



# When the Commissioner's remedial power hasn't been used

Where we have considered but not applied the Commissioner's remedial power.

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Situations where the CRP was considered but not applied to modify the operation of tax law that affects individuals.

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## Commissioner's remedial power not applied – individuals

Situations where the CRP was considered but not applied to modify the operation of tax law that affects individuals.

7 February 2023

### How this page works

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

To help taxpayers and practitioners, this page describes situations where the Commissioner has used the CRP to modify the operation of the law applying to individuals. Each section has:

- links to legislative instruments
- links to explanatory materials
- information about when it applies to and from.

We will add to this page as the CRP is applied to new situations.

## Exempting individuals from 5-year record-keeping requirement

### Issue description

In 2005, when the period of review was shortened to 2 years, record-keeping requirements were changed for:

- payment summaries
- Medicare levy family payments
- returns lodged by agents.

The CRP was sought to exempt some taxpayers from the 5-year record-keeping requirement who would otherwise not already be exempt. However, the Commissioner cannot exercise the CRP in these circumstances because it is clear from paragraphs 2.71 to 2.72 of the Explanatory Memorandum to the **Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005** that it was not intended to exempt individuals outside of the circumstances listed in the statute.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **Use of discretion to classify properties as pre-CGT assets**

### **Issue description**

The exercise of the CRP was sought to disregard a capital gain from a capital gains tax (CGT) event for an asset that was acquired under a contract that was originally to be entered into before the CGT law was enacted but the contract was ultimately deferred pending advice from relevant authorities until after the CGT law commenced to apply.

Paragraph 8 of the 'Main Features' section of the Explanatory Memorandum to the **Income Tax Assessment Amendment (Capital Gains) Bill 1986**, which introduced the CGT regime notes that where assets were acquired on or after 20 September 1985, they are in scope for CGT. It says, 'for example, where assets are acquired under a contract, the time of acquisition will be the time of the making of the contract'. Therefore, using the CRP to modify the law in these circumstances would be inconsistent with the intended purpose or object of the provisions.

## **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **Inheritance taxing point – CGT event E7**

### **Issue description**

Where an asset passes from a deceased individual (first deceased) to a second individual who dies (second deceased) without the affairs of the first deceased having been concluded before the death of the second deceased, the beneficiaries of the second deceased incur a capital gains tax (CGT) liability.

While the asset passes from the first deceased's estate to the second deceased's beneficiaries under their wills, the rollovers available in these situations are available to those who 'own' the asset at the time of death. As no probate or letters of administration are granted for the first deceased before the second deceased dies, the asset is not 'owned' by the second deceased at the time of their death and the rollovers don't apply.

It was proposed to apply the CRP to allow a rollover in these circumstances. However, subparagraph 1 of paragraph B of Chapter 2.18 of the Explanatory Memorandum to the Tax Laws Improvement Bill (No. 1) 1998 states that the rollover doesn't apply to assets that were acquired by the legal personal representative during administration of the first deceased estate. Therefore, the CRP cannot be exercised to modify the law in these circumstances.

## **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **CGT replacement asset rollover relief**

### **Issue description**

The ACT Government offered a voluntary scheme to buy back asbestos insulated properties at market value.

Subdivision 124-B of the *Income Tax Assessment Act 1997* (ITAA 1997) provides that a taxpayer can choose to obtain capital gains tax (CGT) replacement asset rollover relief where an asset is compulsorily acquired, lost, or destroyed. Where this rollover relief is chosen, the taxpayer must incur expenditure in acquiring another CGT asset.

Use of the CRP was sought to include an asset that is damaged because of asbestos insulation under the voluntary scheme within the CGT definition of a compulsorily acquired, lost or destroyed asset.

Chapter 2.16 of the Explanatory Memorandum to the **Tax Law Improvement Bill (No. 1) 1998** expressly states that rollover relief is only available when one of the required circumstances occurs. Damage to an asset is not a specified circumstance and it is not the intended policy outcome to include such a circumstance. Therefore, expanding the circumstances for which replacement asset rollover relief is available is inconsistent with the intended purpose or object of the provision.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **Taxation of a compensation payout**

### **Issue description**

A taxpayer suffered a compensable injury. As a result, income was received from Centrelink and WorkCover, which was included in the taxpayer's tax return. The taxpayer then received a lump sum compensation settlement in a later financial year. In certain circumstances, under Part 3.14 of the *Social Security Act 1991* and Chapter 3 of the *Queensland Workers' Compensation and Rehabilitation Act 2003*, when a person receives a compensation settlement it is required that any Centrelink and WorkCover income received be repaid. The taxpayer repaid the Centrelink and WorkCover monies and sought to amend their tax return.

Subsection 59-30(3) of the *Income Tax Assessment Act 1997* (ITAA 1997) provides that section 59-30 doesn't apply (which makes a payment non-assessable non-exempt income) to an amount that a taxpayer must repay because the taxpayer received a lump sum as compensation or damages for a wrong or injury they suffered in their

occupation. As a result, the amounts the taxpayer received from Centrelink and WorkCover were assessable income and the tax return amendment was denied.

Use of the CRP was sought by the taxpayer to allow the requested amendment.

Paragraph 3.11 of the Explanatory Memorandum to the **Tax Laws Amendment Bill (No. 2) 2003** confirms that an intended exclusion to the provision is where a taxpayer receives income as a benefit or regularly paid compensation, and then has to repay that income because a lump sum compensation payment or a lump sum payment for damages for a wrong or injury suffered in the taxpayer's occupation is later received. Therefore, use of the CRP in this case is inconsistent with the intended purpose or object of the provision.

Further, the **Explanatory Memorandum to the law establishing the CRP** notes that the CRP 'cannot be used to modify the operation of a taxation law for a particular entity ... [including] exercising the power in relation to a class that is so narrowly defined that it could practically only consist of a particular entity'. As this modification would have only impacted the one applicant taxpayer, it would not have been permissible in any event.

## **CRP suitability**

This is unsuitable as:

- it's inconsistent with the intended purpose or object of the relevant provision
- the power cannot be used to modify the law for one particular entity.

## **CGT on the sale of a rental property**

### **Issue description**

A taxpayer sought to have their capital gains tax (CGT) liability waived on the sale of a rental property they owned as joint tenants on the basis they had received none of the rental income.

As a joint tenant of the property the taxpayer held a CGT asset according to the tax law. The disposal of the property triggered the CGT event that gave rise to a capital gain and in turn a CGT liability for

the taxpayer. This is the intended operation of the CGT regime in these circumstances as reflected in Chapters 2.6 and 2.12 of the Explanatory Memorandum to the Tax Law Improvement Bill (No. 1) 1998.

The CRP was not used in this circumstance as the law is operating as intended.

Further, the Explanatory Memorandum to the law establishing the CRP notes that the CRP 'cannot be used to modify the operation of a taxation law for a particular entity ... [including] exercising the power in relation to a class that is so narrowly defined that it could practically only consist of a particular entity'. As this modification would have only impacted the one applicant taxpayer, it would not have been permissible in any event.

## **CRP suitability**

This is unsuitable as:

- it's inconsistent with the intended purpose or object of the relevant provision
- the power cannot be used to modify the law for one particular entity.

## **CGT – extension of the main residence exemption**

### **Issue description**

Section 118-160 of the *Income Tax Assessment Act 1997* (ITAA 1997) allows for the main residence exemption to continue to be claimed when a main residence is accidentally destroyed, and a capital gains tax (CGT) event happens in relation to the land on which it was built without another dwelling being built on the land.

A request was made to extend this section, for an individual taxpayer, to cover when a property is intentionally destroyed (for instance, as part of a renovation process) and the construction of a new residence is interrupted or otherwise prevented.

Chapter 2.12 of the Explanatory Memorandum to the Tax Law Improvement Bill (No. 1) 1998 confirms that the rule in section 118-160 was only intended to apply when 'a dwelling is accidentally destroyed

(e.g. by a bushfire)'. The intentional destruction of a main residence would not be within the intended policy outcome for this rule.

The CRP was not used in this circumstance as the law was operating as intended.

Further, the Explanatory Memorandum to the law establishing the CRP notes that the CRP 'cannot be used to modify the operation of a taxation law for a particular entity ... [including] exercising the power in relation to a class that is so narrowly defined that it could practically only consist of a particular entity'. As this modification would have only impacted the one applicant taxpayer, it would not have been permissible in any event.

### **CRP suitability**

This is unsuitable as:

- it's inconsistent with the intended purpose or object of the relevant provision
- the power cannot be used to modify the law for one particular entity.

## **Pay as you go (PAYG) instalments – high instalment rates**

### **Issue description**

Taxpayers with business or investment income pay instalments towards their income tax liability during the income year. Generally, there are 2 methods for working out the pay as you go (PAYG) instalment amount payable, namely the 'rate' method and 'amount' method. If the 'rate' method is chosen by the taxpayer, the amount that they are required to pay is determined according to a rate notified to them by the Commissioner. In some instances, the calculation of this rate (which is prescribed in the law) can work out to be significantly higher than the taxpayer's top marginal income tax rate. Therefore, for these selected taxpayers, this instalment rate method doesn't accurately reflect their true tax liability.

The anomaly with the calculation occurs where a taxpayer receives a high proportion of one type of income (for example, statutory income such as employee share scheme income) as compared to another type

of income (for example, ordinary income such as interest or dividends). To overcome this problem, taxpayers are informed by the ATO to vary the rate downwards. However, some taxpayers don't manually vary the rate downwards and use the rate that was notified. The result is the taxpayer ends up overpaying their tax instalments. Any overpayments are reconciled at the time of assessment.

Use of the CRP was sought to modify the instalment rate so it would not exceed the top marginal tax rate (plus Medicare levy) and ensure the rate more accurately reflected the taxpayer's actual tax liability.

The intended purpose or object of the law is to ensure efficient collection of income tax through the payment of instalments over a year that is as close as possible to the taxpayer's tax liability for that year. The overpayment or incorrect reporting of tax instalments that is reconciled only when the taxpayer lodges their tax return is clearly not in line with the policy intent. However, the CRP was considered unsuitable in this circumstance as the budget impact of the proposed modification was not negligible.

### **CRP suitability**

This is unsuitable as the impact of the modification on the Commonwealth Budget would not be negligible.

## **Division 83 unused leave entitlements**

### **Issue description**

Unused annual leave and unused long service leave payments are included in a taxpayer's assessable income under Division 83 of the *Income Tax Assessment Act 1997* (ITAA 1997). Where an unused annual leave or unused long service payment is made in connection with a 'genuine redundancy payment', an 'early retirement scheme payment' or an 'invalidity segment of an employment termination payment or superannuation benefit', a tax offset is available to ensure the rate of tax on such payments doesn't exceed 30%.

Under relevant provisions in the ITAA 1997, a tax offset is only available in relation to specific types of payments. As a result, a concern was raised that the ITAA 1997 provisions operated more restrictively than relevant provisions that were previously contained in the *Income Tax Assessment Act 1936* (ITAA 1936).

Use of the CRP was sought to remove references to specific eligible payments in relevant provisions in the ITAA 1997, to ensure the provisions aligned with the original provisions in the ITAA 1936.

The Explanatory Memorandum to the Tax Laws Amendment (Simplified Superannuation) Bill 2006 makes clear that the changes in terminology were not designed to alter the operation of the ITAA 1997 provisions, compared with the ITAA 1936 provisions. The former provisions required unused leave to be paid in respect of a 'bona fide redundancy amount', an 'early retirement scheme amount' or an 'invalidity amount'. These amounts under the former provisions were equivalent to the new prescribed payment categories in the ITAA 1997, which means that there are no relevant differences between the previous provisions and the current provisions.

The modification was deemed unsuitable for the CRP as the law was operating as intended.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **Division 293 tax for higher level office holders**

### **Issue description**

State higher level office holders (SHLOHs) are generally exempted from paying tax under Division 293 of the *Income Tax Assessment Act 1997* (ITAA 1997) if they hold a position listed in section 293-145.01 of the *Income Tax Assessment (1997 Act) Regulations 2021*.

Since this Regulation was enacted in 2013, there have been other positions determined by the courts or the ATO to be SHLOHs. However, the Regulation has not been updated to include these positions.

Use of the CRP was proposed to modify the Regulation to include additional positions as SHLOHs. However, the ATO determined that this was not necessary as it considered that it could administer the existing law in a way that ensured that SHLOHs would not be subject to Division 293 tax. As such, this issue was deemed unsuitable for the

CRP as it was neither necessary nor reasonable to pursue a modification to the law.

### **CRP suitability**

This is unsuitable as the Commissioner doesn't consider the modification to be reasonable, given the issue can be managed appropriately without pursuing the modification.

## **Veteran payment issues**

### **Issue description**

Where a taxpayer is required to repay an amount on which they previously paid tax, section 59-30 of the *Income Tax Assessment Act 1997* (ITAA 1997) allows the taxpayer to treat that amount as non-assessable, non-exempt (NANE) income. Provisions in the ITAA 1936 allow the taxpayer to have an amended assessment issued for the applicable income year excluding that NANE income. Generally, the taxpayer will receive a refund of the tax paid. However, for section 59-30 to apply, the taxpayer must have repaid the applicable amount before it is treated as NANE income.

Use of the CRP was sought to modify the operation of the law to treat the term 'repay' in section 59-30 as including 'entering arrangements to repay'. This would have assisted veterans who are obliged to pay back a Department of Veterans' Affairs pension (where tax has been withheld) and who then later receive a Commonwealth Superannuation Corporation military superannuation pension backdated to their date of discharge (resulting in a lump sum payment).

The Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 2) 2003 clearly states that amendments to earlier year income tax assessments to exclude previously assessable income are only possible when the applicable amount has been repaid. As such, the proposed modification was deemed unsuitable for the CRP as the law was operating as intended. However, the ATO has since developed an administrative solution to address this issue.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

# Medicare levy exemption for Jobseeker payments

## Issue description

Section 251U of the *Income Tax Assessment Act 1936* (ITAA 1936) contains a list of prescribed persons who are exempt from paying the Medicare levy. That list had previously included recipients of the now-repealed Sickness Allowance. That exemption was repealed when the Sickness Allowance was replaced with the Jobseeker Payment on 20 September 2020.

When the applicant applied for Sickness Allowance in early 2021, they were instead placed on the Jobseeker Payment. In light of the similar obligations imposed on the recipients of these types of payments, the applicant proposed that they also be entitled to an exemption from the Medicare levy, and that this should be remedied through the CRP.

When Parliament repealed the Medicare levy exemption for Sickness Allowance recipients, it did not enact an equivalent exemption for Jobseeker payment recipients. The policy intent appears to have been that Jobseeker Payment recipients would not receive a Medicare Levy exemption.

The proposed modification was deemed unsuitable for the CRP as the law was operating as intended.

## CRP suitability

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

# Legal personal representative definition

## Issue description

It is an offence for taxation officers to disclose taxpayer information unless the disclosure is permitted under Division 355 of Schedule 1 to the *Tax Administration Act 1953* (TAA).

Taxation officers are able to disclose taxpayer information to a taxpayer's 'legal personal representative', which includes 'an executor or administrator of an estate of an individual who has died.' The ATO requires evidence of a grant of probate or letters of administration

before disclosing information to an executor or administrator on this basis.

Use of the CRP was proposed to expand the definition of legal personal representative to include persons entitled to be a taxpayer's legal personal representative, when it would otherwise be uneconomical to obtain a grant of probate or letters of administration.

The Explanatory Memorandum to the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 highlights that Division 355 is underpinned by an exhaustive list of entities that can access information on behalf of a taxpayer. As the proposed modification would require the Commissioner to presuppose and determine who is entitled to be a legal personal representative (in a way that would depart from the list determined by the Parliament), this would be involve departure from the current policy. Accordingly, the CRP could not be utilised.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

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## **Commissioner's remedial power not applied – business**

Situations where the CRP was considered but not applied to modify the operation of tax law that affects business.

22 November 2022

### **How this page works**

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## **Early stage investors (Angel investor) – 3-year expense test**

### **Issue description**

Investors in early stage innovation companies must satisfy a number of requirements to access a non-refundable tax offset.

One requirement is satisfying an expense test, which requires the entity to have both:

- incorporated in the last 6 income years
- incurred \$1 million or less in expenses across all of the last 3 income years.

The provision includes the current income year in the expense test period. The test is difficult to apply because entities need to track current year expenses through an incomplete income tax year to show they meet the test.

It was suggested that the Commissioner exercise his remedial power to change the expense test period to the 3 prior income years.

The Commissioner did not need to consider whether to exercise his power because this issue was addressed by a minor technical amendment.

### **CRP suitability**

The issue was resolved via legislative amendment in Item 12 of Part 2 of Schedule 2 to the *Treasury Laws Amendment (2018 Measures No. 2) Act 2020*.

# **Fringe benefits tax (FBT) outdated census data**

## **Issue description**

A fringe benefits tax (FBT) exemption for remote area housing is based on road distances from major population centres, measured as at 24 June 1986 and 1981 using census data.

It was suggested that the road distances from major population centres could be updated using the CRP. However, modifying the law in these circumstances would not be favourable to all taxpayers.

## **CRP suitability**

This is unsuitable as it is not beneficial to all taxpayers.

# **ESVCLPs and pre-owned investments**

## **Issue description**

Generally, an early stage venture capital limited partnership (ESVCLP) can only invest in new shares or units. However, an ESVCLP can invest in 'pre-owned' shares or units if it satisfies certain additional requirements.

An ESVCLP can only meet the additional requirements if the total value of the pre-owned investments in question and the value of all of its other investments doesn't exceed 20% of the ESVCLP's committed capital.

The policy intent was to apply the 20% cap to the total value of the pre-owned investments in question and all of its other pre-owned investments.

The Commissioner did not need to consider whether to exercise his power because this issue was addressed by a minor technical amendment.

## **CRP suitability**

The issue was resolved via legislative amendment in **Item 2 of Part 1 of Schedule 2 to the *Treasury Laws Amendment (2018 Measures No. 2) Act 2020***.

# TOFA and foreign exchange election

## Issue description

The exercise of the CRP was sought to allow taxpayers to make the taxation of financial arrangements (TOFA) foreign exchange election with retrospective effect to fix errors made by incorrectly classifying:

- foreign exchange gains as unrealised foreign exchange gains
- unrealised foreign exchange gains as realised foreign exchange gains.

This was over a number of years where taxpayers were out of time to lodge a request for amendment of their returns.

Paragraphs 5.70 and 5.71 of the Explanatory Memorandum to the **Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008**, which introduced the TOFA regime, notes that elections don't apply to financial arrangements that are held before the income year in which the election is made. Therefore, using the CRP to modify the law in these circumstances would be inconsistent with the intended purpose or object of the provisions.

Further, the Explanatory Memorandum to the law establishing the CRP notes that the CRP 'cannot be used to modify the operation of a taxation law for a particular entity ... [including] exercising the power in relation to a class that is so narrowly defined that it could practically only consist of a particular entity'. As this modification would have only impacted the one applicant taxpayer, it would not have been permissible in any event.

## CRP suitability

- it is inconsistent with the intended purpose or object of the relevant provision
- the power can't be used to modify the law for one particular entity.

# ADIs and Tier 2 regulatory capital

## Issue description

For the purpose of the debt/equity rules in Division 974 of the *Income Tax Assessment Act 1997* (ITAA 1997), an interest would be classed as

'debt' if the issuer has an 'effectively non-contingent obligation' to repay the investment. Regulations may provide what constitutes 'debt' or 'equity' for Division 974 purposes.

Section 974-135F of the *Income Tax Assessment Regulations 1997* provides that non-viability clauses on certain subordinate notes issued by prudentially regulated entities don't in themselves prevent the note's obligation to pay principal or interest from being a non-contingent obligation. This may allow the notes to be classed as a 'debt interest' under the debt/equity rules of Division 974 of the ITAA 1997.

To apply section 974-135F, 'the note must be written off or converted into ordinary shares of the issuer....if a non-viability trigger event occurs'.

Mutual and NFP authorised deposit institutions (ADI) however would issue these notes with the non-viability clauses resulting in a conversion into mutual equity interests (MEIs) instead of shares due to their corporate structuring and capitalisation. This conversion into MEIs is permitted under the prudential standards.

It was unclear as to whether MEIs fit the definition of 'ordinary share' for the purposes of section 974-135F. This could result in a difference in tax outcome for those notes that would convert into 'ordinary shares' and those that would convert into MEIs, despite both notes conforming with the prudential regulations.

Use of the CRP was sought to extend subsection 974-135F(4) to include MEIs.

## **CRP suitability**

The issue was resolved via legislative amendment in the Treasury Laws Amendment (Mutual Equity Interests) Regulations 2019.

## **Simplified reporting to access tax relief at trustee level**

### **Issue description**

A taxpayer anticipated new managed investment trust (MIT) rules that would have allowed the Australian trusts in the particular taxpayer's structure to be considered MITs and access the 15% MIT withholding

rate. However, the taxpayer's trusts did not satisfy the tests for being classified as MITs.

The application of Division 6 of the *Income Tax Assessment Act 1936* (ITAA 1936) results in the amounts being taxed at 45% as trustee tax under subsection 98(4) of the *Income Tax Assessment Act 1936* (ITAA 1936). The ultimate beneficiaries under this trust structure are companies, and Division 6 recognises that the tax paid by the trustee can benefit those companies in respect of their own tax liabilities. However, to obtain a credit for the tax paid by the trustee, it would be necessary for the taxpayer to lodge tax returns for the trust and a number of companies upstream.

Use of the CRP was sought to allow simplified reporting for the chain of entities so that just one tax return needed to be filed and for tax to be paid at the 30% rate rather than at the trustee level.

Paragraphs 10.31 to 10.32 and 10.42 to 10.45 of the Explanatory Memorandum to the **Tax Laws Amendment (2007 Measures No. 3) Bill 2007** states that the applicable tax rate in these circumstances is 45% and shows that the intended method to obtain the credit was for each ultimate beneficiary to lodge a tax return so that their tax liability was individually assessed and the appropriate credit to be refunded. Therefore, using the CRP to modify the law to allow for simplified reporting and a lower tax rate would be inconsistent with the intended purpose or object of the provisions.

Further, the **Explanatory Memorandum to the law establishing the CRP** notes that the CRP 'cannot be used to modify the operation of a taxation law for a particular entity ... [including] exercising the power in relation to a class that is so narrowly defined that it could practically only consist of a particular entity'. As this modification would have only impacted the one applicant taxpayer, it would not have been permissible in any event.

## **CRP suitability**

This is unsuitable as:

- it is inconsistent with the intended purpose or object of the relevant provision
- the power can't be used to modify the law for one particular entity.

# Returns on foreign investment from dual resident companies

## Issue description

In 2014, the tax law provisions dealing with returns on foreign investment were modernised and updated. Section 23AJ of the *Income Tax Assessment Act 1936* (ITAA 1936) was replaced by Subdivision 768-A of the *Income Tax Assessment Act 1997* (ITAA 1997) as part of this process. Subdivision 768-A of the ITAA 1997 treats certain income received by an Australian corporate tax entity from a foreign resident company as non-assessable non-exempt income.

There was a change made to the wording of one of the key conditions for entitlement to the exemption. The condition that the paying company be 'not a Part X Australian resident' was changed to a requirement that the paying company be a 'foreign resident'. This change inadvertently resulted in some dual resident companies' dividends paid to Australian residents being treated as assessable income for the Australian resident. This was not the policy intent. The distribution received by the Australian resident should not be assessable income.

Use of the CRP was sought to modify the law to enable the condition for entitlement to the exemption recognise that the paying company be 'not a Part X Australian resident'.

The CRP was considered unsuitable in this circumstance as the budget impact of the proposed modification was not negligible.

## CRP suitability

This is unsuitable as the impact of the modification on the Commonwealth Budget would not be negligible.

The issue was nonetheless resolved via legislative amendment in Item 113 of Part 2 of Schedule 3 to the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020*.

# Continuity of ownership test (COT) and new head company

## Issue description

Division 166 of the *Income Tax Assessment Act 1997* (ITAA 1997) modifies the COT for widely held and eligible Division 166 companies to make it easier for these companies to apply the continuity of ownership (COT) rules.

Where a new holding company is interposed between the relevant COT tested company and a less than 10% direct stakeholder, the COT tested company is disqualified from relying on the concessional tracing rule in section 166-225 of the ITAA 1997. Section 166-230 of the ITAA 1997 would then apply (attributing the indirect stakes to an entirely different top interposed entity). This generally has the effect of causing the company to fail the COT. The company would then have to satisfy the same business test in order to deduct its tax losses or apply its net capital losses.

The proposed CRP modification to section 166-225 of the ITAA 1997 was to ensure that the interposition of a holding company between the tested company and a less than 10% direct stakeholder will not cause a failure of the COT.

The CRP was considered unsuitable in this circumstance as the budget impact of the proposed modification was not negligible.

## **CRP suitability**

This is unsuitable as the impact of the modification on the Commonwealth Budget would not be negligible.

The issue was nonetheless resolved via legislative amendment in Item 80-83 of Part 2 of Schedule 3 to the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020*.

## **ESVCLP tax offset**

### **Issue description**

Subdivision 61-P of the *Income Tax Assessment Act 1997* (ITAA 1997) provides limited partners in an early stage venture capital limited partnership (ESVCLP) with a non-refundable carry-forward tax offset to encourage investment in new ESVCLPs. The amount of the tax offset is calculated from the formula under subsection 61-765(1) of the ITAA 1997 and is equal to 10% of the lesser of the partner's contributions to the ESVCLP for the income year; and the partner's investment related amount (the proportionate share of the investments

made by the ESVCLP). The investment related amount is worked out using the formula in subsection 61-765(3) of the ITAA 1997 where the partner's share is multiplied by the sum of eligible venture capital investments.

The application of the definition of partner's share in the investment related amount means that if a partner joins a ESVCLP in a subsequent year, they receive a reduced tax offset because the partner's share of the investment related amount is based on the entire capital of the ESVCLP rather than the funds committed in the relevant tax year.

A request was made to use the CRP to amend the partner's share part of the investment related amount formula to make this part based on the funds contributed during the financial year instead of the partner's interest at the end of the income year in relation to the ESVCLP's entire capital.

Paragraph 2.27 of the Explanatory Memorandum (EM) to the **Tax Laws Amendment (Tax Incentives for Innovation) Bill 2016** makes clear that the definition of partner's share was intended to be an end of income year test. This was how the offset was intended to be calculated to encourage long-term commitment from partners to ESVCLPs.

It is clear from the EM that the law is operating as intended. Therefore, using the CRP to modify the law in these circumstances is inconsistent with the intended purpose or object of the provisions.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **Scrip for scrip rollover carveout for trust schemes**

### **Issue description**

The capital gains tax (CGT) scrip for scrip rollover allows taxpayers exchanging shares or trust interests involving companies and trusts as part of a merger or takeover arrangement to defer CGT from the realisation of any capital gains from such transactions. The rollover prevents the triggering of a CGT tax event.

In 2010, amendments were made to the scrip for scrip rollover expanding it to include takeovers that don't contravene key provisions in Chapter 6 of the *Corporations Act 2001* (Corporations Act), and mergers undertaken via a scheme of arrangement (if the entity is a company) that don't meet the participation requirements of the scrip for scrip rollover. As trusts can't undertake schemes of arrangement, the carveout for trusts only applies to takeover bids.

The proposed modification was to include trust schemes as an additional carveout from the participation requirements. It was considered unsuitable for CRP because the law was operating as intended and the modification is clearly inconsistent with policy intent. Paragraph 5.1 of the **Explanatory Memorandum of the Tax Laws Amendment (2010 Measures No. 4) Bill 2010** confirms the carveout is only intended to apply to takeovers and mergers actually regulated by the Corporations Act, whereas there is no actual framework underpinned by the Corporations Act that regulates trust schemes, only an optional opt-in one.

### **CRP suitability**

This is unsuitable as it is inconsistent with intended purpose or object of the relevant provisions.

## **Hybrid mismatch and AT1 Regulatory capital**

### **Issue description**

Australia's hybrid mismatch rules are designed to prevent multinational corporations from exploiting differences in the tax treatment of an entity or instrument under the laws of 2 or more tax jurisdictions.

An issue arose that impacted on an investor's ability to claim franking benefits attached to franked distributions paid on issuers of additional tier 1 (AT1) capital instruments. The main concern with the provision was whether franked distributions on AT1 capital instruments gave rise to an entitlement to a deduction under foreign tax laws.

The CRP was unsuitable because it was assessed to have a small but unquantifiable impact on revenue. This issue was resolved through a legislative amendment.

## **CRP suitability**

This is unsuitable as the impact of the modification on the federal Budget would not be negligible.

The issue was nonetheless resolved via legislative amendment in items 61 to 64 of Part 4 of Schedule 1 to the *Treasury Laws Amendment (2020 Measures No. 2) Act 2020*.

## **Sovereign immunity**

### **Issue description**

The *Income Tax Assessment Act 1997* (ITAA 1997) provides an income tax exemption for certain sovereign entities by making ordinary income or statutory income of these entities non-assessable non-exempt income if certain conditions are satisfied. The exemption doesn't apply where the amount is attributable to either:

- non-concessional managed investment trust (MIT) income (NCMI)
- amounts that would be NCMI but for certain transitional provisions under the *Tax Administration Act 1953* (TAA) (known as Excluded NCMI).

The purpose of this carve-out is to ensure the policy intent of the NCMI provisions in the TAA are not defeated by the fact an investor is a sovereign entity. The NCMI provisions provide that these amounts are subject to withholding tax of 30%, or 15% under the approved economic infrastructure facility exception and transitional rules. If the carve-out did not exist, these amounts would not be subject to any withholding tax.

Consequential amendments were made to the notification requirements in Schedule 1 to the TAA to ensure that where a withholding MIT makes a payment to another entity, to notify that other entity about the extent a payment is attributable to NCMI. The same was not done for Excluded NCMI. This lack of information means parts of payments attributable to Excluded NCMI are not traceable, meaning withholding amounts may be incorrect or no withholding occurs.

The proposed modification was to expand the notification requirements to include Excluded NCMI. However, the text of the relevant paragraph is clear in that it is only the extent of those fund

payments that are attributable to NCMI amounts that should be reported on the notice, and the Commonwealth Parliament has been specific in what should be contained in the notice to assist the payee to discharge its withholding obligations. This is illustrated by paragraphs 1.83 and 1.84 of the **Explanatory Memorandum to the Tax Laws Amendment (Election Commitments No. 1) Bill 2008**.

As the intended purpose or object of the relevant provision is for the notice requirements to be prescribed by the Commonwealth Parliament, the modification is inconsistent with that policy intent.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **Base rate entity passive income (BREPI) and dividends**

### **Issue description**

The *Treasury Laws Amendment (Enterprise Tax Plan Base Rate Entities) Act 2018* changed the requirements for corporate tax entities to qualify for the lower corporate tax rate of 27.5%. This Act changes the test so that an entity will only qualify for the lower rate for an income year if no more than 80% of its assessable income is base rate entity passive income (BREPI) and their aggregated turnover is less than the aggregated turnover threshold for that income year.

The meaning of BREPI is provided under the *Income Tax Rates Act 1986*. An amount of assessable income that is BREPI is defined exclusively under that Act, including an amount that can be 'traced' through a trust or partnership that is directly or indirectly referable to another amount that is defined as BREPI (the tracing rule).

A taxpayer brought forward an issue regarding whether the non-portfolio dividend exclusion and the tracing rule means that non-portfolio dividends can flow through a trust and therefore not be BREPI. It was proposed to modify the operation of the tracing rule so it applies to non-portfolio dividends.

It was considered unsuitable for CRP because the modification would be inconsistent with the policy intent. Paragraph 1.11 of the **Explanatory Memorandum of the Treasury Laws Amendment**

(Enterprise Tax Plan Base Rate Entities) Bill 2017 states that ‘a dividend that is a non-portfolio dividend (within the meaning of section 317 of the ITAA 1936) is not base rate entity passive income.’ Furthermore, the *Income Tax Rates Act 1986* states that the tracing rule applies to BREPI and expressly excludes a non-portfolio dividend from being a distribution that is classed as BREPI. As such, it was determined the law is operating as intended.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **Sole trader eligibility for the JobKeeper Payment**

### **Issue description**

The JobKeeper Payment is a temporary wage subsidy that was introduced by the Australian Government as part of its economic response to COVID-19. The eligibility criteria for the JobKeeper Payment are contained in the **Coronavirus Economic Response Package (Payments and Benefits) Rules 2020** (the Rules). Businesses are eligible on the basis of having eligible employees under Division 2 of the Rules with business owners, including sole traders, eligible under Division 3 on the basis of business participation.

For sole traders to be considered eligible business participants under the Rules, certain requirements must be satisfied. One is that the individual must not be an employee (other than a casual employee) of another entity.

A taxpayer proposed a modification to allow sole traders with separate permanent employment to access the JobKeeper Payment.

This modification was determined to be unsuitable for CRP as the modification was considered to be inconsistent with policy intent. The Rules states that ‘the individual is not an employee (other than a casual employee) of another entity’ at the time of nomination. It is clear that the policy intent is to prevent JobKeeper payments being claimed by sole traders who have other permanent employment.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **GST on property subject to pre-existing long-term lease**

### **Issue description**

Following the Full Federal Court's decision in *Gloxinia Investments (ATF Gloxinia Unit Trust)* [2010] FCAFC 46 (*Gloxinia*), the Commonwealth Parliament made amendments to the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to ensure 'that sales or long-term leases of new residential premises by a registered entity are taxable supplies, and that sales or long-term leases of existing residential premises are input taxed supplies.' The amendments did not apply to wholesale supplies before 27 January 2011, as long as other requirements for the exception were met.

A taxpayer bought an apartment off the plan just after the *Gloxinia* decision, and failed to satisfy the other criterion in the exception, meaning the sale of the apartment was considered a taxable supply. The taxpayer asked the Commissioner to exercise the CRP in a way that would mean their purchase would be an input taxed supply.

The policy intent of the GST Act amendments is clear from the **Explanatory Memorandum to the Tax Laws Amendment (2011 Measures No. 9) Bill 2011**. 'The intention ... is to ensure that certain sales of newly constructed residential premises by a developer to home buyers and investors will be taxable supplies of new residential premises even though there may have been an earlier "wholesale supply" of the premises.'

The proposed modification was deemed unsuitable for the CRP as the law was operating as intended.

Further, the **Explanatory Memorandum to the law establishing the CRP** notes that the CRP 'cannot be used to modify the operation of a taxation law for a particular entity ... [including] exercising the power in relation to a class that is so narrowly defined that it could practically only consist of a particular entity'. As this modification would have only impacted the one applicant taxpayer, it would not have been permissible in any event.

## **CRP suitability**

- it is inconsistent with the intended purpose or object of the relevant provision
- the power can't be used to modify the law for one particular entity.

## **Significant global entities reporting**

### **Issue description**

Amendments to subparagraph 815-355(3)(a)(ii) of the *Income Tax Assessment Act 1997* (ITAA 1997) were introduced into Parliament in 2020 that sought to require country-by-country (CBC) reporting entities to lodge a master file and CBC report that reflected the CBC reporting group of which they are a member, in line with international practice and OECD model legislation.

Before these amendments being legislated, it was suggested that the CRP could be used to modify subparagraph 815-355(3)(a)(ii) to clarify that the provision refers to the CBC reporting group for the current income year, rather than the previous income year.

However, as this issue was ultimately resolved via a legislative amendment in 2021, modification via the CRP became unnecessary.

### **CRP suitability**

This issue was resolved via legislative amendment in **Items 3-5 of Part 1 of Schedule 3 to the Treasury Laws Amendment (2021 Measures No. 5) Act 2021**.

## **Loss carry back tax offset**

### **Issue description**

The temporary loss carry back tax offset allowed certain corporate tax entities to carry back a tax loss for the 2019–20, 2020–21, 2021–22 or 2022–23 income year, and apply it against tax paid in a previous income year (as far back as the 2018–19 income year), to generate a refundable tax offset. This was designed to assist with the economic impacts of COVID-19.

A corporate tax entity needed to make an irrevocable choice to claim the refundable tax offset when it lodged its income tax return for the 2020–21 and 2021–22 income years, under section 160-15 of the *Income Tax Assessment Act 1997* (ITAA 1997). However, paragraph 2.30 and Example 2.1 of 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.

Use of the CRP was sought to modify the operation of section 160-15 to allow a taxpayer to revoke and change their loss carry back choice.

While the proposed modification itself appears to be consistent with the Explanatory Memorandum, new machinery provisions would be required to provide a process for an entity to amend its choice and enable the recalculation of the refundable tax offset entitlement. Incorporating new machinery provisions of this type would broaden the policy intent of the original law, which means that this candidate is not suitable for an exercise of the CRP.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

The issue was nonetheless resolved via legislative amendment in Items 32-33 of Part 1 of Schedule 3 to the Treasury Laws Amendment (2021 Measures No. 5) Act 2021.

70923

## **Commissioner's remedial power not applied – not-for-profit**

Where the CRP was considered but not applied to modify the operation of tax law that affects NFP entities.

22 November 2022

### **How this page works**

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

To help taxpayers and practitioners, this page describes situations where the Commissioner has used the CRP to modify the operation of the law applying to individuals. Each section has:

- links to legislative instruments
- links to explanatory materials
- information about when it applies to and from.

We will add to this page as the CRP is applied to new situations.

## **Not-for-profit (NFP) exemption from income tax**

### **Issue description**

Income tax exempt not-for-profits (NFP) must satisfy 'special conditions' by applying income and assets solely for the purposes for which they are established and complying with all the substantive requirements in their governing rules.

Some in the NFP sector consider that the conditions operate overly restrictively with minor technical breaches resulting in the loss of the income tax exemption. Some in the sector consider that the ATO's attempts to relieve this result by the terms of a public ruling (*Taxation Ruling TR 2015/1 Income tax: special conditions for various entities whose ordinary and statutory income is exempt*) are not supported by the law, and therefore doesn't provide sufficient certainty for all sector participants.

Use of the CRP was sought to modify the law to include a discretion to allow NFPs to be held to satisfy special conditions and maintain exempt status.

Paragraphs 9.56 and 9.60 of the Explanatory Memorandum to the **Tax Laws Amendment (2013 Measures No 2) Bill 2013** states that NFPs must comply with these special conditions and 'are expected to operate in a manner consistent with those rules and purposes' to retain their exempt status. Paragraph 9.61 notes the requirement to comply

with the substantive requirements allowing for 'minor procedural irregularities' to occur whilst retaining exempt status. It is clear compliance with the substantive requirements is expressly required and that a limited discretion already exists. Therefore, modifying the law to apply a broader discretion is inconsistent with the intended purpose or object of the provisions.

## **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

70903

# **Commissioner's remedial power not applied – superannuation**

Where the CRP was considered but not applied to modify the operation of tax law that affects superannuation.

7 February 2023

## **How this page works**

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

To help taxpayers and practitioners, this page describes situations where the Commissioner has used the CRP to modify the operation of the law applying to individuals. Each section has:

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We will add to this page as the CRP is applied to new situations.

# Definition of 'ineligible annuity' and deferred life annuities

## Issue description

The definition of 'ineligible annuity' provides a carve-out from the definition of qualifying security for the purposes of the taxation of financial arrangements (TOFA) rules. This carve-out currently refers to 'an annuity issued by a life assurance company to, or for, the benefit of a natural person (other than in the capacity of the trustee of a trust estate)'.

The carve-out applies to a deferred annuity purchased directly by an individual from a life company, but not to an annuity purchased by a superannuation fund to underwrite its liabilities to its members.

As a result, annuities issued by life companies to complying superannuation funds to meet their liabilities for the provision of deferred superannuation income streams may be subject to double taxation during the accumulation (pre-retirement) phase.

The Commissioner did not need to consider whether to exercise his power because this issue was addressed by a minor technical amendment.

## CRP suitability

The issue was resolved via legislative amendment in Item 30 of Part 6 of Schedule 8 to the *Treasury Laws Amendment (2018 Measures No. 4) Act 2019*.

# Transitional CGT relief for unsegregated super funds

## Issue description

There are transitional rules that are intended to preserve the tax-exempt status of capital gains accrued by super funds, but not realised before 1 July 2017.

These transitional rules are difficult to apply to unsegregated funds because of the need to undertake analysis of all capital gains tax (CGT) assets at a share parcel level to determine which are eligible for

the relief and which are not and then apportion amounts on a parcel-by-parcel basis.

The suggested modification using the CRP would have amounted to a new regime for providing cost base resets. This treatment would be inconsistent with the purpose of the provision.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **ENCC rules and associated earnings formula**

### **Issue description**

There is a formula for calculating associated earnings for the purposes of the excess non-concessional contributions (ENCC) rules.

The Commissioner was asked to use the CRP to permit the use of a different formula because the income calculated under the statutory formula is 'far higher than the actual income earned on the excess non-concessional contributions'.

However, the Commissioner can't exercise the CRP in these circumstances because it is clear from paragraph 1.44 of the Explanatory Memorandum to the **Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2014** that the associated earnings formula may result in associated earnings being 'lower or higher than the actual earnings from the investments made with excess non-concessional contributions by the superannuation provider'. This was an intended policy outcome of the measure.

The law is operating as intended.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **Lost and unclaimed super reporting**

## **Issue description**

Super funds are required to assess member accounts each year on 31 December and 30 June (the 'unclaimed money day') to determine whether the accounts are lost, unclaimed or inactive low-balance super accounts. These accounts are then required to be reported and paid to the ATO before the following 30 April and 31 October (the 'scheduled statement day'). Where accounts were assessed as lost, unclaimed or inactive low-balance on 'unclaimed money day', but ceased to be lost, unclaimed or inactive low-balance on the 'scheduled statement day', the legislation still required the funds to report details of these accounts to the ATO.

Super funds had been able to report this information using the unclaimed money statement, however this has been superseded by the SuperStream standard. The standard is unable to accommodate the reporting of information without an associated payment.

The proposed modification was to remove the requirement to report this information to the ATO.

The modification was deemed unsuitable for the CRP as it was inconsistent with the intended purpose or object of the relevant provisions. This information is required to be provided to the Commissioner as per the policy intent evident in paragraph 3.33 of the *Explanatory Memorandum of the Bill to the Tax Laws Amendment (2009 Budget Measures No. 2) Act 2009*, paragraphs 4.27 and 4.28 of the *Explanatory Memorandum of the Bill to the Tax Laws Amendment (2009 Measures No. 1) Act 2009* and paragraph 4.34 of the *Explanatory Memorandum of the Bill to the Treasury Laws Amendment (Protecting Your Superannuation Package) Act 2019*.

## **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

The issue was nonetheless resolved via legislative amendment in Items 54, 59 and 60 of Part 1 of Schedule 3 of the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020*.

## **Debit value for certain capped defined benefit income streams**

## **Issue description**

Effective from 1 July 2017, a 'transfer balance cap' was introduced that limits the amount an individual can have in retirement phase that supports a superannuation income stream and is subject to exempt current pension income rules. The general transfer balance cap is currently \$1.6 million.

Special rules apply to certain superannuation income streams referred to as capped defined benefit income streams (CDBIS). The amount of the transfer balance debit when a CDBIS is commuted in full is the debit value, just before the superannuation lump sum is paid, of the superannuation interest that supports the CDBIS. A problem arose with determining the debit value for the debit of a life expectancy pension/annuity or market linked pension/annuity where it was fully commuted. As the CDBIS has been fully commuted, the taxpayer no longer had a right to receive superannuation income stream benefits and therefore there could not be a 'next' superannuation income stream benefit, resulting in a nil debit value. When the individual commenced a new market linked pension, the individual would have 2 transfer balance credits on their account without a transfer balance debit referable to the commutation. For some CDBIS, the special value may result in a higher transfer balance credit amount than would be the case if the general valuation rules applicable to non-CDBIS applied. It was intended that the law provide a transfer balance debit with respect to the commutation and that the individual would then have a new transfer balance credit when the new market linked pension/annuity commenced.

The issue was due to be considered by the CRP Panel, but a legislative solution was pursued instead.

## **CRP suitability**

The issue was resolved via legislative amendment in items 327 and 328 of Part 4 of Schedule 3 to the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020*.

Items 327 and 328 amend subsections 294-145(1) and (6) of the *Income Tax Assessment Act 1997* (ITAA 1997) to ensure the transfer balance debit is the debit value of the superannuation interest that supported the superannuation income stream just before the commutation takes place.

## **Early release of superannuation – extra discretion**

### **Issue description**

An individual applied for a determination for early release of superannuation on compassionate grounds to provide medical treatment for a dependant. The Commissioner could not make a determination as the individual did not provide medical certification from a specialist that the treatment was necessary and not readily available through the public health system, which is a requirement under subregulation 6.19A(3) of the *Superannuation Industry (Supervision) Regulations 1994* (SISR).

Use of the CRP was proposed to modify the operation of regulation 6.19A to allow a 'common sense' discretion in assessing compassionate release of superannuation cases.

The policy is clear that the intended purpose of subregulation 6.19A(3) is that a person must have 2 medical certificates, one of which must be from a medical specialist. The medical certification must state that the treatment is not readily available in the public health system.

Further, paragraph 6.19A(1)(f) allows for an application to be made to meet expenses that are consistent with one of the grounds under subregulation 6.19A(1) of the SISR. However, this is a qualified discretion and can't be applied to bypass the evidentiary requirements contained in paragraphs 6.19A(1)(a) to (e) where the application is to pay for an expense that falls into one of those paragraphs.

As the proposal would be inconsistent with the intended purpose or object of the regulation, the CRP could not be utilised.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **Associated earnings formula**

### **Issue description**

An individual will have excess non-concessional contributions if they receive an excess non-concessional contributions (ENCC)

determination. The ENCC determination must state, amongst other things, the amount of the associated earnings on the excess non-concessional contributions calculated using the formula in section 97-30 of Schedule 1 to *the Tax Administration Act 1953* (TAA). In that formula, the default proxy rate is calculated by reference to the general interest charge rate, though the Treasurer may determine an alternative rate, including a zero rate, by legislative instrument.

The applicant asked the Commissioner to exercise the CRP to have the associated earnings amount in their ENCC determination reduced to zero to account for their self-managed superannuation fund performing significantly worse than the default proxy rate used in their ENCC determination.

The Explanatory Memorandum to the *Tax and Superannuation Laws Amendment (2014 Measures No. 7) Bill 2014* highlights that the associated earnings amount may be lower or higher than the actual earnings made by a superannuation fund, which is the intended outcome under the policy. Accordingly, the law is operating as intended and the CRP could not be utilised.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

70918

## **Commissioner's remedial power not applied – tax administration**

Where the CRP was considered but not applied to modify the operation of tax law that affects the tax system.

22 November 2022

### **How this page works**

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least be no worse off, as a result of the modification. This power is known as the **Commissioner's remedial power (CRP)**.

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## **Interest on overpayments (IOP) of withholding tax (WHT)**

### **Issue description**

Where the Commissioner amends the rate of withholding tax (WHT) for non-residents after an internal review, there is no 'decision to which this Act applies' and therefore no entitlement to interest on overpayment (IOP).

It was suggested that the CRP could be used to modify the law to create an entitlement to IOP.

However, it is clear from clause 3 of the Explanatory Memorandum to the **Taxation (Interest on Overpayments) Bill 1983** that it was not intended that IOP be paid in these circumstances.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

## **GST and amended indirect tax assessments**

### **Issue description**

The *Taxation (Interest on Overpayments and Early Payments) Act 1983* (TIOEP Act) provides that interest is payable where early payments are

made on specified tax liabilities, and on overpayments of income tax and other specified tax liabilities arising from an assessment or other decision to which the TIOEP Act applies. For an entitlement of interest on an overpayment to arise, it must be in relation to a relevant tax (which includes GST and indirect tax). Decisions to which the TIOEP Act applies include objections and court or tribunal decisions.

Use of the CRP was sought to create an entitlement to interest on overpayments of GST and indirect tax assessments that arise from non-litigious methods, such as alternative dispute resolution, ATO internal review or settlement entered into under a court or tribunal order.

The policy intent of the TIOEP Act is clear from the Act and the **Explanatory Memorandum to the TIOEP Bill**, which provides 'authority for the Commissioner of Taxation to pay interest on certain refunds of tax made as a result of a successful objection or appeal by a taxpayer against an assessment or other decision of the Commissioner'.

Since interest on overpayments was only designed to be available in certain, specific circumstances, the modification was deemed unsuitable for the CRP as the law was operating as intended.

### **CRP suitability**

This is unsuitable as it is inconsistent with the intended purpose or object of the relevant provision.

70924

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