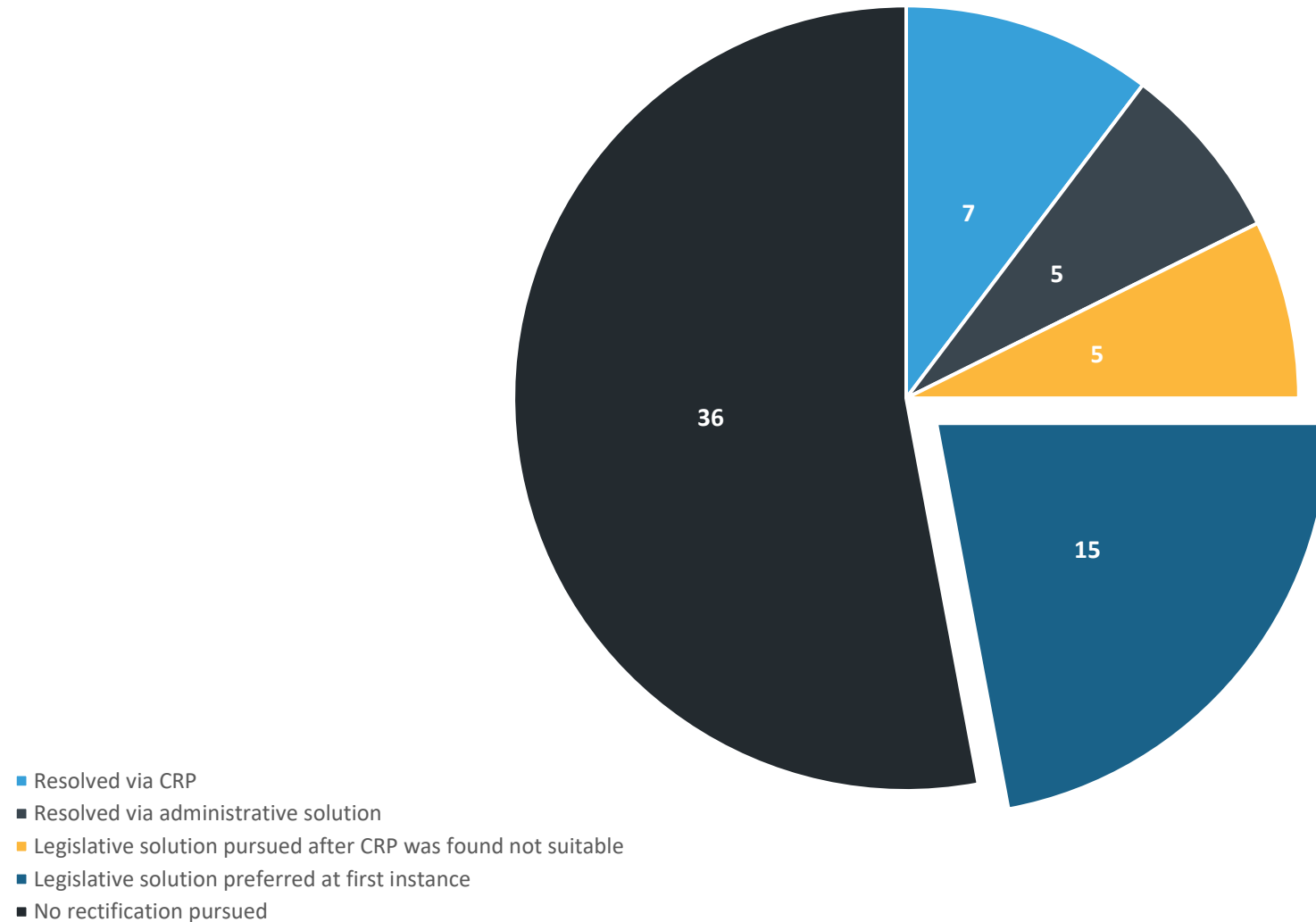


CRP is a measure of last resort



An overview of CRP considerations

As at 30 September 2023



7 CRP determinations have been made by the Commissioner

CRP modification	Date of effect	Ceases/ceased to be in effect
Taxation Administration (Remedial Power – Foreign Resident Capital Gains Withholding) Determination 2017	17/10/2017	1/10/2027
Taxation Administration (Remedial Power – Small Business Restructure Roll-over) Determination 2017	9/5/2018	1/4/2028
Taxation Administration (Remedial Power – Disclosure of Protected Information by Taxation Officers) Determination 2020¹	15/5/2020	23/3/2023
Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020²	9/12/2020	1/1/2022
Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020³	14/5/2021	1/4/2022
Taxation Administration (Remedial Power – Work Test for Personal Superannuation Contributions) Determination 2023	11/08/2023	1/7/2028
Taxation Administration (Remedial Power – Remission of Charges and Penalties) Determination 2023	15/09/2023	1/10/2028

Notes

1 CRP later enacted effective 1 January 2022 – refer Items 47 and 48 of Schedule 3 to the Treasury Laws Amendment (2021 Measures No.5) Act 2021

2 CRP later enacted effective 1 January 2022 – refer Item 44 to 46 of Schedule 3 to the Treasury Laws Amendment (2021 Measures No. 5) Act 2021

3 CRP later enacted effective 1 April 2022 – refer Items 33 to 37 of Schedule 8 to the Corporate Collective Investment Vehicle Framework and Other Measures Act 2022

Examples where a CRP determination was made



Authorising otherwise protected information regarding deceased taxpayers to be disclosed to practitioners

The tax secrecy provisions contain restrictions on who could access information relating to a deceased taxpayer, which made the finalisation of the deceased's affairs more difficult. The CRP was exercised to allow tax officials to disclose (otherwise) protected information relating to the deceased to registered tax agents, BAS agents or legal practitioners representing an executor or administrator of the deceased estate



Maintaining special tax treatment during COVID-19 for seasonal workers

During the COVID-19 pandemic, foreign resident workers employed under the Seasonal Worker Program (**SWP**) could extend their stay in Australia using a different temporary visa, but they would no longer be covered by the concessional tax rate under the SWP. The CRP was exercised to allow these workers to continue to be covered by the special taxation regime designed for the SWP.

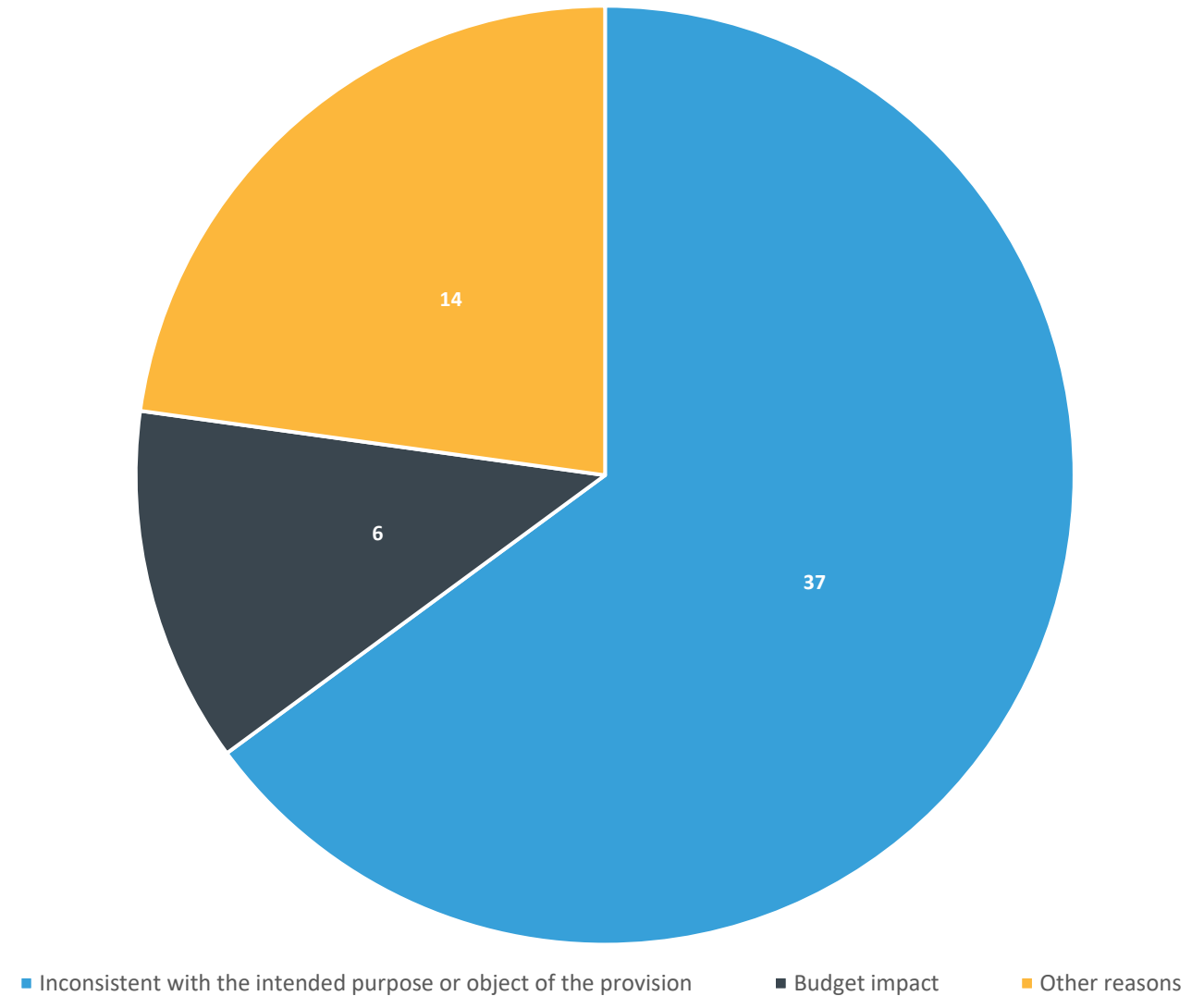


Remitting penalties and general interest charge for taxpayers affected by natural disasters or other serious and adverse external events:

The automatic remission of penalties and General Interest Charge by the ATO for taxpayers affected by natural disasters prior to liabilities being raised was not previously supported by the tax law. The CRP was exercised to expressly allow the Commissioner to automatically remit penalties and interest for natural disaster affected taxpayers who satisfy the relevant criteria whether or not the charge or penalty has become due and payable.

Reasons why CRP candidates were found not suitable for CRP

- The Budget Impact criterion (which some stakeholders posited was the reason for CRP candidates failing) was found not to be the main reason
- The majority of CRPs failed because they were considered to be inconsistent with the intended purpose or object of the provision



Observation: A preference for law change ... and for the law to expressly state everything

- The ATO demonstrated a preference in some cases to allow legislative amendments to be progressed in favour of exercising the CRP
- For Example - in relation to Candidate 55
 - The CRP concerned revision, amendment and modification of a choice to carry back losses (a COVID-19 support measure)
 - Although the ATO considered such a modification would not be inconsistent with the intended purpose of the provision, the absence of an express description enabling a modification meant that the ATO ultimately determined the candidate to be unsuitable for the CRP.
- Similar issues were observed by the IGTO in the investigation into *The Exercise of the Commissioner's General Powers of Administration*
- The preference to allow legislative amendment to address the issue meant that the CRP was not exercised in all cases where it potentially could have been

Observation: Law change was preferred in 30% of candidates, but can lead to delays

- Where the CRP is not pursued in favour of law change, the result can take many years to eventuate.
 - The range of timeframes observed for CRP candidates to be addressed by law change was between 8 months and 3.5 years
 - An exercise of the CRP can be effective 15 sitting days (in both Houses of Parliament) after tabling
- For Example - Candidate 58 (submitted to the ATO by the IGTO)
 - although it was assessed to have met all the CRP criteria, a decision was ultimately made to not exercise the CRP as law change had been announced
 - There was a 2 year delay between the date the ATO determined it would not exercise the CRP until the announced law change ultimately received Royal Assent

Case Study – IGTO’s Request for CRP as part of a dispute investigation - Candidate 58 – First Home Super Saver Scheme (FHSSS)

- 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.
- 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
- The Government announced on 11 May 2021 (as part of the 2021-22 Federal Budget), 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 included amendments to assist 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.
- 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. ...*
- 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

Case Study – Candidate 55 – Can you modify a choice to carry back losses

A CRP request to allow taxpayers 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

- A choice to carry losses back was introduced as a COVID-19 support measures
- A request for CRP to be exercised to ensure the choice could be revised, amended or modified in certain circumstances was rejected by the ATO
- The ATO considered the CRP request would not be inconsistent with the intended purpose or object of the provision
- However, 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



Observation: There is low community and ATO awareness of the CRP

- The ATO's CRP process relies upon taxpayers, tax practitioners and other areas of the ATO to identify and put forward potential candidates for consideration to exercise the CRP
- The IGTO did not find the ATO interpreted the CRP criteria in an overly narrow or conservative manner, there was a high proportion of candidates being found to be unsuitable for CRP exercise
- The quality and quantity of CRP candidates depends upon stakeholders (internal and external) being aware of the CRP, its scope, purpose and statutory criteria.

Observation: The impact on the Commonwealth Budget is not intuitive & not well understood

- Stakeholders perceived that many CRP candidates failed because they would not have a ‘negligible budget impact’
- Our investigation showed fewer cases failed for this reason – the impact on Commonwealth budget was not always assessed
- However, the budget impact was not assessed for cases which failed because the measure was ‘inconsistent with the intended purpose or object of the provision’
- There may be challenges satisfying the budget impact criterion where:
 - There is a lack of data or imperfect data to actually assess the impact of any modification on the Commonwealth budget.
 - In the absence of being able to say that the impact would be ‘negligible’, it was more likely than not to be concluded as ‘not negligible’
- The IGTO also observed that unintended impacts and consequences are best identified early (within the forward estimates period) for the Commonwealth Budget impact to be assessed as negligible – a core CRP requirement. This is unlikely to be well understood.

Recommendations

- The IGT0 made 9 recommendations to the ATO
- The ATO has agreed, agreed in part or agreed in principle with all but one part of one recommendation
- The ATO has disagreed with recommendation 4.2(a)

Recommendation 1 (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

- ATO Response - Agree

(b) bolster community awareness through guidance and information, including that which is already published and available on the ATO website.

- ATO Response - Agree

Recommendation 2 (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.

- ATO Response - Agree

Recommendation 3 (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.

- ATO Response - Agree

Recommendation 4 (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

- ATO Response - Agree

(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.

ATO Response – Agree in Part

Recommendation 5 (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;

- ATO Response - Agree

(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

ATO Response - Agree

(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.

ATO Response – Agree

Recommendation 6 (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

- ATO Response - Disagree

- (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.

ATO Response – Agree in Part

Recommendation 7 (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;

• ATO Response - Agree

- (b) leveraging its existing consultation and stewardship forums to consult on potential CRP candidates that are under consideration; and

ATO Response – Agree in Principle

- (c) publishing information about the consultation that the ATO undertakes in relation to each CRP matter published on the ATO website.

ATO Response – Agree

Recommendation 8 (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.

- ATO Response – Agree in Principle

Recommendation 9 (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

ATO Response - Agree

- (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).

- ATO Response – Agree in Principle

www.igt.gov.au

enquiries@igt.gov.au

(02) 8239 2100

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