



## THE TAX INSTITUTE

14 March 2022

Inspector-General of Taxation and Taxation Ombudsman  
GPO Box 551  
Sydney NSW 2001

By email: [crp@igt.gov.au](mailto:crp@igt.gov.au)

Dear Inspector-General of Taxation and Taxation Ombudsman

### **The Exercise of the Commissioner's Remedial Power**

The Tax Institute welcomes the opportunity to contribute to the Inspector-General of Taxation and Taxation Ombudsman's (**IGTO**) investigation into *The Exercise of the Commissioner's Remedial Power* and related terms of reference (**Investigation**).

Broadly, the Commissioner's Remedial Power (**CRP**) gives the Commissioner of Taxation (**Commissioner**) the power to modify the operation of the tax legislation in instances where the legislation is not operating as intended by Parliament. Such modification must be for the benefit of the taxpayer or to ensure impacted taxpayers are at least no worse off. The CRP was intended to play an important role in resolving technical and administrative deficiencies in the legislation that may not otherwise be resolved through processes such as law change and has indeed done so, albeit in very limited circumstances. The Tax Institute considers that there is the potential for the CRP to be used far more effectively through broader interpretation and greater transparency.

We have had the benefit of reviewing the submission prepared by the Corporate Tax Association (**CTA**) on the CRP for the purposes of the Investigation (**CTA submission**). The Tax Institute endorses and supports the CTA submission. Please consider the CTA submission to be a reflection of our views regarding the CRP and the matters raised in the terms of reference for the Investigation. In addition, we have set out below comments which build on key points outlined in the CTA submission and also reflect feedback from The Tax Institute's members.

### **Review of existing processes**

The Tax Institute supports the review of the current processes to ensure that the CRP is being effectively utilised in all appropriate circumstances. Given the limited scope of the CRP, it is important to ensure that existing processes, and the way in which it is interpreted, do not further restrict its potential application. We have noted below some areas that would benefit from clarification and examination.

### *Negligible impact on revenue*

As noted in the CTA submission, the requirement for successful CRP candidates to have a 'negligible impact on revenue' is a controversial blocker to the exercise of the CRP. Feedback from our members supports this view and indicates that the tax profession and members of the public do not have clarity over how the revenue impact is calculated or what it is measured against. Consistent with the comments in the CTA submission, there also appears to be a broad view, that it operates as an (ambiguous) threshold rather than one of a number of matters requiring consideration under Division 370 of Schedule 1 to the Taxation Administration Act 1953. There is uncertainty regarding the underlying methodology and any assumptions that are utilised during the costing process.

The Tax Institute considers that there should be greater clarity and guidance regarding what a 'negligible impact' is, and the methodology used for its calculation. Providing this clarity will ensure that there can be greater scrutiny over CRP decisions, especially if this suggestion is combined with greater transparency over the CRP process and allowing public submissions on all CRP candidates, as outlined in this letter.

Further, The Tax Institute strongly agrees with the comments in the CTA submission with regard to the way in which a negligible impact on revenue appears to be measured in practice, and the preference for assessing a CRP candidate's impact on revenue by reference to the original *intended* budgetary impact and not against how the relevant measure *actually* operates. We consider that the current drafting of Division 370 may already allow for this and that potentially only a restatement of policy may be required to give this effect. However, if this approach would be insufficient to achieve the appropriate outcome, we would recommend either an application of the CRP to modify Division 370 itself or, alternatively, a legislative amendment to clarify this.

### *Public engagement in the Commissioner's Remedial Power process*

In the CRP process detailed in the CTA submission, we note that there is no opportunity for the public to contribute technical views and insights in respect of potential CRP candidates. The Tax Institute recommends that the IGTO examine the current practice regarding public engagement and whether stakeholder input should be allowed for at early stages of the process. We consider that it may be in the public interest for the CRP process to allow for greater input from tax professionals and stakeholders on CRP candidates. We envisage that any such submissions could be managed by the ATO and included as part of the broader pack of materials that is provided to the CRP Advisory Panel for its consideration. This would help to ensure that each CRP candidate has been fully considered with all relevant information available, reducing the risks of incorrect decisions being made due to information gaps.

### *Class of taxpayers*

We note that Australian Taxation Office (**ATO**) website guidance states that:<sup>1</sup>

*The CRP may only be used to resolve general issues that arise for all taxpayers, or issues that impact a particular class of taxpayers. It can't be used to resolve specific issues affecting a particular individual.*

---

<sup>1</sup> Refer to <https://www.ato.gov.au/general/ato-advice-and-guidance/commissioner-s-remedial-power/> (QC 51404).

The objective of this website guidance may be to clarify to taxpayers that the exercise of the CRP is not a review right to an ongoing matter, but rather a method to remedy underlying technical deficiencies in the legislation in specified instances. However, the wording implies that the CRP cannot be exercised when only one taxpayer is *identified* as being adversely affected.

We consider that this view is contrary to the intention of the enabling legislation which allows a CRP modification to be made, provided there is a specified class of entities, or in specified circumstances.<sup>2</sup> The Tax Institute is of the view that if the class of taxpayers, or the circumstances in which the CRP modification applies, is adequately specified, the number of taxpayers in that class, either those identified at present or which may fall into the class at a future point, should not be relevant to determining whether the CRP should be exercised.

Accordingly, we consider that the basis for the Commissioner's view extracted above should be reviewed. Such a narrow interpretation may result in inequitable situations where a CRP candidate may not progress for consideration by the CRP Secretariat or the CRP Advisory Panel even if the other requirements were met, again diluting its effectiveness and potential to be used in circumstances otherwise appropriate for its exercise.

#### *Refresh of the CRP Advisory Panel*

As noted in the CTA submission, all current members of the CRP Advisory Panel were also part of the Tripartite Working Group established to discuss the feasibility and operation of the CRP. We recognise the importance and advantages of retaining knowledge regarding the formative stages of the CRP. However, we consider that it also is important to ensure that the process allows for fresh ideas and views that challenge the status quo. To achieve this, The Tax Institute recommends that consideration be given to refreshing the membership of the CRP Advisory Panel. We are of the view that it should be expanded to include new individuals with different areas of expertise to current members of the CRP Advisory Panel. Alternatively, we would suggest the terms of the members of the CRP Advisory Panel could be carefully and systemically managed to create a gradual rotation. For example, a five-year term could be introduced for members, with staggered end dates to ensure the preservation of historical knowledge.

#### **Education and training on the Commissioner's Remedial Power**

Feedback from The Tax Institute's members indicates that the requirements for exercising the CRP, along with the underlying process, are not well understood by tax practitioners or taxpayers. We consider that greater education and guidance material should be made readily available so that taxpayers and practitioners can better identify and escalate issues that may potentially be resolved through application of the CRP.

---

<sup>2</sup> *Taxation Administration Act 1953*, subsection 375-5(3) of Schedule 1.

Further, we consider that ATO officers and participants in the ATO's various stewardship groups and consultation forums would also benefit from greater training regarding the requirements of, and process for, the exercise of the CRP. Based on feedback from our members, and The Tax Institute's experience in engaging with the ATO about certain interpretational matters, ATO officers generally do not appear to discuss with taxpayers or the professional bodies the potential for the CRP to be used to address interpretational blockages. Further, the CTA submission notes instances where there is a lack of oversight for matters recommended by such stewardship groups and consultation hubs to be considered as CRP candidates. While we agree that matters can be raised in these forums for escalation to the CRP Secretariat, in practice this does not appear to occur as often as it potentially could, noting that there is no transparency with regard to any such escalation.

There is a risk of these matters not being given the proper consideration and analysis if the relevant ATO officers or external representatives in those forums do not have the adequate training or awareness of the nuances for the exercise of the CRP. Additionally, ATO officers and participants in these forums need to have access to the information or appropriate contacts who can assist them in making an application for assessment. A better understanding by ATO officers and participants in the ATO's various consultation and stewardship groups, of the requirements of, and process for, the exercise of the CRP would improve the operation of the CRP overall.

### **Increased transparency over the Commissioner's Remedial Power process**

The CTA submission refers to concerns raised by the CRP Advisory Panel about the lack of transparency around CRP processes and governance. While the registers outlining when the CRP has been used and when it has been considered but not applied, and a CRP process pathway have since been published, we consider there are still serious concerns regarding transparency and governance of the CRP processes. Consideration of the underlying detail of each CRP candidate is currently treated as confidential and only made available to the CRP Advisory Panel. The Tax Institute questions the basis on which these documents are kept confidential and recommends that the justification be explained. We consider that the underlying detail for each CRP candidate should be made publicly available to provide greater transparency over the CRP process.

The CTA submission also highlights concerns raised by the CRP Advisory Panel over the underutilisation of the CRP Advisory Panel in respect of matters considered unsuitable by the CRP Secretariat. The Tax Institute considers that all matters raised for consideration as CRP candidates should be put before the CRP Advisory Panel, with the findings and reasons published, irrespective of the outcome. Further, we consider that it would be beneficial for significant disagreement within the CRP Advisory Panel to be made transparent, for example through minority reports or opinions.

Providing this information for both successful and unsuccessful CRP candidates will better inform the public and tax profession about the progress of a matter, while providing clarity around the process. Greater transparency will also enable targeted advocacy to ensure pertinent issues are appropriately resolved in a timely manner. It will also enable more public oversight of the extent to which the ATO is adopting purposive or overly narrow approaches to the legislative issues in question. This goes to the overarching purpose of the CRP which was fundamentally intended to facilitate purposive interpretation in circumstances where the ATO was otherwise taking consistently strict interpretational approaches.

## Expansion of the Commissioner's Remedial Power

The Tax Institute considers that the limited scope and narrow interpretation of the CRP is the primary reason it has only been successfully utilised five times. While it is not the ATO's role to create taxation and superannuation legislation, the ATO is responsible for their administration. We consider that the CRP would be more effectively used if its scope and interpretation, and therefore its application, were expanded to address a broader range of technical deficiencies. Ultimately, we consider it may require an amendment to the law to explicitly define a broader scope. For example, where the law gives rise to inconsistent outcomes depending on capital or revenue treatment, the CRP should be able to address these instances. We note that a potential expansion of the CRP should undergo a period of public consultation to ensure that the scope is appropriately defined. This would make the CRP more effective in achieving its objective of reducing red tape and allow Government to allocate its limited resources to more pertinent issues.

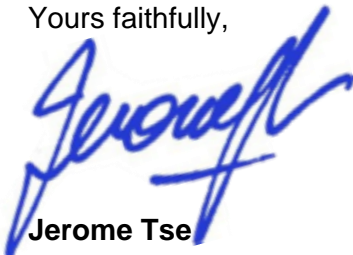
We would be pleased to continue to work with the IGTO on this Investigation and identify further opportunities to ensure that the CRP operates in the most effective manner.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

Please refer to **Appendix A** for more information about The Tax Institute.

If you would like to discuss any of the above, please contact Tax Counsel, Julie Abdalla, on 02 8223 0058.

Yours faithfully,



**Jerome Tse**

President

## **APPENDIX A**

### **About The Tax Institute**

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government, and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge, and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships, and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic, and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.