

The Commissioner's general power of administration and remedial power



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Resolving unintended, unforeseen and inadvertent tax outcomes and consequences

Introduction

The Australian taxation and superannuation system is one of the most complex in the world, with more than 14,000 pages of legislation. The statutory instructions to guide the interpretation of all Commonwealth legislation, including taxation legislation, are set out in the *Acts Interpretation Act 1901*. Relevantly, 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.

Notwithstanding the overriding requirement to interpret legislation purposively, sometimes taxation laws as introduced produce unintended, unforeseen or inadvertent tax outcomes and consequences. Although there is always an option to correct these outcomes by amending the law,¹ this process is not always timely or possible, given other priorities and matters on the legislative agenda.

Since March 2017, the tax laws have provided the Commissioner with a specific remedial power to overcome unintended, unforeseen or inadvertent tax outcomes and consequences in certain limited circumstances. That is, to provide taxpayers and their advisers with greater certainty, at least until a legislative solution can be introduced.

Relevantly, the Inspector-General of Taxation and Taxation Ombudsman (IGTO) commenced two review investigations in December 2021 consistent with our statutory role and purpose of improving taxation administration, namely:

- [the exercise of the Commissioner's remedial power](#); and
- [the exercise of the Commissioner's general powers of administration](#).

¹ Often by way of miscellaneous or minor and technical amendments to the tax law.

It appears that these administrative provisions may not be universally well known or understood. This article provides a brief introduction to them, to promote community awareness and understanding as to how these provisions operate or assist to improve tax certainty and the taxpayer experience.

The Commissioner's Remedial Power (CRP)

The Commissioner may modify the operation of a taxation law² in certain limited circumstances. That is, provided:

1. the modification is not inconsistent with the intended purpose or object of the provision;
2. the Commissioner considers the modification is reasonable, having regard to the intended purpose of the provision and whether the cost of complying with the provision is disproportionate to that intended purpose or object; and
3. the impact on the Commonwealth Budget is negligible.

The mechanism to achieve this is for the Commissioner to make a disallowable legislative instrument which is tabled in the Australian Parliament. The CRP is effectively delegated legislation and accordingly this process affords transparency with the Australian Parliament – which is ultimately responsible for passing all laws of the Commonwealth. However, unlike legislation that may be modified or amended as it passes through the Parliament, a legislative instrument is either allowed or disallowed.

The requirements for legislative Instruments are governed by Chapter 3 of the [Legislation Act 2003](#) and include:

- the rule-maker must undertake appropriate³ and reasonably practicable consultation;
- the disallowable legislative instrument is to be tabled in **both** Houses of Parliament for a period of **15 sitting days** before it commences; and
- a sunset period (whereupon the Instrument lapses) where the standard default period is 10 years.

In February 2022, the Senate Standing Committee for the Scrutiny of Delegated Legislation updated Principle (I) which outlines its approach that any legislative modifications contained in a delegated legislation should not operate for more than three years without sufficient reasons. In considering the Committee's views, the Commissioner inserted repealing provisions into two of its recent Determinations so that these instruments ceased to operate approximately three years after they took effect. The Commissioner has advised that it will continue to consider the Committee's views in future CRP legislative instruments.

² Refer [subsection 370-5\(1\) of Schedule 1](#) to the *Taxation Administration Act 1953*.

³ [Section 17](#) of the *Legislation Act 2003* states that the rule-maker may have regard to any relevant matter in determining whether any consultation is appropriate, including the extent to which the consultation:

- (a) drew on the knowledge of persons having expertise in fields relevant to the proposed instrument; and
- (b) ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

The Commissioner has exercised his CRP discretion on six occasions to date, as follows:⁴

CRP modification	Date of effect	Ceases to be in effect
Taxation Administration (Remedial Power – Foreign Resident Capital Gains Withholding) Determination 2017	17 October 2017	1 October 2027
Taxation Administration (Remedial Power – Small Business Restructure Roll-over) Determination 2017	8 May 2018	1 April 2028
Taxation Administration (Remedial Power – Disclosure of Protected Information by Taxation Officers) Determination 2020	15 May 2020	23 March 2023 [Note 1]
Taxation Administration (Remedial Power – Certificate for GST-free supplies of Cars for Disabled People) Determination 2020	9 December 2020	1 January 2022 [Note 2]
Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020	14 May 2021	1 April 2022 [Note 3]
Taxation Administration (Remedial Power – Work Test for Personal Superannuation Contributions) Determination 2023	Made 10 May 2023 and awaiting the relevant period of disallowance	To be determined

Notes

Note 1: The modification was legislated – see items 47 and 48 of Schedule 3 to the [Treasury Laws Amendment \(2021 Measures No. 5\) Act 2021](#).

Note 2: The modification was legislated – see item 44 of Schedule 3 to the [Treasury Laws Amendment \(2021 Measures No. 5\) Act 2021](#).

Note 3: The modification was legislated – see items 33 to 37 of Schedule 8 to the [Corporate Collective Investment Vehicle Framework and Other Measures Act 2022](#).

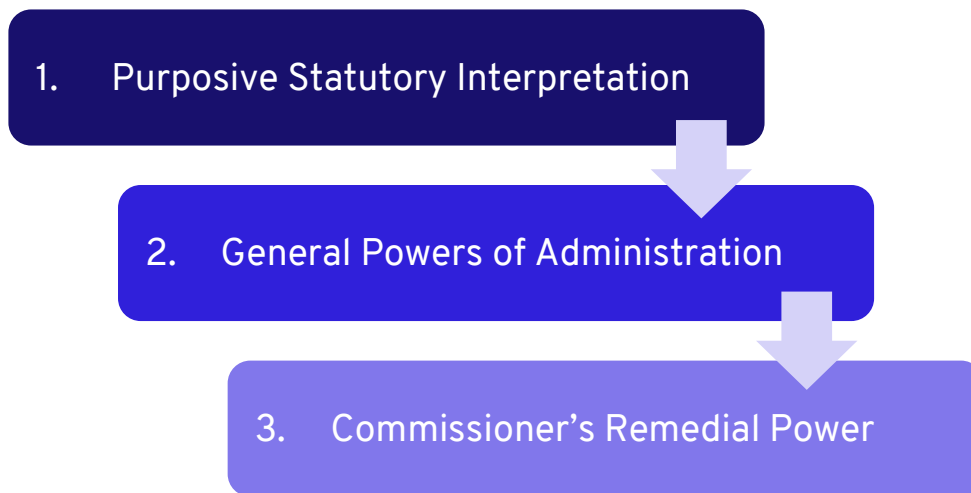
⁴ Australian Taxation Office, [When the Commissioner’s remedial power has been used](#) (2022).

It should be noted that the ‘intended purpose or object’ used in the CRP is different to the ‘purpose or object’ used in purposive statutory interpretation.⁵ When determining the ‘intended purpose or object’ of a tax provision, there is no requirement for primacy to be given to the text of the Act. This provides the Commissioner with the ability to address an unintended or inadvertent outcome or consequence even when the text of the provision is silent or appears unambiguous.

Taxpayers and tax professionals may request the Commissioner to consider exercising the CRP through an online application form on the Australian Taxation Office (ATO) website:

[Commissioner’s remedial power](#).

It should also be noted that ATO guidance⁶ on the CRP makes it clear that the exercise of the CRP is a discretion of last resort.



The IGTO will provide further background on the results of its review investigation in its review investigation report.

The Commissioner’s General Powers of Administration (GPA)

Many taxation and superannuation laws contain provisions that state that the Commissioner shall have general administration of the Act.⁷ Although they do not expressly mention a power or a discretion, they are collectively known as the Commissioner’s General Powers of Administration (GPA). The IGTO’s [review investigation into the GPA](#) has identified a range of stakeholder views about the role and purpose of the GPA.

⁵ Section 15AA of the *Acts Interpretation Act 1901* states that: ‘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.’

⁶ Australian Taxation Office, [Commissioner’s Remedial Power](#).

⁷ See, for example, [section 8](#) of the *Income Tax Assessment Act 1936* and [section 356-5 of Schedule 1](#) to the *Taxation Administration Act 1953*.

Many day-to-day administrative decisions and actions are taken by ATO officials as an exercise of the GPA. However, the GPA is also relied upon by the Commissioner (or his delegate, or duly authorised tax official) in a number of significant areas of tax administration including:

- settlement of tax disputes;
- compromise of tax debts;
- development of practical compliance guidelines;
- administering tax laws following significant judicial decisions;
- implementing aspects of the Government's coronavirus economic support measures; and
- implementing a shortcut deduction method for working from home expenses during the COVID-19 pandemic.⁸

The Commissioner has set out instructions to his staff in [Practice Statement Law Administration \(PS LA\) 2009/4](#) *When a proposal requires an exercise of the Commissioner's powers of general administration*. Importantly, these instructions include the following:

3. A purposive interpretation of law

In the course of administering tax laws on behalf of the Commissioner, our 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.

4. Circumstances in which the Commissioner's GPA may be properly exercised

The courts have recognised that the general administration provisions reinforce the principle that the Commissioner is authorised to do whatever may be fairly regarded as incidental to, or consequential upon, the things that the Commissioner is authorised to do by the taxation laws.

The GPA are narrow in scope and governed by the operation of administrative law principles. A proper exercise of the powers is confined to dealing with management and administrative decisions, such as the allocation of compliance resources more broadly recognised as practical compliance approaches.

The Commissioner's GPA cannot be used to remedy defects or omissions in the law. It is the Commissioner's remedial power which provides discretion to modify the operation of a tax law to ensure it can be administered to achieve its intended purpose or object.

The scope and extent of these powers is outlined in greater detail in Appendix B of this practice statement.

⁸ Practical Compliance Guideline [PCG 2020/3](#) *Claiming deductions for additional running expenses incurred whilst working from home due to COVID-19*.

5. The appropriate authority to exercise the Commissioner's GPA

The *Carltona* principle allows employees to exercise the GPA on the Commissioner's behalf, but only when there is an implied authority for them to do so.

An implied authority to exercise the GPA on the Commissioner's behalf exists if it is within the scope of your usual duties to make a judgment call or decision that affects the allocation of resources, including your own time. Generally speaking such every day decisions are made by officers at all levels in the course of their usual duties.

The Commissioner has expressly delegated the following GPA (neither of which is within the scope of this practice statement):

- the settlement of cases, and
- the compromise of tax debts.

If a judgment call or decision needs to be made that is not necessarily within the course of your usual duties, you may need to consider preparing a proposal as to whether it is appropriate for the Commissioner to exercise his or her GPA in the circumstances.

The decisions of the Full Federal Court and Federal Court in [Macquarie Bank Limited v Commissioner of Taxation](#) [2013] FCAFC 119 and [Macquarie Bank Limited v Commissioner of Taxation](#) [2013] FCA 887 are important in understanding the GPA for several reasons, including:

- they illustrate some of the limits of the Commissioner's general powers of administration, including the fact that the GPA does not permit the Commissioner to dispense with the operation of the law and ... 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;
- they confirm that the Commissioner's practice statements do not, and cannot, bind the Commissioner when seeking to raise an assessment or re-assessment; and
- they demonstrate that there is no basis upon which Macquarie [i.e. a taxpayer] could seek to enforce any adherence to the practice statement [an instruction of the Commissioner to his ATO officials issued pursuant to the general powers of administration].

A summary of the issues in the case are set out below for completeness.

The decision in Macquarie Bank Limited

The taxpayer, Macquarie Bank Limited (MBL), sought judicial review under the *Administrative Decisions (Judicial Review) Act 1977* and section 39B of the *Judiciary Act 1901* of a decision by the Commissioner's delegate not to apply a view of the law on a prospective basis only.

MBL argued that in assessing MBL for the 2005–06, 2006–07 and 2007–08 income years, there was a retrospective application of the Commissioner's view of the law on the allocation of Offshore Banking Unit (OBU)⁹ expenses, which would lead to a tax liability for the applicants that was higher than it would be if the assessments were issued only on a prospective basis. That is, the Commissioner's actions were contrary to his earlier statement, conduct and position as set out in PS LA 2011/27 *Determining whether the ATO's views of the law should be applied prospectively only* and upon which MBL contends that it relied.

PS LA 2011/27 'outlines procedures to be followed and the factors to be considered by tax officers in relation to any circumstance in which the ATO is considering applying its view of the law' with retrospective effect. The practice statement also states that it 'must be followed in any circumstance where a tax officer applies the ATO view of the law'.

MBL contended that the Commissioner was proposing to issue assessments by applying the ATO view of the law **both** prospectively and retrospectively but without following the procedures or acting in accordance with the practice statement. MBL also contended that the Commissioner has a discretion about whether to consider reassessing it and that, in effect, that discretion must be exercised in conformity with the practice statement whatever might otherwise be the application of the law to the taxpayer in question.

MBL's case was that the Commissioner is not permitted (or by statute not required) to proceed to assess MBL in a way that is contrary to a view he may previously have held unless, and until, the practice statement has first been applied. MBL did not seek to rely upon any reasonable expectation or the rules of natural justice, to give rise to any obligation on the Commissioner to make a decision in accordance with the practice statement. Instead, MBL relied upon the power of the general administration of tax legislation given to the Commissioner.

The Full Federal Court upheld [at 9] the decision of Justice Edmonds at first instance in finding that:

The relief now sought by Macquarie must fail and has no utility because the practice statement cannot prevent the Commissioner from exercising his powers of assessment or of re-assessment and the practice statement did not, and could not, bind the Commissioner when seeking to raise an assessment or re-assessment:

⁹ Offshore Banking Unit as per Division 9A of Part III of the *Income Tax Assessment Act 1936*.

Justice Edmonds also noted at [76]:

Although PS LA 2011/27 is framed in imperative language, it is not (and does not purport to be) an exercise of any delegated law-making power and does not have statutory force. Nor is there any provision in the 1936 Act that expressly or impliedly requires the Commissioner to consider whether some form of concessional treatment should be extended (assuming that to be possible) to taxpayers in circumstances where earlier conduct by the ATO might have contributed to them ordering their affairs in a particular way. PS LA 2011/27 is referable only to s 8 of the 1936 Act vesting the “general administration” of the Act in the Commissioner. While that may in some senses be properly described as a “power”, though more accurately described as a duty, **it does not include a power to make decisions that create, extinguish or modify the legal rights of taxpayers; nor does it include a power to promulgate rules that create legal rights or immunities or that otherwise have the force of delegated legislation.**

[Emphasis added]

Further guidance and information

Further guidance and information is available from the [ATO website](#) and the website of the [Inspector-General of Taxation and Taxation Ombudsman](#).

If you have any specific concerns that have not been outlined above, please email taxpolicy@taxinstitute.com.au.

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