# 35th Australasian Tax Teachers Association Annual Conference

# Taxation in a Brave New World

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Thank you for the opportunity to share some remarks and observations at this 35th Australasian Tax Teachers Association Annual Conference.

I note the topic for the conference is taxation in a brave new world, but I was gifted the individual freedom to choose my own topic for this purpose.

Perhaps unsurprisingly given my background and training as a tax lawyer, and the fact that in my current role I am very much immersed in the world of taxation administration, the area of tax that most intrigues me concerns the administrative choices made and available when interpreting statutes as part of that administration, especially where those statutes seemingly impose conflicting duties and responsibilities.

A purposive interpretation[1] is of course assumed but tax and superannuation systems serve such a multitude of purposes, some of which may be competing. The role or at least the consideration of these competing interests is complex.

I am also a Chartered Accountant, and one aspect of the role of a professional accountant is to act in the public interest[2]. There are similar reflections in the Robo-debt report for example, that a government lawyer should uphold the interests of the Commonwealth as a whole.

Divining what is this whole or public interest in taxation and superannuation systems can be complicated, not just because it affects the rights of individuals but also because the laws can be inherently inconsistent, and the legislative framework provides little guidance to inform how to resolve such inconsistencies and make fair administrative decisions. That is, the framework is lacking, incoherent or requires development. My view is, simply stated, that there is an inadequate framework for good governance of the system itself.

## For example, tax and superannuation systems raise revenue

Should they be administered to protect the Revenue versus the rights of the citizen?

A very high-level overview of the relevant statutes reads something like this:

> Section 166 of the *Income Tax Assessment Act 1936* requires that the Commissioner (i.e. the Commissioner must) make an assessment of taxable income, tax payable and tax offsets from the returns, and from any other information in the Commissioner ' s possession, or from any one or more of these sources.
>
> Having made that assessment, there is then a tax debt due and payable in accordance with section 5-5 of the *Income Tax Assessment Act 1997*.
>
> Section 11 of the *Public Governance, Performance and Accountability Rule 2014* (the PGPA Rule) requires an Accountable Authority (the Chief Executive of an agency) to pursue the recovery of debts owing to the Commonwealth for which it is responsible[3].
>
> Section 15 of the *Public Governance, Performance and Accountability Act 2013* requires that the accountable authority of a Commonwealth entity must govern the entity in a way that:
>
> *a. promotes the proper use and management of public resources for which the authority is responsible; and*
>
> *b. promotes the achievement of the purposes of the entity; and*
>
> *c. promotes the financial sustainability of the entity.*
>
> *(2) In making decisions for the purposes of subsection (1), the accountable authority must take into account the effect of those decisions* ***on public resources generally****.*
>
> In the case of the Australian Taxation Office, the Chief Executive and the Accountable Authority is the Commissioner of Taxation (Commissioner).
>
> The Commissioner must also comply with the Public Service Code of Conduct[4] which includes a requirement that he or she (like all APS employees), when acting in connection with APS employment, must comply with all applicable Australian laws[5].
>
> The Commissioner must also (as the accountable authority) govern the ATO in a way that is not inconsistent with the policies of the Australian Government[6].

This brief summary in my view highlights that even at the Governance level of the tax system, there are potentially conflicting mandatory requirements for the purposes of practical administration. Whilst there is some guidance to ensure the protection of Commonwealth resources, there is an inadequate framework for resolving inconsistencies or

inadequacies in the legislation where (say) they are in contest with the rights of individuals. More on this later.

Some other potential conflicts to ponder include the fact that tax and superannuation systems:

- Provide financial relief in the form of offsets and rebates – Should the financial interests of the citizen prevail over the Commonwealth Budget
- Support retirement incomes in the form of superannuation and pensions – which raises a contest between raising revenue (including superannuation revenue), preserving and protecting superannuation balances, minimising pension pressures on the Commonwealth Budget (today and tomorrow) and protecting the rights of citizens (individually or collectively) to access their savings
- Support intergenerational change - Protecting the system and economy today versus tomorrow

The World State's motto in a Brave New World was Community, Identity & Stability which then fundamentally involved a contest with individual freedoms.

There are several reasons why I think this topic is interesting and of relevance to the conference.

1. Firstly, the findings of the Royal Commission into Robo-debt made some important observations and recommendations about the role of the government lawyer and legal advice that perhaps have broader implications for tax administration generally.
2. Secondly ,the IGTO completed two investigations in 2023 which touch upon this topic.
   - The administration of the Commissioner's remedial power
   - the administration of the Commissioner's general powers of administration

I have selected the following quote from a Brave New World as a theme for my remarks:

*Words can be like X-rays if you use them properly – they'll go through anything. You read and you're pierced.*

We sometimes expect our statutes, our words to have X-ray like vision and powers but what happens when they don't? How do we and how should we address the ambiguity and uncertainty and resolve the potential conflicts?

On the one hand we expect those administering the law to at all times act lawfully and uphold the law but where the law itself inherently raises potential conflicts, what support or guidance do the words provide to resolve the potential conflict of administrative duty (as noted above)?[7]

I wonder if taxation in a Brave New World would be better served by articulating a better framework for administrative decision making. A principal or overriding objective. A purpose or suite of considerations to be balanced so that a power, discretion, provision or statute can be applied consistently, fairly, efficiently and correctly. Providing such guidance or a framework as a means to make better, more consistent decisions and better resolve such conflicts.

The IGTO recently recommended as part of our review investigation into the exercise of the Commissioner's general powers of administration (GPA) that Government should consider enacting a framework of guiding principles for the exercise of the Commissioner's GPA.

Without prescribing what principles or factors should make up that framework, the IGTO provided, by way of example, some principles which may be suitable to be included in the framework.

For example:

The Commissioner of Taxation shall exercise his powers of general administration in a way that is practicable and in accordance with the law and in furtherance of:

a. fostering voluntary compliance and willing participation of all taxpayers within the tax and superannuation systems;
b. minimising the cost of compliance for taxpayers to participate within the tax and superannuation systems;
c. ensure that the resources of the ATO are applied to optimise compliance assurance and revenue collection;
d. resolving disputes in a procedurally fair and proportionate manner having regard to the GPA principled framework;
e. assisting taxpayers who make honest mistakes to correct their mistakes where this assists to achieve outcomes and results as intended by specific measures;
f. promoting fairness in all the circumstances; and
g. respecting the requirements of procedural fairness.

I consider that the implementation of a framework of guidance would improve the tax administration system by yielding more transparent and fairer outcomes for taxpayers and tax practitioners while also ensuring that ATO decision-making is consistent, efficient and effective to achieve the intended purpose of legislation as enacted by Parliament. This would enhance the accountability of decision making and the overall integrity of the tax system.

These features and qualities are recognised as important in administrative law design generally[8] and tax administration design internationally, since:

*"Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply"*.[9]

I submit that taxation in a Brave New World would be better served by better articulating the relevant objectives and purpose and providing a framework of guiding principles and objectives to better support administrative decision making.

The practical intended and expected benefits of a principled framework are set out in detail in the IGTO GPA report at Section 5.5 (commencing on page 181).

The following is provided by way of evidence and argument to further support this submission.

# The Royal Commission into the Robo-debt Scheme

In July 2023, the Royal Commission into the Robo-debt Scheme released its report (Robo-debt Report) covering a wide-reaching scope of issues. Chapter 19 of that report - *Lawyers and legal services* begins with the following pertinent quotes[10]:

> *Upholding the principles and values of a government lawyer in a time of crisis requires courage and conviction – The Hon Justice Stephen Gageler*
>
> *Often the advice of the government lawyer defines the law as understood by the government and, in many instances will determine the rights of citizens dealing with the government. – The Hon Justice Bradley Selway QC*

One of the important observations made in the Robo-debt Report is the need for professional standards to inform the provision of legal advice to Government.

The Chapter goes on to state that - *It is trite but true to say that the government should, in all its legal endeavours, be seen to uphold the law.*

*One of the fundamental ethical duties owed by a lawyer is the avoidance of any compromise to their integrity and professional independence. A lawyer must not act as the mere mouthpiece of their client. The actions of government lawyers take on extra significance because the government is a client which has powers and obligations that far exceed those of the normal citizen.*

These comments are in the context of Chapter 19 – Lawyers and Legal services but I do think they are apposite to all persons administering tax and superannuation laws. The administration of taxation and superannuation laws for example affects the rights of citizens directly.

This was not the first time this theme of professional standards had been identified. In 2009 in the Blunn Kreiger Report[11] observed that:

> *The lack of a clear role and purpose for in-house lawyers in some agencies has hampered the development of a professional ethos. By professional ethos we mean a recognition on the part of in-house lawyers that,* ***in addition to being employees of an agency and owing the agency loyalty, they are also professionals. Professionalism brings with it obligations to be objective and independent, and to recognise obligations to uphold the rule of law and the interests of the Commonwealth as a whole.***

The Robo-debt report notes that in 2017, in a review of Commonwealth legal services, Secretary of the Attorney-General's Department (AGD), observed that despite the recommendations of the Blunn Krieger Report:

> *… little progress has been made to develop a single unifying professional ethos and this has undermined the efforts that in-house legal areas have taken to support their lawyers.*

So, a Brave New World in the area of Tax Administration would emphasise two things:

- the importance of administrative law principles; and
- the need for Professionalism and professional standards to inform that administration.

## Administrative Law Principles

The Australian Administrative Law Policy Guide, issued by the Attorney-General's Department, notes the following in relation to decision making that is fair, high quality, efficient and effective:[12]

> ***4.1 A whole-of-system approach to accountability***
>
> *The administrative law system is based on the fundamental values of fairness, lawfulness, rationality, openness and efficiency.*[13] ***How government interacts with the public in individual cases influences public trust and confidence in government administration more broadly.*** *By showing a commitment to delivering justice through administrative decision making, review mechanisms and other accountability mechanisms, the Federal Government can play an active role in improving the quality of access to justice for individuals.*
>
> *…*
>
> ***Many of the accountability features of the administrative law system****, such as the availability of judicial review, the jurisdiction of the Ombudsman, the jurisdiction of the*

*Merit Protection Commissioner and obligations under freedom of information and privacy legislation**, will be applicable to agency decision making regardless of whether they are specified in individual statutes. They are of general application, with limited or no scope for exemptions.***

*…*

*Together, these mechanisms create a comprehensive administrative law system that provides for:*

- *decision making that is fair, high-quality, efficient and effective*
- *individual access to review of both the merits and lawfulness of decisions and conduct*
- *accountability for government decisions and conduct, and*
- *public access to information about government decisions and processes, and individual access to personal information held by the government.*

***4.1.2 What should be in a primary decision making power?***

*…*

***Administrative power that affects rights and entitlements should be sufficiently defined to ensure the scope of the power is clear. Legislative provisions that give administrators ill-defined and wide powers, delegate power to a person without setting criteria which that person must meet, or fail to provide for people to be notified of their rights of appeal against administrative decisions are of concern** to the Senate Scrutiny of Bills Committee[14] and the Senate Standing Committee on Regulations and Ordinances.[15] …*

***4.1.3 Criteria for decision making***

***Policy makers should consider whether statutory criteria would be appropriate to guide the decision maker in the exercise of a discretionary power. Where a broad discretion is proposed, this should be clearly explained in the explanatory material for the legislation. It is often desirable to include examples of relevant considerations even where the decision maker is exercising a broad discretion.***

*Where a decision is likely to affect individuals' rights or freedoms, criteria in legislation (to which a decision maker may have regard) may include principles in relevant human rights instruments. …*

#### *4.1.4 Procedural fairness*

*Decision makers should act in a manner which affords people affected by decisions procedural fairness (or natural justice), and explain those decisions in a manner which people can understand. Procedural fairness forms the basis for a ground of judicial review under the common law and the ADJR Act, and requires certain standards and procedures to be observed in administrative decision making. Broadly, procedural fairness requires that the decision maker be, and appear to be, free from bias and/or that the person receives a fair hearing.* ***'The precise contents of the requirements... may vary according to the statutory context; and may be governed by express statutory provision'.***

*As a matter of policy, the Administrative Law Branch agrees with the comments of the ARC that* ***'procedural fairness should be an element in government decision making in all contexts, accepting that what is fair will vary with the circumstances'. The ARC considers that, to promote public law values, legislation may specify the procedural obligations of decision makers where the requirements are not sufficiently certain, but should not attempt to cover all aspects of procedural fairness.*** [Emphasis added]

## Professional Standards

The need for professional standards is justified in part because the public interest necessarily includes the public and advice to government "in many instances will determine the rights of citizens dealing with the government"[16]. I would not limit this objective to Government Lawyers but extend it to anyone administering the tax and superannuation laws.

Only in this way can you insure against the failures identified in the Robo-debt Report and prevent administration by **assertion** as identified in the following statement:

> *Legal advices and commentary prepared by in-house lawyers in DHS and DSS throughout the Scheme* ***seldom referred to legislative and judicial authority*** *in support of positions and arguments and generally failed to undertake the critical analysis that would be expected of a qualified lawyer.* ***Resort was often had to the assertion*** *"the department is entitled to make a decision based on the best evidence available to it at the time,"* ***which ignored the fundamental requirement that administrative decisions be based on probative evidence, and its converse, that a decision not based on probative evidence is illogical and liable to be set aside (the "no evidence" principle).***

This leads me into my first Case Study example which relates to the First Home Superannuation Saver Scheme.

# First Home Superannuation Saver Scheme

The FHSSS Case Study illustrates a number of issues in tax administration for me:

- The preference for a Tax Code;
- The inability for taxpayers to correct their mistakes, absent an express statement to this effect in the legislation; and finally and relevantly
- The fundamental requirement for statutory and judicial authority for the interpretation of statutes, in this context the meaning of freehold interest.

The examples which follow have previously been made public in a submission made by the IGTO on 27 September 2021 to the House of Representatives Standing Committee on Tax and Revenue - *Inquiry into Housing Affordability and Supply In Australia* [see submission 120 https://www.aph.gov.au/Parliamentary_Business/Committees/House/Former_Committees/Tax_and_Revenue/Housingaffordability/Submissions].

## Some Background

Since 1 July 2018, taxpayers have been able to apply to the ATO for a release of the voluntary contributions made to their superannuation funds after 1 July 2017 along with any associated earnings to contribute towards the purchase or construction of a first home. The FHSSS capped the amount of contributions that can be released at $15,000 in any financial year[17], and a total maximum of $30,000 across all years. From 1 July 2022, the maximum total increased to $50,000[18].

Accessing funds under the FHSSS involves:

- applying to the ATO for a determination of the maximum amount that may be released;[19]
- applying to the ATO for a 'release authority' which specifies the amount that the superannuation fund must release to the ATO;[20] and
- receiving released amounts from the ATO,[21] minus any applicable withholding, in order to facilitate the purchase or construction of the home.

A taxpayer is required to enter into a contract for purchase or construction of the home within 14 days before, or 12 months after, applying to the ATO for release of the funds. However, the Commissioner may grant taxpayers an additional 12 months to enter into the contract.[22] Where, at the end of the extended period, no purchase has been made, the taxpayer may either recontribute the released sums or choose to keep the amounts and be subject to FHSS tax.

## Freehold Interest

The term 'freehold interest' is well defined in the context of property law and the Commissioner of Taxation has also issued his own views on the definition of 'freehold interest' in a number of different contexts including Self-Managed Superannuation Funds (SMSFs)[23], Capital Gains Tax (CGT)[24] and Goods and Services Tax (GST)[25]. A summary of these views and definitions is provided in **Appendix B** to the IGTO submission which can be

found at the following link:
https://www.aph.gov.au/Parliamentary_Business/Committees/House/Former_Committees/Tax_and_Revenue/Housingaffordability/Submissions.

However, in the context of the FHSSS, the Commissioner adopted a broader [different] view of 'freehold interest' which narrows the eligibility circumstances for FHSSS and which is i**nconsistent** with his views expressed in other contexts. In particular, the ATO view adopted for the purposes of administering FHSSS is that:

- an individual can hold a freehold interest in land even if he or she does not have exclusive possession of land for an indefinite period of time;
- when an individual enters into a sale contract for the acquisition of land, the individual holds a freehold interest in land because of equitable rights impressed upon their contractual rights, even if the individual does not have any right of possession and even if the individual is not yet the legal or indeed the beneficial owner of the land;
- the individual can hold a freehold interest in land, even if the relevant lot will not come into existence until subdivision occurs at a later time;
- the individual is, nevertheless, not taken to have held a freehold interest in land if the sale contract does not complete.

The ATO has not been able to point to any legal authorities to support this particular interpretation of 'freehold interest'. The adoption of the broad definition can operate to prevent certain types of first home purchasers from accessing the FHSSS, as illustrated in Examples 3 and 4 taken from the IGTO submission.

*Example 3*

| | |
|---|---|
| 1 July 2020 | The applicant requests a FHSS determination pursuant to s. 138-10 of Schedule 1. The Commissioner makes a FHSS determination and issues it to the applicant. |
| 15 July 2020 | The applicant enters into a contract to purchase vacant land on which to construct his first home. |
| 15 August 2020 | The contract for the purchase of vacant land completes and the applicant obtains exclusive possession of the land for an indefinite period of time. The applicant liaises with architects and builders with a view to making arrangements for the construction of his first home. |
| 20 August 2020 | The applicant requests a release authority pursuant to s. 131-5 of Schedule 1 (this is within 60 days of the issuing of the determination, for the purposes of s. 131-5(3)). |
| 31 October 2020 | The Applicant enters into a contract for the construction of his first home. Entry into the contract occurs within 12 months of the making of the release request, for the purposes of s. 313-35 of the ITAA 1997. |

In the above example, applying the ATO's current view of 'freehold interest', the taxpayer would be eligible to apply for access to funds under the FHSSS as, at the time the FHSSS determination was sought, the taxpayer was not taken to be holding a 'freehold interest'.

### *Example 4*

| | |
|---|---|
| 1 July 2020 | The applicant enters into a contract to purchase vacant land on which to construct his first home. |
| 15 July 2020 | The applicant requests a FHSS determination pursuant to s. 138-10 of Schedule 1. The Commissioner makes a FHSS determination and issues it to the applicant. |
| 15 August 2020 | The contract for the purchase of vacant land completes and the applicant obtains exclusive possession of the land for an indefinite period of time. The applicant liaises with architects and builders with a view to arranging the construction of his first home. |
| 20 August 2020 | The applicant requests a release authority pursuant to s. 131-5 of Schedule 1 (within 60 days of the issuing of the determination, for the purposes of s. 131-5(3)). |
| 31 October 2020 | The Applicant enters into a contract for the construction of his first home. Entry into the contract occurs within 12 months of the making of the release request, for the purposes of s. 313-35 of the ITAA. |

In contrast to Example 3, the taxpayer in Example 4 would not be permitted to access monies under the FHSSS by reason of the fact that the contract for the purchase of vacant land was entered prior to the request for a FHSSS determination. In this scenario, the ATO adopts the view that the taxpayer is holding a 'freehold interest' (i.e., in the vacant land), and therefore they are ineligible to access the FHSSS resulting in them being unable to use released monies towards a contract for construction of a home on the vacant land.

The statutory interpretation issues noted above were ultimately addressed by legislative change in 2023 by passing the following amendment.

### *Amendment to s 138-10(2)(a)(i)*

Treasury Laws Amendment (2023 Measures No. 3) Bill 2023 was introduced into Parliament on 14 June 2023 and received Royal Assent on 20 September 2023. Schedule 4 of the Act repeals s 138-10(2)(a)(i) and replaces it so that s 138-10(2)(a)(i) now reads as follows: [26]

(2) You may request the Commissioner, in the *approved form, to make a *first home super saver determination if:

(a) you have never held:

(i) a legal interest in an estate in fee simple in real property in Australia;

The 2023 EM states:

> *4.10 Amendments have been made to provisions which determine an individual's eligibility for the FHSS Scheme. For an individual to be eligible for the FHSS Scheme, the individual must first make a request for a FHSS determination. An individual can only do this if certain conditions are satisfied. One of these conditions is that the individual has never held a relevant interest in real property or land (see paragraph 138-10(2)(a) in Schedule 1 to the TAA).* ***Amendments have been made to ensure this condition refers to the point in time at which an individual becomes a property owner. In the case of a standard contract for the purchase and sale of real property, the purchaser becomes a property owner once the contract is completed and ownership of the real property transfers to the purchaser.*** *As per the application provision provided by item 28 of Schedule 4 to the Bill, the amendments apply in relation to FHSS determinations made on or after the commencement of Schedule 4 to the Bill. [Schedule 4, items 20 and 21, subparagraphs 138-10(2)(a)(i) and 138- 10(2)(a)(ii) of Schedule 1 to the TAA]*

Where the interpretation of a statute is ambiguous, the aim and provisions of a subsequent Act (in this case, an amended provision) may throw light on the correct construction[27] . The language of the 2023 EM supports the argument that Parliament intended to only clarify the provision, for example, in stating that 'amendments have been made to ensure this condition refers to the point in time at which an individual becomes a property owner', rather than suggesting that the amendments alter the condition.

Notwithstanding this amendment and clarification, the ATO view is that the clarified interpretation does not apply retrospectively to 'cure' or 'clarify' the prior applications. This seems curious given the objectives, aims and purpose of the FHSSS.

### *Aims of the FHSSS*

The explanatory memorandum (2017 EM) to the First Home Super Saver Tax Bill 2017 explains the context for the Scheme as follows:

> *Australians are entering the housing market later in life than previous generations. With house prices high, difficulty saving a deposit is a key barrier to getting into the market.* ***The FHSS Scheme will help Australians boost their savings for their first home by allowing them to build a deposit inside superannuation.***[28]

Paragraph 1.67 of the 2017 EM states:

> *The requirement that an individual has never held a freehold interest in real property in Australia, certain leases of land in Australia or a company title interest in land* ***ensures that individuals who have previously owned a home are unable to use the FHSS Scheme.***[29]

The 2017 EM goes on to state at paragraph 1.71:

> *Because of this scope, the restrictions about real property are broader than simply having owned a home as they also cover an investment property or commercial property. However, the scope is appropriate for determining eligibility to access the FHSS Scheme* ***because another interest in real property in Australia (or proceeds from an earlier sale of such property) can be used as security for a home deposit, and is an indicator that the individual does not require additional assistance for entry into the residential housing market.***[30]

The 2017 EM goes on to state:

> *Obligations on individuals after amounts are released*
>
> *1.170 The FHSS Scheme is designed to assist individuals in saving for a deposit for their first home.*
>
> *1.171 The FHSS Scheme applies a post-release compliance approach to ensure that individuals have access to the amounts that they have saved under the FHSS Scheme before they are required to pay their deposit. This means that* ***instead of requiring individuals to provide evidence that they have entered into a contract prior to amounts being released (which would likely to give rise to substantial timing and liquidity issues), individuals are simply required to purchase their first home within a specified period after amounts are released.***
>
> *1.172 If an individual fails to purchase their home within this period of time, they have the option of recontributing an amount back into their superannuation or paying an amount of tax that will broadly neutralise the tax concessions they received from accessing the FHSS Scheme.*

The administration of the freehold interest requirements in these provisions has not assisted some taxpayers saving for their first home, as Parliament intended. Other administrative examples involving taxpayer mistakes further eroded the effectiveness of the FHSSS – more on this later.

# The Commissioner's Remedial Power

The Commissioner's Remedial Power (**the CRP**) was enacted and available from 1 March 2017. The Commissioner's Remedial Power (**CRP**) is outlined in Division 370 of Schedule 1 of the *Taxation Administration Act 1953* (TAA)[31]. 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;*
>
> *(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 mechanism to achieve this exercise of power is for the Commissioner to issue a disallowable legislative instrument. The legislative instrument is tabled in the Australian Parliament and so is transparent to the Australian Parliament and may be disallowed by the Australian Parliament. This transparency and accountability feature was introduced, in part, to address concerns about conferring such a discretion or power on the Commissioner for the purposes of his/her administration of taxation laws.

It is an extraordinary (and for some perhaps, a controversial[32]) discretion to allow the Commissioner to modify the operation of a provision of a taxation law[33] (one that he or she is administering) to overcome unforeseen, unintended and inadvertent outcomes in enacted taxation laws.

The CRP was introduced as an answer to a problem that had long been in search of a solution – to provide a timely remedy for unforeseen, unintended and inadvertent outcomes in enacted taxation laws … at least until a legislative solution can be introduced. It could also 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).

Since its introduction, the Commissioner has made 7 determinations of the CRP (that is 7 times in seven years) as follows:

| 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[34] | 1/10/2027[35] |
| Taxation Administration (Remedial Power – Small Business Restructure Roll-over) Determination 2017 | 9/5/2018[36] | 1/4/2028[37] |
| Taxation Administration (Remedial Power – Disclosure of Protected Information by Taxation Officers) Determination 2020 | 15/5/2020[38] | 23/3/2023[39] |
| Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020 | 9/12/2020[40] | 1/1/2022[41] |
| Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020 | 14/5/2021[42] | 1/4/2022[43] |
| Taxation Administration (Remedial Power – Work Test for Personal Superannuation Contributions) Determination 2023 | 11/08/2023[44] | 1/7/2028 |
| Taxation Administration (Remedial Power – Remission of Charges and Penalties) Determination 2023 | 15/09/2023[45] | 1/10/2028 |

Whilst this may seem underutilised especially when at the time of enactment, it was anticipated that the remedial powers would be used ten times in each financial year, it is worth noting that in other jurisdictions (such as, New Zealand) have a remedial power that is yet to be used.

The IGTO completed a review investigation into the administration of the CRP in December 2023 and made nine (9) recommendations to the ATO to improve its administration of the CRP. The ATO has agreed with, agreed in part, or agreed in principle with all recommendations save for one part of one of the recommendations - with which it disagreed (Recommendation 4.2(a)). Further background and information is set out in the IGTO review investigation report - *The Administration of the Commissioner's Remedial Power*.

Some of the key findings of our review investigation into the administration of the CRP, of relevance to my discussion are best illustrated through Case Studies.

## There remains a preference for the law to expressly state everything … a Tax Code if you like … which is good in theory, but codification of complex 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 a preference for the law to expressly state everything (a Tax Code if you like) would be ideal in a perfect world, codification is impractical, unrealistic and unhelpful, especially given the express statutory objectives of the CRP. However, I also have some sympathy for the view that the expectation and obligation that public servants will act lawfully may constrain their willingness to act 'outside' the statute, even where the statute expressly authorises this.

Our investigation of CRP decisions 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 … that is not expressly set out in the tax law. Similar issues of statutory interpretation were also identified in the IGTO review investigation report – *The exercise of the Commissioner's General Powers of Administration*.

### CRP Candidate 55 – Loss Carry Back Tax Offset

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. Entities needed to make a choice to claim the refundable tax offset. It is worth noting that this was a choice introduced in the context of the COVID-19 pandemic.

#### *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*

A request for the 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 measures[46]) could be revised, amended or modified in certain circumstances was rejected by the ATO (discussed in the IGTO report as Candidate 55).

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. 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. However, the legislation did not have any mechanism to support an amendment to the loss carry back choice.

ATO records for Candidate 55 do 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 below present a curious inconsistency in the ATO's rationale to exclude the CRP.

| | |
|---|---|
| **CRP Secretariat Determination** | Candidate was unsuitable for the CRP because the proposed modification was inconsistent with the intended purpose or object of the provision.<br><br>The CAM form outlines the CRP Secretariat's reasons as follows[47]:<br><br>*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.*<br><br>*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:*<br><br>***[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.*<br><br>*Example 2.1, which steps through the process for calculating the refundable tax offset, makes the following statement:*<br><br>***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**. As a result, the unutilised amount of the loss ($130,000) can be carried forward and deducted in future income years.*<br><br>***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.*<br><br>*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.* |

| | |
|---|---|
| | *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.*<br><br>*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.*<br><br>*This issue is not suitable for CRP as the modification is inconsistent with policy intent.* |

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 the lack of drafting machinery provisions to enable that modification meant it would be inconsistent with the intended purpose or object - due to lack of guidance in the extrinsic materials.

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.

## Law change was preferred in around 30% of the CRP cases reviewed but waiting for law change 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 all the CRP candidates.

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. 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.

Delay due to legislative change 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.

Law change provides the highest level of certainty, but waiting for law change can result in uncertainty and unfair outcomes in the interim. In our investigation, the range of timeframes that we observed CRP issues were addressed through preferred law change ranged from eight (8) months to three and a half (3.5) years[48]. An exercise of the CRP can be effective 15 sitting days (in both Houses of Parliament) after tabling.

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

### CRP Candidate 58 – First Home Superannuation Saver Scheme (FHSSS)

The First Home Super Saver Scheme (FHSSS) allows first home buyers to save for their home through the superannuation system. Ordinarily, funds may not be withdrawn from your superannuation fund until you reach preservation age (or other events trigger an early release).

Individuals who made errors on their FHSSS applications were advised that they were unable to correct their errors. That is, because the law did not expressly provide that a mistake could be corrected.

In many instances, this resulted in FHSSS applicants accessing less money than they were eligible to receive under the scheme to buy or construct their first home.

In Case 58, 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 input $1 for release 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 – in error. 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 correct 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 CRP Secretariat Determination reveals the reasons for not exercising the CRP as follows:

| | |
|---|---|
| **CRP Secretariat Determination** | On 22 June 2021, the CRP Secretariat expressed the view that the candidate was not suitable for the CRP.<br>Per the CAM form[49] provided to the IGTO, the CRP Secretariat's reasons are as follows:<br>*… 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. …* |

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. It is noted that the CRP Advisory Panel appears to have been consulted after the CRP Secretariat view about the CRP candidate had been formed.

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 case 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 (made on 11 May 2021), there was no relief for impacted first home buyers because the CRP which was available and eligible was not exercised. I emphasise that this was a technical change to allow a taxpayer to correct a mistake to access a concession that Parliament intended they were entitled to access where they met the relevant criteria.

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) effectively delayed the delivery of sensible and pragmatic outcomes for taxpayers. That is, in circumstances where the CRP modification was consistent with the intended purpose of the law.

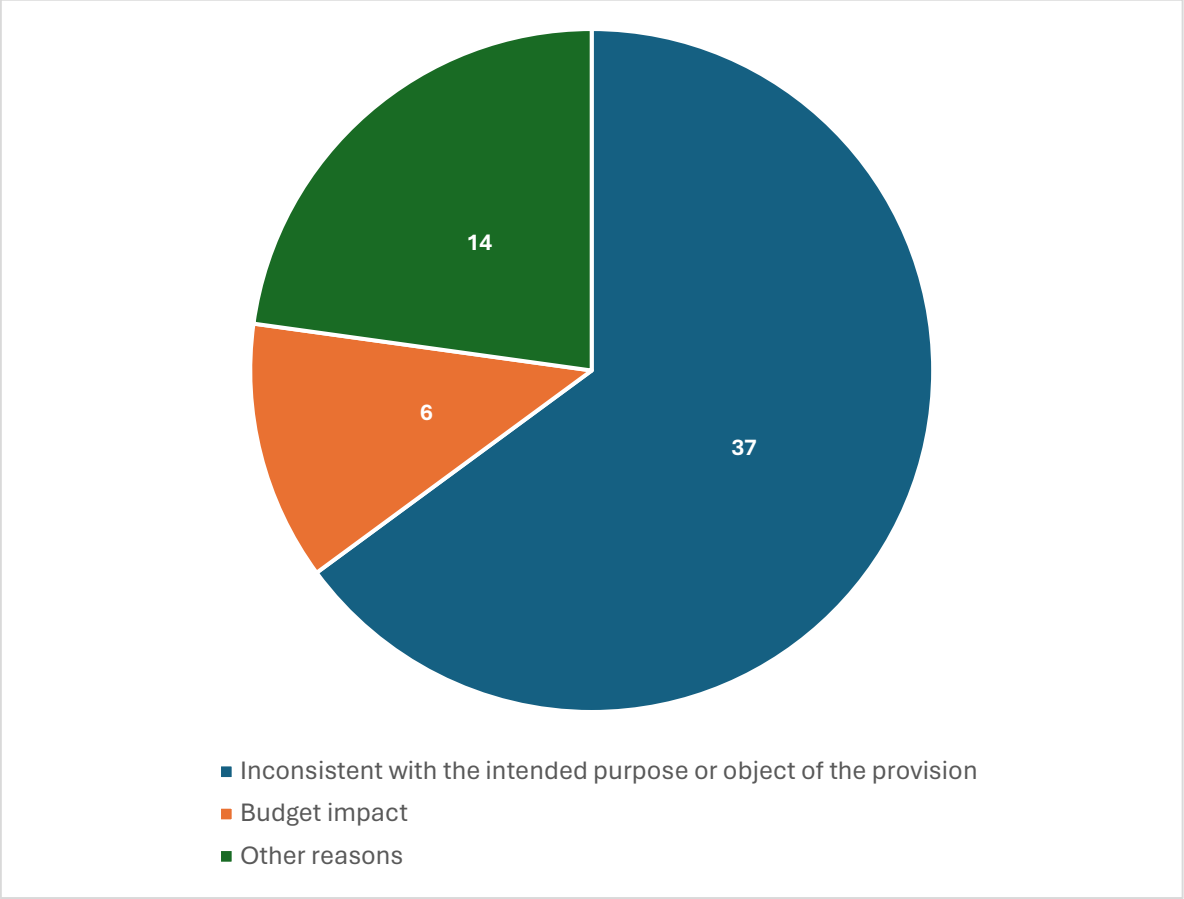
## The intended purpose or object of the provision

The IGTO review investigation notes that the CRP has been considered on 68 occasions and as noted above, exercised just seven (7) times. In the sixty-one (61) instances where it was not exercised, four (4) were withdrawn by applicants, and fifty-seven (57) were assessed as not suitable for the CRP. The most common reason for a CRP candidate to be rejected was a finding that the proposed modification was inconsistent with the intended purpose or object of the provision. The ATO reasons for why these 57 applications were not suitable for the CRP are summarised as follows:

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

| ATO reasons 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%** |

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




The ***intended*** purpose or object of the provision as a relevant consideration for each of the eligibility criteria listed in paragraphs 370-10(1) (a), (b)(i) and (b)(ii) **is not the same** as the ordinary rules of statutory interpretation. The ***intended*** purpose or object of the provision **is not** expressly considered in applying the general rules of statutory interpretation[50].

Ordinary rules of statutory construction give primacy 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.

Conversely, for the purposes of discerning the *intended* purpose or object of the provision, section 370-10[51] permits consideration of any material and primacy is not required to be given to the text of the Act.

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]*

Only 11% (i.e. 4 out of 37) of the 37 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. Other reasons why further legislative intervention was not pursued included issues that were considered to have a low impact on taxpayers or those where the ATO applied an administrative solution to address the 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 any 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.

## Conclusions

The CRP was introduced to provide the Commissioner with the means to override unforeseen or unintended outcomes in enacted taxation laws. Several safeguards apply to address the 'rule of law' concerns raised by stakeholders:

- The mechanism to give effect to the power is transparent and is a disallowable instrument of Parliament;
- There must be Treasury or Department of Finance advice that the impact on the Commonwealth Budget is negligible. However, 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 sunset requirements for legislative instruments require that at expiry, either a fresh legislative instrument is re-issued or the legislation itself is amended.

However, despite these safeguards, the opportunities to resolve unintended consequences through the CRP have been few and there appears (my inference) a reluctance to rely on this power, if there is any possibility of law change itself.

Whilst I have some sympathy for the view, especially following the Robo-debt report which criticised the failures of public servants, that the need to act lawfully may constrain their willingness to act 'outside' the statute, even where the statute expressly authorises this, we cannot expect the Tax law to be enshrined as a Code and some better way to guide administrative decision making is necessary in my view.

The improvement recommendations made in the IGTO's Review investigation report on the Exercise of the Commissioner's General Powers of Administration are also of relevance to the administration of the CRP.

# The Commissioner's General Powers of Administration

Finally, and appropriately, I will conclude my observations with some comments on the Commissioner's General Powers of Administration.

Legislation administered, wholly or partly by the Commissioner generally includes a provision[52] that the Commissioner shall have general administration of the relevant Act (sometimes referred to as the General Power of Administration or powers of general administration).[53]

Although the exact text of the GPA may vary slightly between different legislation, it is generally expressed simply and succinctly without elucidation as to the purpose, scope or parameters. Section 8 of ITAA 36 for example has included a general power of administration since inception in 1936 as follows:

> ***Section 8 ITAA 1936***
>
> *The Commissioner shall have the general administration of this Act.*

What does this mean for the purposes of tax administration? And specifically for the purposes of interpreting the text of tax and superannuation laws. What if any guidance does this afford consistent, fair and efficient tax administration.

## GPA and statutory Interpretation

For many years and perhaps even still today, there is a belief, an urban myth, a 'legal vibe' if you like that the Commissioner's GPA provides the Commissioner with administrative latitude when interpreting tax statutes. There are several reasons that may explain this in my view. The fact that some 'compromises' of tax law are permitted or ostensibly exercised in reliance upon the GPA, may be a potential source of community misunderstanding, confusion or misaligned expectations. This is especially so where the reasons are not apparent and where there is no framework or objective to 'guide' the exercise of the GPA.

Possible reasons for the misunderstanding include:

### 1 The text in PS LA 2009/4

This may in part be explained by the text in PS LA 2009/4 *When a proposal requires an exercise of the Commissioner's powers of general administration* itself, which includes (since 4 February 2016) the following statement, which has remained in all subsequent versions of the PS LA:[54]

> ***A purposive interpretation of law***
>
> *In the course of administering tax laws on behalf of the Commissioner, an officer's primary focus should be on interpreting the law in a manner which supports that law's purpose. This means that where the law is open to more than*

> *one interpretation the alternative interpretations of the law should be explored before considering reliance on the GPA.*
>
> ***In the rare circumstance where the operation of the law is unclear or leads to unforeseen or unexpected consequences, it may be appropriate to consider whether the issue can be resolved using the Commissioner's GPA.*** *{Emphasis added]*

The text of the PS LA tends to suggest, at least in some circumstances, that when faced with legislation that is unclear or which leads to unforeseen or unintended consequences, the ATO should first seek to address the issue through adopting a purposive interpretation of the statute[55]. Where that fails to address the issue, consideration may be given to whether the GPA could be applied to address the matter.

Elsewhere in the PSLA there are clear statements that GPA cannot be used for this purpose, but our investigation confirmed that there are a range of views about what GPA may and may not be used or relied upon to achieve.

## 2 PSLA GAs are not all simply about resource allocation

This may also be explained in part by the PSLA GAs issued by the ATO (last issued on 13 June 2013) which seemingly go beyond decisions about resource allocation.

This would include for example:

- PS LA 2004/3 (GA) - Trading stock: valuation of goods taken from trading stock for private use by sole traders or partners in a partnership
  - This Law Administration Practice Statement explains how to value goods taken from trading stock for private use by sole traders or partners in a partnership.
- PS LA 2006/1 (GA) - Calculating cost base of CGT asset where there is insufficient information to determine any Division 43 capital works deduction
  - This Law Administration Practice Statement outlines when a taxpayer is not required to reduce the asset's cost base and reduced cost base for Division 43 capital works expenditure.
- PS LA 2006/2 (GA) - Operation of Division 7A of the Income Tax Assessment Act 1936 on loans that have become statute barred
  - To advise that statute barred private company and trustee loans made prior to the enactment of Division 7A will not be treated as giving rise to a deemed dividend under Division 7A.

- PS LA 2008/1 (GA) - GST and input tax credits for acquisitions related to making supplies under a disclosed hire purchase agreement entered into before 1 July 2012
  - To outline the Commissioner's approach to calculating the input tax credit entitlement for acquisitions that relate to the making of supplies under disclosed hire-purchase agreements.
- PS LA 2013/3 (GA) - Treatment of input tax credits claimed by a recipient of a non-taxable supply where the Commissioner has the discretion to give a refund of the overpaid GST to the supplier due to the operation of section 105-65 of Schedule 1 to the Taxation Administration Act 1953.
  - To explain the circumstances in which the Commissioner will use his powers of general administration to allow a recipient to retain an input tax credit that it has claimed where a transaction was incorrectly treated by a supplier as giving rise to a taxable supply.
- PS LA 2013/4 (GA) - Apportioning taxable fuel used in a vehicle for powering the auxiliary equipment of a vehicle
  - To set out what will be considered a fair and reasonable apportionment of the taxable fuel used to power the auxiliary equipment of a vehicle and therefore not subject to the road user charge.

## Tax Settlements are made in reliance on the GPA

This may also be explained in part by the long-established practice of entering into tax settlements. At a general level, 'a settlement is an agreement between the ATO and the taxpayer to resolve matters in dispute where one or both parties make concessions on what they consider to be the legally correct position.'[56]

The use of GPA within the context of the settlement of tax disputes is well-documented and has been the subject of a number of prior reviews and examinations by the IGTO,[57] the Auditor-General[58] as well as being the subject of various litigation.[59] The ATO publishes details of its settlements in its Annual Report.[60]

Settlements, particularly large settlements, are therefore well-known and well-publicised.[61] Arguably, they are the best discrete example of the ATO's use of the Commissioner's GPA - outside of day-to-day routine and micro exercises of the power (such as selecting taxpayers for audit).

Australia has had a self-assessment system of taxation since 1986-87, which generally requires taxpayers to lodge a tax return based on their own self-assessment of their taxable income. However there remains a positive statutory obligation on the Commissioner to

assess tax from the returns and other information in his possession.[62] Having made an assessment, a debt arises and there is then a statutory obligation to collect all Commonwealth debts due and payable, with limited exception.

Whereas administrative processes such as assessment, amended assessment, objections and litigation generally occur under an express statutory power or discretion, settlements are an exercise of the GPA[63].

There is no express administrative discretion set out in the tax law to authorise a tax settlement. Nor is there any express authority to allow a taxpayer to correct their mistakes. The latter (and not the former) necessitated an actual law change but more on this later.

Fundamentally, the conclusion of a settlement has a direct effect on the resource allocation decisions of the Commissioner and the good management of Commonwealth resources contemplated in the PGPA Act. However, as I noted in my introduction, the obligations under section 166 of the ITAA 1936 and the PGPA Act obligations, including the obligation to collect all Commonwealth debts are seemingly in conflict with this practice. And yet … settlements are a recognised and accepted practice of tax administration in reliance upon the Commissioner's GPA. Why is this possible but it is not possible to allow a taxpayer to correct a mistake, absent an express legislative authority to do so?

An overview of the various views expressed as to the purpose of the GPA is set out below.

It is worth noting that the ATO guide to the Code of Settlement references settlements in the context of the good management rule as follows:

> *In formulating what has been called the 'good management rule', the courts have recognised that **it is open to the Commissioner to make sensible decisions having regard to the best use of the limited resources available**. The Commissioner is not obliged to relentlessly pursue every last tax dollar where that would clearly be uneconomic or where the outcome is at best problematic.*

and

> *The good management rule has broad application, extending beyond individual cases. For example, there may be occasions where the Commissioner might consider it to be in the overall interests of the administration of the tax laws not to pursue retrospective audit and/or assessing action in return for acceptance by a section of the public or group of taxpayers of the Commissioner's position for current and future years.*

Although binding upon the Commissioner of Taxation, it is important to recognise that the PGPA Act and 'good management rule' apply to statutory officers more generally and are not tax specific. They are separate and discrete from the Commissioner's GPA.

## Different views about the scope and purpose of the GPA

There were a range of views about the scope and purpose of the GPA.

### The ATO view communicated as part of this IGTO Review Investigation

As part of the IGTO review investigation, the ATO expressed its view that:[64]

> *The purpose of the general administration provisions is to nominate the Commissioner as the person responsible for the administration of the taxation laws, and by whom decisions about the administration of those Acts may be made.*
>
> *This creates a duty, owed by the Commissioner to the Commonwealth, to administer the taxation laws. While these provisions may authorise a broad range of administrative actions, this authority does not extend to the Commissioner modifying the rights or obligations of taxpayers. It is the expressed powers in the taxation laws which are the source of the power of the Commissioner to modify such rights or obligations.*

### Other Views

A number of different (not necessarily contradictory) views emerged:

- The GPA confers a distinct power[65] - that is separate from other provisions in the statute, and which therefore can be expressly or impliedly delegated or authorised.
- A power in relation to Interpretative issues and intended compliance approach based on the interpretation[66]
- The GPA imposes an obligation or duty on the Commissioner only – that is, to administer taxation laws - and does not confer any separate or distinct power on the Commissioner.
- In combination with the ruling system, the GPA may be used by the Commissioner to make determinations on interpretative issues or intended compliance approaches.
- The GPA confers power only to the extent that it is necessary and incidental to the administration of other provisions in the statute[67].
- The GPA confers power only in relation to resource allocation decisions[68].
- The GPA confers no additional power but merely serves to denote that a piece of legislation, or part thereof, is a taxation law for the purposes of the definition in section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) which then invokes various secrecy and confidentiality provisions[6970].
- Some combination of the above.

There is clearly ambiguity as to the scope, purpose and Parliamentary intent of the Commissioner's GPA.

## Duty vs Power

It is worth noting that the legislative references to GPA is not expressed as a power but rather a statement that the Commissioner has the general administration of the Act. However, the ATO's 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**), since its first iteration does refer to the GPA as a 'power' and it has been referred to as such by a former Second Commissioner of Taxation.[71]

Some of the views set out above tend to support the view that the GPA is simply a *duty* imposed by Parliament on the Commissioner to the administer the laws as written. This interpretation arguably offers the Commissioner very little, if any, discretion beyond those discretions expressly stated in the legislation or that would be administratively necessary to give effect to those provisions. The GPA would then simply be the means to operationalise the requirements of the statute – **without compromise**. Any discretion would need to be statutorily granted – that is, expressed in the statute. This view arguably aligns with Justice Isaac's observation that 'The Commissioner is a trusted officer appointed by the Government to put the Act into practical operation'.[72]

Former Commissioner Michael Carmody acknowledged the importance of the GPA in addressing the practicality of administration of taxation laws.[73] This view may align with some community expectations of practical or pragmatic administration.

If the GPA is indeed a *power*, then a question necessarily needs to be asked about the conditions under which the power may be exercised and the parameters of that power. A recent case has suggested that if the GPA were a power, it is not one of limitless bounds and does not entitle the Commissioner to take an action that is otherwise impermissible under the law.[74]

It is also worth noting that various 'powers' that are not strictly or purely managerial or resource allocation decisions and actions are nonetheless described as exercised in the name of the GPA, including:

- Tax settlements – see PSLA 2007/6 and 2015/1;
- Compromise of tax debts – see PSLA 2011/3;
- The shortcut method to work from home deductions – see PCG 2023/1 and Chapter 3 section 5;
- Various PSLA GAs – see Chapter 3 (specifically 3.4.3);

- Various PCGs – see discussion about the use of GPA in the context PCGs in Chapter 3, section 3.4;
- PSLA 2009/4 – When a proposal requires an exercise of the Commissioner's general powers of administration - which sets out the ATO internal procedure to escalate exercises of the Commissioners' GPA to the Commissioner himself; and
- The administrative practice of granting a two-month grace period for taxpayers to complete a trust distribution statement for tax purposes (prior to the High Court decision in Bamford).[75]

This list (which is not intended to be exhaustive) may tend to suggest that the ATO's reliance on the GPA in administering taxation laws is in fact more than simply as a duty.

## Case Study – Early release of superannuation - Can a Taxpayer correct their mistakes, and can the Commissioner's GPA assist to achieve this outcome?

The following Case study is taken from the IGTO review investigation into the Commissioner's GPA and summarises the issues raised during in our dispute investigations of unresolved complaints on behalf of individual complainants.

The IGTO investigated 67 complaints concerning the ATO's administration of the COVID-19 early release of super (COVID-19 ERS), which had a common theme. The applicants concerned had made an error in completing their application for COVID-19 ERS. Effectively, one or more of the superannuation accounts nominated on their application did not have sufficient funds to pay the entirety of the amount that had been applied for to be released. That is, the taxpayer did not nominate the correct fund.

### *Background and Context*

During the COVID-19 pandemic, taxpayers who met certain eligibility criteria could make an application to access up to $10,000 of their otherwise 'preserved' superannuation funds[76] in each of FY20 and FY21. That is, on compassionate grounds.

Eligibility was determined according to a number of aspects of the applicant's personal circumstances as set out in the regulations. The law defined proxies for entitlement by reference to employment, income and whether the applicant was in receipt of other Government assistance[77].

The COVID-19 ERS process is a two-step process:

(a) an application is made by the individual, and

(b) a determination is then made by the Commissioner.

Once an application is made in accordance with regulation 6.19B of the Superannuation Industry (Supervision) Regulations 1994 (**SISR**), the Commissioner is required (provided he is

satisfied that the applicant meets the relevant criteria), under sub regulation 6.19B(3) of the SISR to issue a determination that a 'condition of release' has been satisfied. This determination effectively notifies and allows the applicant's superannuation member benefits to be released by the nominated superannuation fund.[78]

Sub regulation 6.19B(5) of the SISR states the determination must specify the superannuation entity or entities from which the benefits are to be released, as well as the amount that may be released from each specified entity.

Where the error or mistake was detected **before** an ATO determination had issued to the superannuation fund, then it was possible to address the error by transferring (rolling over) funds from one or more other superannuation funds, so that sufficient funds were held in the fund nominated on the application form.

Where the ATO had issued a determination to the nominated superannuation fund, then the ATO's administration depended on whether the applicant had made an application for $1,000 or less or for more than $1,000. The ATO was prepared to 'administratively disregard' the application for the former but not the latter. Further explanation is set out in the IGTO review investigation report.

The IGTO independently examined the legal analysis of the tax and superannuation legislation and regulations. Based on this analysis, the IGTO is of the view that there is no legislative right in the tax or superannuation legislation that allows an individual to amend or revoke an application generally where 'errors of fact' or honest mistakes (e.g. selecting the wrong fund) were made in that application.

This may be because of deliberate policy design or a drafting oversight. Regardless, it is somewhat surprising that genuine errors or honest mistakes cannot be rectified or corrected as a matter of general tax administration practice especially in the design of measures which are aimed to assist or provide relief during periods of economic hardship.

However, the absence of an express statutory power is also not determinative since the overriding obligation of statutory interpretation is to construe the statutory text with regard to its context and purpose and, where there is a choice, to choose 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).

### Can the determination issued by the ATO to the superannuation fund be amended or revoked under the Acts Interpretation Act 1901?

The IGTO sought to understand whether the ATO would be able to amend or revoke the determination that was issued to the super fund (as opposed to the application). In particular, the IGTO asked the ATO to consider how subsection 33(3) of the *Acts Interpretation Act 1901*(**AIA**), which confers on the ATO the power to amend, vary or revoke an administrative instrument, such as the determination in question, could apply.

Subsection 33(3) of the AIA, provides as follows:

> *Power to make instrument includes power to vary or revoke etc. instrument*
>
> *(3) Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.*

The ATO agreed with the IGTO that it had a general power to amend or revoke determinations made under sub regulation 6.19B(3) of the SISR. However, the ATO explained that any determination made under sub regulation 6.19B(3) of the SISR must be 'in respect of an application made by the person in the financial year.' Furthermore, the ATO explained that a COVID-19 ERS application made under sub regulation 6.19B(1) of the SISR must be 'for a determination that an amount of the person's preserved benefits, or restricted non-preserved benefits, in a specified superannuation entity or entities may be released.' According to the ATO, the references to the 'amount' and 'superannuation entities' in this sub regulation infers that any determination made under sub regulation 6.19B(3) of the SISR is to be limited to the information contained in the application. That is, there is in effect **NO** power to repeal, rescind, revoke, amend, or vary the determination in these circumstances.

Stated simply, even though the ATO has the power to amend the determination issued to an applicant's super fund, the ATO view is that it does not have a power to amend it in such a way to make it inconsistent with the information contained in the original (but unfortunately erroneous) application. Similarly, while the ATO also has the power to revoke the determination issued to a super fund, it considers that it does not have the power to subsequently issue a new determination to a super fund that is inconsistent with the information contained in the original application.

The IGTO remains unclear why a construction which permitted a taxpayer to correct a genuine error or honest mistake was not supported – especially where this construction is open based on the purpose of the COVID-19 ERS provisions in conjunction with subsection 33(3) of the AIA.

Whilst sub regulation 6.19B(5) of SISR requires the ATO to specify an amount and superannuation entities in the determination, there is no explicit requirement that those amounts and entities be the ones stated in the application. Furthermore, to consider otherwise might render s33(3) of the AIA ineffective, as it would prevent the ATO from amending determinations if the determination must always and only match what is in the application. The non-application of the part of s33(3) which allows the ATO to amend determinations would also be difficult to reconcile with the clear intention that sub

regulation 6.19B(4), which requires s33(3) to operate for the ATO to be able to revoke determinations.

Although the ATO's administration (and view) was not so unreasonable to be arbitrary or discriminatory, in the IGTO's view, it did result in inconsistencies in administration in circumstances where it was also reasonably open for the ATO to arrive at a view that would produce more coherent administration and which was beneficial for applicants who had made genuine errors, consistent with the objectives of compassionate release.

The COVID-19 ERS measure was intended to provide people in serious economic hardship (as defined by their economic circumstances) with the funds to support themselves and their families during this difficult time. Australians (and other temporary or permanent residents) who were eligible to apply for COVID-19 ERS were especially vulnerable to the financial effects of the pandemic because they were unemployed, on social security payments, or have had their working hours or business turnover significantly reduced. Anyone who met these criteria as envisioned by the Australian Parliament, was entitled under the law to seek release of up to $10,000 in each of the FY20 and FY21.

In our view, it was open to the ATO to amend the determination to remedy a shortcoming in the application and reflect an applicant's intention. However, the ATO does not agree with the IGTO's views because it believes that it cannot issue a determination that is inconsistent with the information in the original application – that is notwithstanding section 33 of the AIA and the Commissioner's GPA.

The IGTO does not find the ATO's explanations persuasive.

Further the IGTO notes that the remedy of rectification for a unilateral mistake made by a taxpayer in completing an instrument (for example, completing an application) can be available in the Federal Court.[79] That is, where there is *evidence which convincingly proves that the written words of a document failed to properly express the … [correct] intention*. However, the IGTO questions if this form of relief is an efficient use of the Court's time and an affordable remedy for most taxpayers.

For completeness, some relevant extracts of Justice Gordon's decision in *GE Capital Finance Australasia Pty Ltd & Anor V FC of T [2011] FCA 849* is set out below:

> *89 Moreover, the mistake or omission need not be one apparent from the face of the document -- the objective background context may reveal the error. In Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101 at [24], Lord Hoffmann stated that:*
>
> *"... in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration."*

***Is a "form" capable of rectification?***

*105 There was no dispute that the doctrine of rectification applies equally to unilateral instruments and instruments between two or more parties:[80]*

*I accept that the Court has power to rectify a unilateral document.*

***Intention***

*106 Rectification turns on the subjective intentions of the maker (or makers) of a document:[81]*

*…*

*116 There is one final consideration - was the mistake a mistake capable of rectification? This question was considered in Gibbon v Mitchell [1990] 3 All ER 338. Millett J stated at 343 that:*

*"... wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponer did not intend the transaction to have the effect which it did.* ***It will be set aside for mistake whether the mistake is a mistake of law or of fact so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it.*** *The proposition that equity will never relieve against mistakes of law is clearly too widely stated."*

*(Citations omitted).*

*117 The "usual type" of mistake capable of rectification involves incorrectly recording the intention of the maker of a document. Such a mistake may be rectified by inserting words or deleting words, or substituting different words because the words that are there have the wrong meaning: see Allnutt v Wilding [2007] EWCA Civ 412 at [12]; Butlin's Settlement Trusts at 260. This is such a case. Vanderkley was not mistaken as to the consequences or tax advantages which would arise out of forming a MEC group and notifying the respondent via the 7024 Form. He was mistaken as to the legal effect of the 7024 Form. He mistakenly believed that the 7024 Form as submitted to the respondent would result in certain tax advantages, but because of the omission of the date, it failed to have that effect.*

> *118 In the circumstances, I am satisfied that the omission of the words "10 November 2003" in Part 3 of the 7024 Form next to the words "[i]f joined after date of consolidation, give date joined the group", in the sections dealing with GEMIH and GEMICO, is a mistake that the Court could and should rectify in the manner sought by the applicants.*
>
> *119 Before leaving this issue, there is one final matter which should be noted. In Wills v Gibbs, Rimer J noted that the purpose of the claim was to achieve a tax advantage. His Honour stated that that was not, of itself, a bar to a rectification order, but that in accordance with Racal Group Services v Ashmore [1995] STC 1151 at 1157, the Court would not order rectification if the only effect would be to secure a fiscal benefit, and the rights of the parties would be unaffected. The Court had to be satisfied that there was an issue, capable of being contested, between the parties. Here that was not in issue. The respondent accepted that this case affects the parties' rights.*

A Brave New World of taxation should recognise that even if *Words can be like X-rays if you use them properly*, there needs to be a framework of words used properly to guide administrative decision making. A principal or overriding objective, a suite of considerations to be balanced so that those making administrative decisions can determine to apply a power, discretion, provision or statute consistently, fairly, efficiently and correctly, especially where there are competing interests.

Providing such guidance or a framework as a means to make consistent administrative decisions which affect the rights of citizens would enhance the fairness of the system and improve the resolution of potential conflicts, which I think are inevitable in any complex system of taxation and superannuation.

# Endnotes

[1] As required by section 15AA of the *Acts Interpretation Act 1901*

[2] **APES 110 - Code of Ethics for Professional Accountants (including Independence Standards)**
100.1 A1 A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest. A Member's responsibility is not exclusively to satisfy the needs of an individual client or employing organisation. Therefore, the Code contains requirements and application material to enable Members to meet their responsibility to act in the public interest

[3] The accountable authority of a non-corporate Commonwealth entity must pursue recovery of each debt for which the accountable authority is responsible unless:

a. the accountable authority considers that it is not economical to pursue recovery of the debt; or
b. the accountable authority is satisfied that the debt is not legally recoverable; or
c. the debt has been written off as authorised by an Act.

[4] Section 14 of the Public Service Act 1999

[5] subsection 13(4) of the Public Service Act 1999

[6] section 21 of the *Public Governance, Performance and Accountability Act 2013*

[7] This 'conflict' of duties was described in the English case Inland Revenue Commissioners v National Federation of Self-employed & Small Businesses Ltd [1982] AC 617. At page 651, Lord Scarman of the House of Lords considered the equivalent administration power of the Inland Revenue Commissioners. He said that:
... in the daily discharge of their duties inspectors are constantly required to balance the duty to collect 'every part' of due tax against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected.
He observed that the relevant statutory provisions:
... establish a complex of duties and discretionary powers imposed and conferred in the interest of good management upon those whose duty it is to collect the income tax ... I am persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of taxpayers to treat taxpayers fairly, to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise, to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect.

[8] Attorney-General's Department, *Australian Administrative Law Policy Guide* (2011) pp 8 – 10.

[9] Organisation for Economic Co-operation and Development, *General Administration Principles – GAP001 Principles of Good Tax Administration* [PDF 64.0KB] (21 September 2001) p 3.

[10] The Royal Commission into the Robo-debt Scheme, page 519

[11] The Report of the Review of Commonwealth Legal Services Procurement 2009

[12] Attorney-General's Department, *Australian Administrative Law Policy Guide* (2011) pp 11-12 <https://www.ag.gov.au/sites/default/files/2020-03/Australian-administrative-law-policy-guide.pdf>.

[13] See Administrative Review Council, Submission to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Inquiry into Certain Matters Relating to the Role and Functions of the Administrative Review Council* (1996) at [15]; Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (revised 2009).

[14] See for example, Senate Scrutiny of Bills Committee, Parliament of Australia, *The Work of the Committee during the 41st Parliament November 2004 – October 2007* (2008). The issues relate to (ii) of the Committee's terms of reference to report on whether Bills 'make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers.

[15] See: Senate Scrutiny of Bills Committee, Parliament of Australia, *Committee Reports*.

[16] Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 Public Lawyer Review 1, 1.

[17] *Taxation Administration Act 1953,* Sch 1, Sub-div 138-B.

[18] Australian Government, Federal Budget 2021-22 – Budget Paper No 2 (2021) p 17.

[19] *Taxation Administration Act 1953,* Sch 1, s 138-10.

[20] *Taxation Administration Act 1953*, Sch 1, Div 131.

[21] *Taxation Administration Act 1953*, Sch 1, s 131-65.

[22] *Income Tax Assessment Act 1997*, s 313-35(2). The ATO has stated on its website that "we will grant you an extension of time to do so for a further 12 months. There is no need to apply for this extension, it will be automatically granted to you and we will notify you of this."

[23] See for example: Commissioner of Taxation, *Self Managed Superannuation Funds Ruling SMSFR 2009/1 Self Managed Superannuation Funds: business real property for the purposes of the Superannuation Industry (Supervision) Act 1993*.

[24] See for example: Commissioner of Taxation, *Taxation Ruling TR 94/29 Income tax: capital gains tax consequences of a contract for the sale of land falling through*; Commissioner of Taxation, *Taxation Ruling TR 2006/14 Income tax:*

*capital gains tax: consequences of creating life and remainder interests in property and of later events affecting those interests*.

[25] See for example: Commissioner of Taxation, *Goods and Services Tax Ruling GSTR 2006/7 Goods and services tax: partitioning of land*; Commissioner of Taxation, *Goods and Services Tax Ruling GSTR 2006/8 Goods and services tax: the margin scheme for supplies of real property acquired on or after 1 July 2000*, and Commissioner of Taxation, *Goods and Services Tax Ruling GSTR 2009/2 Goods and services tax: partitioning of land*.

[26] Item 29 of Sch 4 to the 2023 Bill.

[27] Deputy Federal Commissioner of Taxes v Elder's Trustee & Executor Co Ltd (1936) 57 CLR 610, 625–626; cited in Masson v Parsons (2019) 266 CLR 554 at [28]

[28] Explanatory Memorandum to the First Home Super Save Tax Bill 2017, para 1.6.

[29] Explanatory Memorandum to the First Home Super Save Tax Bill 2017, para 1.67.

[30] Explanatory Memorandum to the First Home Super Save Tax Bill 2017, para 1.71.

[31] The CRP provisions came into effect on 1 March 2017

[32] Treasury's 2009 discussion paper "An 'extra-statutory concession' power for the Commissioner of Taxation?" received 11 submissions, of which:

- Six (6) were supportive of the proposal to provide the Commissioner with an extra-statutory concession power;
- One (1) was equivocal and suggested that the matter be referred to the Board of Taxation for further review and consultation; and
- Four (4) 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.

[33] 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.

[34] 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/>.

[35] Ibid.

[36] 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/>.

[37] Ibid

[38] *Taxation Administration (Remedial Power – Disclosure of Protected Information by Taxation Officers) Determination 2022* para 2

[39] 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*

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

[41] 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*

[42] 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/>

[43] *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*

[44] 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/>

[45] 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/>

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

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

[48] see Tables 5.2 and 5.3 of the IGTO report – A review of the Commissioner's administration of the Commissioner's Remedial Powers

[49] Australian Taxation Office, 'Commissioner's Remedial Power Assessment Methodology Form – Amending First Home Super Saver Scheme Applications' (Internal ATO document, undated)

[50] Refer 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.

[51] Section 370-10
(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]

[52] For example: *Income Tax Assessment Act 1936* s 8; *Superannuation Guarantee (Administration) Act 1992* s 43; *Excise Act 1901* s 7; *Fringe Benefits Tax Assessment Act 1986* s 3; *Taxation Administration Act 1953* sch 1 s 356-5

[53] 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'

[54] ATO, *PS LA 2009/4 – Escalating a proposal requiring the exercise of the Commissioner's Powers of Administration* (as at 4 February 2016) at [3]

[55] The statutory instructions to guide the interpretation of all Commonwealth legislation, including taxation legislation, are set out in the *Acts Interpretation Act 1901*. Section 15AA of that Act provides:

> ***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.*

The rules of statutory interpretation are independent rules, unaltered and unadjusted because of a GPA conferred on the Commissioner. This view is summarised succinctly in paragraph 11 from the joint judgment of the Full Federal Court in *Macquarie Bank*:

> *The power of the general administration of tax legislation given to the Commissioner, by provisions like s 8 of the 1936 Act, s 356-5 of Schedule 1 of the 1953 Act and s 44 of the Financial Management and Accountability Act 1997 (Cth) ('1997 Act'), does not permit the Commissioner to dispense with the operation of the law. The power of general administration in such provisions is not a discretion to modify, or which modifies, the liability to tax imposed by the statute: the power in such provision for general administration (coupled with whatever discretion they may contain) affects the administration of the Acts and not the Commissioner's duty to act according to law and to assess taxpayers to the correct amount of liability imposed by the legislation. It may be accepted for the purposes of argument, as was argued for Macquarie, that the Commissioner's power of general administration, given by provisions like s 8 of the 1936 Act, s 356-5 of schedule 1 of the 1953 Act and s 44 of the 1997 Act, gives him a "discretion" in making compliance decisions to reassess and "in relation to the evidence he is willing to accept to ascertain the taxable facts" (although the latter may be doubtful or, at least, requires heavy qualification), and (b) permits the Commissioner "to decline to consider re-assessing, or to decline to in fact re-assess a taxpayer"; but no such "discretion" can be exercised to fetter an assessment or re-assessment when the Commissioner has formed the view that the statute imposes a liability contrary to some view he may previously have had, or had, accepted. His duty then is to apply the law as he understands it to be.*

[56] Australian National Audit Office, *The Australian Taxation Office's Use of Settlements* (2017) p 7.
[57] See for example: Inspector-General of Taxation, *Review into Aspects of the Tax Office's settlement of active compliance activities* (2009); Inspector-General of Taxation, *Review into the Australian Taxation Office's use of early and alternative dispute resolution* (2012); Inspector-General of Taxation, *The management of tax disputes* (2015).
[58] Australian National Audit Office, *The Australian Taxation Office's Use of Settlements* (2017).
[59] See for example: *Grofam Pty Ltd & Ors v Commissioner of Taxation* 97 ATC 4565 at [4665]-[4666].
[60] See for example: Commissioner of Taxation, *Annual Report 2021-22* (2022) pp 203-204.
[61] ATO, *ATO secures settlement of marketing hub tax dispute* (20 July 2022).
[62] *Income Tax Assessment Act 1936*, s 166.
[63] ATO, *Practical guide to the ATO Code of settlement* (as at 17 March 2022) at [8]; ATO, *PS LA 2015/1 – Code of settlement* (15 January 2015). [PS LA 2015/1]
[64] ATO communication to the IGTO, 14 March 2023.
[65] The Treasury, Report on Aspects of Income Tax Self-Assessment (2004), 72.
[66] Several submissions to the Treasury consultations in 2004 asserted that the Commissioner could use the GPA more effectively by adopting a system of extra-statutory concessions (ESC) such as that adopted in the United Kingdom (UK). The Treasury, at the time observed that the adoption of ESCs into the Australian tax system was unnecessary as similar outcomes could already be achieved through the GPA in combination with the binding ruling system. Specifically, it observed:

> *Using slightly different means, the Australian system achieves the same result. 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. Having made such a statement, any favourable application of the law by the Commissioner under the statement will effectively bind the Commissioner, even if his opinion is later found to be incorrect at law. All that is required is that such action be taken in good faith, in the interests of the proper administration of the system and that the position is not detrimental to taxpayers compared to the position under the law.*

[67] Mark Leibler AC, Tax and the Rule of Law (Annual Tax Lecture, Melbourne Law School, 23 March 2022) p 5; Bruce Quigley, The Commissioner's powers of general administration: how far can he go? (Paper delivered at the 24th National Convention of the Taxation Institute of Australia, 12 March 2009) 4-5.

Michael D'Ascenzo, The rule of law: a corporate value (Speech delivered at the Law Council of Australia's Rule of Law Conference, 1 September 2007).

[68] ATO, PCG 2016/1 Practical Compliance Guidelines: purpose, nature and role in the ATO's public advice and guidance (3 June 2016), [8].

[69] Support for this view can be found in notes accompanying certain GPA provisions. For example, section 32 of the Register of Foreign Ownership of Water or Agricultural Land Act 2005 states:

*32 Commissioner has the general administration of this Act*

*The Commissioner has the general administration of this Act.*

***Note: This Act is therefore a taxation law for the purposes of the Taxation Administration Act 1953 (among other laws).***

*That Act contains a wide range of provisions about gathering, protecting and dealing with information, the exercise of powers and the performance of functions, under taxation laws, and the enforcement of taxation laws.*

[70] There was a rewrite of taxation administration provisions in 2010 that resulted in similar provisions being created or consolidated into existing legislation. For example, in the TAA 1953 there are four separate provisions which set out GPAs:

> ***Section 3A of the TAA 1953***
>
> *The Commissioner has the general administration of this Act.*
>
> ***Section 356-5 of Schedule 1 to the* TAA 1953**
>
> *The Commissioner has the general administration of each indirect tax law.*
>
> **Section 356-10 of Schedule 1 to the TAA 1953**
>
> *The Commissioner has the general administration of the Major Bank Levy Act 2017.*
>
> ***Section 356-15 of Schedule 1 to the TAA 1953***
>
> *The Commissioner has the general administration of the Offshore Petroleum (Laminaria and Corallina Decommissioning Cost Recovery Levy) Act 2022.*

[71] Bruce Quigley, *The Commissioner's powers of general administration: How far can he go?* (12 March 2009).

[72] *Commonwealth Agricultural Service Engineers Ltd (in Liq) v Commissioner of Taxes (SA)* [1926] HCA 30; (1926) 38 CLR 298 at 293.

[73] Former Commissioner Michael Carmody in his speech *the Art of Tax Administration, Two Years on* made the following observations: *In a dynamic business environment, it is difficult for any law, let alone one as expansive as tax law to contemplate fully the practicality of administration for all types of tax payers - from large international corporations to small, home-based businesses. This is particularly the case given the past tendency towards more prescriptive or black letter law. At times, this can lead to potentially disproportionate costs because the detailed evidentiary requirements for compliance are out of step with what is reasonably practical for business. At other times, a failure to meet the formalities of compliance can have severe consequences, notwithstanding that there has been substantive compliance with the law. This has raised the question of the extent to which my power of general administration of the law - which embodies the good management rule - can be utilised to address these issues. …The point of this discussion is that I believe more can be done in the interest of reducing compliance costs. Having said that tricky areas of balance will arise and need to be addressed. Transparency also will also be critical.* [The speech is collected and piled in Rodney Fisher and Michael Walpole, *Global Challenges in Tax Administration (ATAX Tax administration Series Volume 1*), May 2005.

[74] *Commissioner of Taxation v Travelex Limited* [2020] FCAFC 10 at 109. Note: the case was appealed to the High Court of Australia, but issues concerning the GPA were not raised in appeal.

[75] *Commissioner of Taxation v Bamford*; *Bamford v Commissioner of Taxation* [2010] HCA 10.

[76] Superannuation Industry (Supervision) Regulations 1994, sub-reg 6.19B.

[77] *(1) A person may apply to the Regulator for a determination that an amount of the person's preserved benefits, or restricted non-preserved benefits, in a specified superannuation entity or entities may be released on the ground that it is required to assist the person to deal with the adverse economic effects of the coronavirus known as COVID-19 if:*

> *a)the person is unemployed; or*
>
> *b) the person is eligible to receive any of the following under the Social Security Act 1991:*

*i) jobseeker payment;*

*ii) parenting payment;*

*iii) special benefit; or*

*c) the person is eligible to receive youth allowance under the Social Security Act 1991 (other than on the basis that the person is undertaking full-time study or is a new apprentice); or*

*d) the person is eligible to receive farm household allowance under the Farm Household Support Act 2014; or*

*e) on or after 1 January 2020 the person was made redundant, or their working hours were reduced by 20% or more (including to zero); or*

*f) for a person who is a sole trader--on or after 1 January 2020 the person's business was suspended or suffered a reduction in turnover of 20% or more.*

[78] *Superannuation Industry (Supervision) Regulations 1994*, regs 6.18 and 6.19.
[79] *GE Capital Finance Australasia Pty Ltd & Anor V Federal Commissioner of Taxation* [2011] FCA 849.
[80] See, by way of example: *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* 95 ATC 4620; [1996] ANZ ConvR 219; (1996) Aust Contract Reports 90-061; (1996) NSW ConvR 55-761; (1995) 41 NSWLR 329 at 345; *Kent v Brown* (1942) 43 SR (NSW) 124 at 128; In *Re Butlin's Settlement Trusts* [1976] Ch 251 at 260-2 and *Allnutt v Wilding* [2006] EWHC 1905 (Ch) at [16].
[81] See: *Carlenka* at 331-2; *Butlin's Settlement Trusts* at 262; *Allnutt v Wilding* [2007] EWCA Civ 412 at [11].