UNPACKING THE COMMISSIONER'S REMEDIAL POWER

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I Introduction

Schedule 1 of the *Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017* (Cth), inserts a new Division 370 in Part 5-10 in the *Taxation Administration Act* 1953 (Cth) ('TAA'), which provides the Commissioner of Taxation with a *discretionary* power to make legislative instruments modifying the *operation* of a tax or superannuation provision in specified circumstances ('Remedial Power'). The aim of Division 370 of the TAA is to enable the Commissioner to overcome unintended consequences in the operation of taxation laws, and ensure that the laws operate in accordance with their intended purpose or object. While Division 370 is quite short (and unusually so for modern tax legislation), it contains a number of interesting provisions.

Under Division 370 of the TAA, the Commissioner is only able to modify the operation of a provision where (to paraphrase):

- the modification is 'not inconsistent' (rather than *consistent'*) with the provision's 'intended purpose or object'. This test is objective, but it could be expected that the Commissioner and taxpayers might well have a different view of what the provision's intended purpose or object is, and what modification would be needed to make it 'not inconsistent' with that purpose;
- the *Commissioner considers* the modification to be '*reasonable'*, having regard to the intended purpose or object of the provision, and whether taxpayer compliance costs would be *disproportionate* without the modification; and
- a specified public servant advises the Commissioner that the impact of the modification on the Commonwealth budget '*would be negligible*'.

The test contains a number of vague terms (such as 'reasonable'', disproportionate' and 'negligible') on which the views of the Australian Taxation Officer ('ATO') and taxpayers, might be expected to differ on occasions. A modification can be general, or apply only to a specified class or to specified circumstances, but will not apply if the modification would produce a less favourable result for the affected taxpayer.

The wide scope of the power delegated to the Commissioner has raised some concerns in relation to possible inconsistencies with the rule of law and the separation of powers doctrine – though the draftsman inserted a number of safeguards in an attempt to assuage such concerns. In the end, it may be a question of whether the advantages outweigh the disadvantages, and the end is seen to justify the means. The modest aim of this Paper is to outline the basic elements of the Remedial Power and to raise some issues which might emerge from an exercise of the Remedial Power.

II Background – The Problem and Proposed Solution

From time to time – and unfortunately with more frequency, as tax law becomes increasingly complex – taxpayers complain that they have been caught by the unintended consequences of a piece of tax legislation, and are being treated unfairly[1]. Examples include[2]:

- taxpayers affected by natural disasters who receive assistance or compensation but are unable to access Capital Gains Tax "(CGT") rollover relief;[3]
- companies unable to satisfy the continuity of ownership test for carry-forward of losses where they have large numbers of small shareholdings[4];
- unpaid present entitlements under Division 7A of the *Income Tax Assessment Act 1936* (Cth) ("ITAA36"); and
- taxpayers who accidentally exceed the cap on superannuation contributions.

Such unintended consequences are undesirable, not least because they 'create uncertainty by delivering tax outcomes that do not make sense in their context'[5]. However, all too often in the past, the ATO has given the unpalatable but technically accurate response that while they can see the problem and the resulting unfairness, the ATO cannot change the wording of the legislation, and indeed is charged with the application and enforcement of the legislation as written[6]. As the Australian specialist tax advisory firm Greenwoods & Herbert Smith Freehills has observed:

> We have seen too many instances where it is accepted that the text of the income tax legislation has miscarried, but the ATO regards itself as unable to interpret and administer the provision in a way that produces an outcome it acknowledges would be sensible.[7]

Certainly, on occasions, a purposive interpretation of the legislative provision, the application of s 15AA of the *Acts Interpretation Act 1901* (Cth), or the exercise of the Commissioner's general power of administration under s 8 ITAA36 and s 3A of the TAA, may enable the ATO (if it is so inclined), to apply legislation in a manner more consistent with the apparent intent and objectives of that legislation.

However, on other occasions, these aids will not suffice to resolve the problem.[8] For example, the ATO has indicated that even a purposive interpretation of the words in s 272-5 of the ITAAA36 (dealing with loss carry forward by fixed trusts) could not achieve an interpretation 'aligned with industry expectations'[9].

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1 Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2016 Measures No. 2) Act 2017 (hereafter the 'EM'), para [1.90].

2 Nassim Khadem, 'Tax Commissioner gains new powers to deal with "unintended outcomes" in tax and super laws' Canberra Times 1 May 2015 <http://local.images.canberratimes.com.au/business/the-economy/tax-commissioner-gains-new-powers-to-deal-with-unintended-outcomes-in-tax-and-super-laws-20150501-1mxoxx.html>.

3 EM [1.108].

4 EM [1.109].

5 EM [1.99]

6 As the EM [1.99] notes, 'the Commissioner cannot resolve unintended tax outcomes by giving effect to the purpose or intention of a provision, where such an approach would extend beyond the words of the 'provision'.

7 Submission to Tom Reid, Law Design Practice, The Treasury, 7 January 2016, 1

8 EM paras [1.99], [1.142]; T Cardan, 'New remedial power for the Commissioner will benefit taxpayers', <http://www.wolterskluwercentral.com.au/tax/income-tax/new-remedia[-power-commissioner-will-benefit-taxpayers/> .

9 Though in that case, the Commissioner was able to deal with the situation by exercise of the discretion in s 272-5(3) of Sched 2F *ITAA36*.

Alternatively, it may sometimes be possible to have Parliament amend the law to overcome a problem. However, Parliamentary time is limited[10], and amendment is a lengthy, resource intensive[11] and uncertain process[12]. In the meantime, the delay may cause considerable uncertainty for affected taxpayers, and a form of 'Russian Roulette' if taxpayers have to "bet" on whether amendments will be made in time (or at all)[13] to protect their transactions, with the prospect of additional tax and penalties if they get it wrong[14].

What was needed to alleviate these problems was a process that would enable the ATO to remedy minor problems (relatively) quickly[15] and easily, thus reducing uncertainty, risk and compliance costs for taxpayers and the consequential need for taxpayers to seek clarification on issues[16], which in turn would reduce regulatory costs for the ATO and government.[17] With the aim of achieving these improvements, in 2016 Australia's Federal Government introduced the Tax and Superannuation Laws Amendment (2016 Measures No. 2) Bill 2016 – which subsequently became law in February 2017[18]. Schedule 1 of the new Division 370 gives the Commissioner of Taxation a *discretionary* statutory power ('Remedial Power') to modify the *operation* (but not the text) of a taxation law by legislative instrument, to enable the law to be administered so as to remedy a particular unintended consequence of that law [19]. The Remedial Power

> is intended to increase certainty in the administration of taxation laws by reducing the regulatory burden on entities that arise from unforeseen or unintended consequences in the application of taxation laws which cannot otherwise be addressed … [and] also ensures the Commissioner can administer the law consistently with its intended purpose or object. It is anticipated that this power will reduce the time it takes to give effect to some minor legislative corrections. It may

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10 [EM [1.138] – as is the Parliamentary draftsman's time: EM [1.103]-[1.104].
11 EM [1.98].
12 See EM [1.98], [1.100]-[1.105], [1.111]
13 Cf the EM [1.21],[1.91], [1.100]-[1.101]. The ATO has tried to alleviate the problem by providing administrative protection from penalties in certain circumstances – though this is limited: EM [1.105],
14 EM [1.110]
15 The EM estimates that the process of introducing a Remedial Power modification might take some 6-9 months to complete, as compared to "up to and sometimes more than" 2 years for legislative amendment: EM [1.104], [1.150].
16 EM [1.150].
17 The EM suggests that had the Remedial Power been applied to the examples the EM cites, "The saving on administrative and parliamentary resources, while difficult to quantify, would be significant": [1.152],[1.166].
18 The Bill was passed by the Senate on 9 February 2017, assented to on 28 February, and is now the *Tax and Superannuation Laws Amendment (2016 Measures No.2) Act 2017* (Cth) (Act No.15). Useful background to the remedial power (including earlier discussions of Recommendation 24 in the Tax Design Review Panel Report *Better Tax Design and Implementation* (2008) and the Treasury paper on 'An "Extra-Statutory Concession" Power for the Commissioner of Taxation' (17 July 2009), as well as a consideration of possible alternatives is contained in the 'Regulation Impact Statement'. See also Nicole Wilson-Rogers 'A Proposed Statutory Remedial Power for the Commissioner of Taxation – A Henry VIII Clause to benefit taxpayers?' (2016) 45 *Australian Tax Review* 253.
19 The Tax Objection characterised the remedial power as 'not unlike the scope the High Court afforded to courts in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] 147 CLR 297; 'A new statutory remedial power for the Commissioner of Taxation' 7 April 2016, 1 <http://thetaxobjection.com/new-statutory-general-discretion-commissioner-taxation-proposed-div-370-remedial-power/>. See also Tamara Cardan, 'New remedial power for the Commissioner will benefit taxpayers' (4 October 2016) <http://www.wolterskluwercentral.com.au/tax/income-tax/new-remedial-power-commissioner-will-benefit-taxpayers/>.

> also, where appropriate, allow for some minor technical corrections to be addressed … where, due to their relatively low priority, this may not otherwise occur.[20]

The Commissioner can either introduce a modification of his own motion, or else (probably more commonly) act in response to a request by an affected party,[21] and a modification will apply generally, unless it states that it only applies to a specified class of entities or specified circumstances.[22] The Commissioner cannot use the Remedial Power to modify the operation of a taxation law for a single entity.[23]

To help the Commissioner determine, among other things, when it is appropriate to exercise the Remedial Power, an expert panel is to be created (the issue of adequate consultation is discussed below).

Australia is not the only jurisdiction to have grappled with such issues. New Zealand faced a similar issue in 2016, when its government was considering a means by which their Commissioner of Inland Revenue ('IR') could achieve 'greater administrative flexibility in limited circumstances'[24]. New Zealand considered the implications of developing a Remedial Power along the Australian lines, but rejected this approach[25], preferring to expand their IR's discretionary 'care and management' powers in ss 6 and 6A of their *Tax Administration Act 1994* (NZ) to cover a range of specified areas[26].

III Costs Imposed by the Exercise of the Remedial Power

A *Practical And Political Costs*

While the Remedial Power has obvious benefits, it imposes a range of costs on various parties, ranging from 'adjustment' costs for taxpayer and their advisers as they endeavour to understand the Remedial Power process and the implications for them of any particular modifications (because the modification of existing complex provisions will mean that taxpayers and advisers will have to grapple with the interaction of the two sets of provisions[27]), to the costs to all parties of community consultation and input[28].

The ATO plans to reduce at least some of these costs by 'building familiarity' with the operation of the Remedial Power through online and physical, communication and consultation.[29]

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20 EM to the Bill [1.22]. An example of a putative legislative instrument under the Remedial Power is set out at pages 34-39 of the EM to the Bill.

21 For example, the Association of Superannuation Funds of Australia applied on 10 May 2017, for exercise of the Remedial Power in relation to transitional Capital Gains Tax relief for unsegregated funds: see Fiona Galbraith (Director, Policy, The Association of Superannuation Funds of Australia), 'Letter to Australian Taxation Office Assistant Commissioner Jason Lucchese', 10 May 2017. The Institute's submission incorporates the ATO's pro-forma application form.

22 Sec 370-5(3).

23 EM [1.54]; note [1.55].

24 Inland Revenue Ta Tari Taake New Zealand Tax Policy, 'Chapter 6 – Role of the commissioner and design of a new Tax Administration Act', 2016 <http://taxpolicy.ird.govt.nz/publications/2016-dd-mts-7-tax- administration/chapter-6>.

25 Ibid 5 on the basis that the Australian approach was 'shaped by the relevant context' including difficulty in passing legislation because of the Australian parliamentary structure, which did not apply in NZ.

26 Including minor or transitory legislative anomalies, areas where a statutory rule is difficult to formulate, long-standing practices accepted by both IR and taxpayers, and cases of 'unfairness at the margins': above, n 25, 2-3.

27 EM [1.157].

28 EM [1.154]-[1.156]; see also [1.159].

29 EM [1.158].

There will also be costs to government in: overseeing the introduction of a modification, monitoring its ongoing operation and relevance, and tracking and preparing for its 'sun-setting'[30]. There may also be a *political* cost related to implementation of the Remedial Power in that the ATO 'would no longer be able to justify decisions that give rise to unjust tax outcomes on grounds that [it] has no relevant discretionary power under the ITAA36 beyond the limits of the general power of administration'.[31] The ATO (and thus ultimately the government) will therefore in future, be under greater pressure to explain why it has decided (or not decided) to exercise the Remedial Power in a particular case.

B *The Scope Of The Remedial Power Under the Taxation Administration Act 1953 (Cth) And Constraints*

References to legislation in the following segments of this Paper are to the *Taxation Administration Act 1953* (Cth) ('TAA') unless otherwise stated.

1 THE SCOPE OF THE REMEDIAL POWER

The Remedial Power is exercisable in relation to any 'taxation law', and applies to any Act for the whole or part of which the Commissioner has general administration[32]. This would include income tax (including under the *Capital Gains Tax Act 1985* (Cth) ('CGT 1985')), superannuation, the *Goods and Services Tax Act 2000* (Cth) ('GST 2000), the *Fringe Benefits Tax Assessment Act 1985* (Cth) ('FBT'), the *Tax Agents Services Act 2009* (Cth) ('TASA'), and excise taxes, among others.

Where the Commissioner shares the general administration of a law with another government agency, it is expected that the Commissioner will consult with the other agency before making a decision about whether or not to exercise the Remedial Power.[33] Giving an administrator such broad quasi or delegated legislative power[34] is a significant step, which might raise potential constitutional[35] and other concerns – and some commentators have been critical of such clauses[36]. However, the approach is not new as the Commissioner has long had power to make regulations under s 266 of the ITAA 1936'[37] and provisions such as ss 655A, 741, and 992B of the *Corporations Act 2001* (Cth), [38] give the Australian Securities Investment Commission

30 The EM suggests that such costs would be 'far less significant than those associated with making changes to the primary law': EM [1.167]. This seems plausible, but it will be interesting to monitor.

31 The Tax Objection, above n 19, 2.

32 Sec 370-5(1) of the *Tax and Superannuation Laws Amendment (2016 Measures No 2) Act*, applying the definition of a "taxation law" in s 995-1(1) ITAA*97*.

33 EM, [1.25].

34 The EM itself characterises the power as "legislative": para [1.19].

35 Nicole Wilson-Rogers, 'The constitutional validity of a statutory remedial power for the Commissioner of Taxation' (2015) *Australian Taxation Review* 44, 242-262.

36 See for example Robin Speed, President of the Rule of Law Institute of Australia, 'Submission to Mr Tom Reid', Law Design Practice, The Treasury, 8 January 2016; Fiona Galbraith, Director, Policy, The Association of Superannuation Funds of Australia, submission to Jason Lucchese, Assistant Commissioner, ATO, 10 May 2017.

37 See, eg, s 24AV ITAA36

38 Such provisions are commonly described as 'Henry VIII' clauses, so called because of that monarch's penchant for using similar powers to override laws made by Parliament – see for example Wilson-Rogers above n 18, 14-18. The other examples cited above n 13, 21-24. See also Stephen Argument 'Henry VIII clauses Fact sheet', paper prepared for the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT (November 2011); Rule of Law Institute of Australia, (Draft) "Henry VIII clauses & the rule of law".

('ASIC') similar powers which have survived High Court scrutiny[39]. For example, ss 926A(1)-(4) of the *Corporations Act 2001* (Cth) state in essence, that the ASIC may:

- exempt a person or financial product or class of persons/products from all or specified provisions to which the section applies;
- declare that relevant provisions apply as if specified provisions were omitted, modified or varied as specified in a declaration; and
- apply an exemption unconditionally or subject to specified conditions[40].

These provisions confer on the ASIC a very broad power to change the legislation's operation in a particular context. The ASIC typically describes its use of the power along the following lines:

> [W]e use our discretion to vary or set aside certain requirements of the law where there is a net regulatory benefit, or where we can facilitate business or cut red tape without harming other stakeholders[41].

The ASIC Commissioner's remedial power was clearly modelled on such provisions, so that given the confirmed constitutional validity of the ASIC powers, the tax Remedial Power seems unlikely to offend constitutional principles[42].

2 CONSTRAINTS ON THE EXERCISE OF THE REMEDIAL POWER

Not surprisingly, exercise of the very broad taxation Remedial Power is subject to a number of constraints, namely:

(a) *The Remedial Power is discretionary, limited to minor technical corrections, and is a measure of last resort*

Clearly, the power is intended to be used only as a last resort, and infrequently – the EM indicated that the Commissioner would be expected to use the Remedial Power no more than 10 times per annum,[43] and only to remedy minor issues – it cannot be used, for example, to alter the purpose or object of a law. The power is *discretionary*, and the Commissioner cannot be forced to exercise the power unless there are extraordinary circumstances. However, there will no doubt be very different views on whether it is appropriate for the Commissioner to exercise their discretion in a particular case, and on what terms. Similarly, the questions of when a technical correction is 'minor', where the boundary lies and what are the criteria, are an amorphous issue

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39 *Capital Duplicators Pty Ltd v Australian Capital Territory (No. 1)* (1992) 177 CLR 248.

40 See ASIC Report 411 'Overview of decisions on relief applications' (February to May 2014)(Sept 2014) 4. Provisions such as s 926A (1) and (2) of the *Corporations Act 2001* (Cth) differ from the tax Remedial Power in that they can be exercised for a particular entity and are limited in terms of the law which can be modified to provisions to which the section applies.

41 Significantly, ASIC Report 506 'Overview of decisions on relief applications (April to September 2016)' (December 2016) 4, observed that [t]he purpose of the report is to improve the level of transparency and the quality of information available about decisions we make when we are asked to exercise ASIC's discretionary powers to grant relief from provisions of the Corporations Act and the National Credit Act'.

42 See Nicole Wilson-Rogers, above n 38.

43 EM [1.152]. Compare Cardan, above n 8 and see also Wilson-Rogers above n 18, 24-25 who speculates that the greatest difficulty in applying the remedial power may be in demonstrating the inconsistency between the underlying policy and the way the law is being applied, given that identifying the policy underlying legislation is 'notoriously problematic'. Wilson-Rogers, above n 18, 24 and below n 75.

on which opinions can be expected to differ on occasion. Unfortunately. the Act and EM do not provide any guidance on this point.

(b) *The Power can only be exercised where the modification proposed would not be inconsistent with the intended purpose or object of the law: s 370-5(1)(a) Tax Administration Act 1953* (Cth) ('TAA')

Under s 370-10(a)-(c) of the TAA, in ascertaining the intended purpose of a provision, the Commissioner *must* examine (to paraphrase):

- Any documents that may be considered pursuant to s 15AB(2) of the *Acts Interpretation Act 1901* (Cth)[44] – but for the purpose of ascertaining the intended *purpose* of the legislation, not the *meaning* of a provision;
- Any other material that would assist in determining the intended purpose, 'whether or not that material forms part of the provision in question'. This would include for example, government announcements and releases, as well as the 'full legislative history' of the provision from its inception; [45] and,
- *may* give consideration to the text of a relevant provision, though the text need not be given 'primacy' in that process.

The test for inconsistency with the provision's object or purpose is objective, and ultimately a court would have to decide the issue if an exercise of the Remedial Power were challenged, for example by competitors who could establish standing,[46] but did not fall within the modification and were therefore disadvantaged. While the power is very broad, if a modification were found by a court to be in fact inconsistent with a provision's object or purpose, the modification would be pro tanto beyond power, and therefore invalid.

It is important to note that the 'intended purpose or object' of a provision for Remedial Power purposes may well be different to what would be determined as the provision's 'purpose or object' through the application of statutory interpretation principles seeking to determine the meaning of that provision[47]. Thus s 370-10(c) of the TAA specifically states that in ascertaining the intended purpose or object of a provision 'primacy is not required to be given to the text of the provision'. That is:

> While the material considered may include the text of the relevant provisions, the focus is on ascertaining the intended purpose or object of the provision (when considered in its broader

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44 Or s 15AB(2) as applied by s 13 of the *Legislation Act 2003* (Cth). Section 15AB(2) sets out a list of the extrinsic material that may be considered in interpreting a provision, and includes materials such as the Explanatory Memorandum of a Bill, and Second Reading speech, committee and Royal Commission reports, among others.

45 EM [1.35]

46 Exploration of this issue is beyond the scope of this Paper, but see, eg, Queensland Public Interest Clearing House Incorporated, 'Standing in Public Interest Cases' (Monograph, July 2005); Joshua D Wilson and Michael McKiterick, 'Locus Standi in Australia – A Review of the Principal Authorities and Where It Is all Going', (Paper presented to the 2010 Conference of the Civil Justice Research Group, The University of Melbourne); Kathleen M Mack, 'Standing to Sue Under Federal Administrative Law' [1986] 16 *Federal Law Review* 319.

47 EM [1.30].

> context), and, unlike in statutory interpretation, does not require weight to be given to the text of the provision. [Schedule 1, item 3, note to paragraph 370-10(c)].[48]

Significantly, the test for application of the statutory Remedial Power is whether the proposed modification would 'not be inconsistent with' the intended purpose or object of the law. This test is broader than a test of whether a modification would be 'consistent with' that purpose,[49] and is intended to cover circumstances where it is 'reasonably clear' that the circumstances which have arisen were not foreseen or contemplated at the time the law was passed, and 'it may reasonably be ascertained that had those circumstances been considered when the law was drafted, the law would have been drafted differently'.[50] While this test rolls off the tongue, it may prove elusive to apply in practice. If Parliament had not foreseen the particular eventuality, any speculation as to whether it might have altered the drafting if it had been informed about the issue, is fraught with uncertainty.[51]

(c) *The Commissioner must also consider the modification to be reasonable, having regard to specified factors: s 370-5(1)(b) TAA*

The factors which the Commissioner is required by s 370-5(1)(b) of the TAA, to take into account are (to paraphrase):

(i) The intended purpose or object[52] of the relevant provision; and also
(ii) Whether taxpayers' costs of complying with the provision are 'disproportionate' to achieving the provision's intended purpose or object[53].

These factors raise a number of difficult issues. In relation to (i) above, examination of background materials and the text of a provision (above), may provide an insight into a provision's general object, but not yield a clear statement of a provision's precise intended purpose in a particular context.

In relation to factor (ii) above, the question of whether costs imposed are 'disproportionate' is also likely to raise difficult questions in some cases. Dictionary definitions are not particularly helpful. The Australian Macquarie Dictionary defines 'disproportionate' simply as 'not proportionate; out of proportion, as in size, number etc', and then defines 'proportionate' as '1. proportioned; being in due proportion; proportional …", and 'proportion' as '1. Comparative relation between things or magnitudes as to size, quantity, number etc; ratio … 2. Proper relation between things or parts … 7. symmetry; harmony; balanced relationship …'. [54]

The Explanatory Memorandum to the Act is silent on the intended scope of 'disproportionate' and does not offer any insights or examples to clarify the application of that term in the context

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48 EM [1.31]. See also the Note to sub-sec 370-10(c), which states that 'Ascertaining an intended purpose or object for the purposes of paragraph 370-5(1)(a) or subparagraph 370-5(b)(i) is not necessarily the same as ascertaining a purpose or object for the purposes of interpreting a provision of an Act'. Similarly, the EM at [1.33] states that 'While the material considered may include the text of the relevant provisions, primacy, or a greater weight, need not be given to the text of the provisions in ascertaining intended purpose or object'.

49 EM [1.27].

50 EM [1.28].

51 Cf Wilson-Rogers, above n 18, 26.

52 As noted above n 18, Wilson-Rogers speculates that the greatest difficulty in applying the remedial power may be in demonstrating the inconsistency between the underlying policy and the way the law is being applied, given that identifying the underlying policy is 'notoriously problematic': Wilson-Rogers, above n 18, 24-25 and below n 75.

53 The EM [1.38] observes that in some cases, one factor may be more relevant than the others.

54 *Australian Macquarie Dictionary*, Macquarie Library Pty Ltd, 1981, 528,1382 respectively.

of the Remedial Power. This leaves the meaning of 'disproportionate' disturbingly vague – and an issue on which reasonable minds may differ.

While the ATO will hopefully publish advice on its interpretation of s 370-5(1)(b) of the TAA, and courts will no doubt establish its boundaries in due course, there will still be considerable scope for disagreement on whether in any particular case, the compliance costs involved will be substantial enough to be 'disproportionate', and lively debates are to be expected. In addition to these prescribed statutory factors, the EM suggests that because the Remedial Power is discretionary – although the TAA 'does not prescribe other matters the Commissioner may take into account'[55] in deciding whether it is 'reasonable' to exercise the Remedial Power – the Commissioner may also choose to take into account a range of other matters including[56]:

- The extent to which the modification is favourable to entities[57];
- Whether a modification would lead to asymmetrical outcomes;[58]
- The extent to which the modification has an adverse direct effect on the tax rights, obligations and liability of many third parties[59];
- The impact on any current judicial interpretation of the relevant law[60]; and
- Whether the proposed modification reflects systemic issues which would be more appropriately addressed through legislative amendment by Parliament[61].

Despite the EM and the experience with the Australian Prudential Regulation Authority ('APRA') and ASIC, a disgruntled taxpayer might seek to raise the argument that because s 370-5(1)(b) of the TAA specifies the two factors to be taken into account in determining whether a modification would be reasonable (and does not refer to relevant factors as *including* these factors; nor does it include the usual 'any other relevant' factors terminology), the Commissioner may be limited to considering these two factors.

The EM contains examples of situations where it is said that it would be reasonable to apply the Remedial Power.[62] However, the examples given are clear cases – future problems will probably lie closer to the boundaries, and may not lend themselves to such easy analysis. It is worth noting also that if the Commissioner were to decide that an exercise of the power was (or was not) 'reasonable,' where the facts were such that no reasonable person could have reached that conclusion, the Commissioner's exercise of the power might be open to challenge[63].

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55 EM [1.39]

56 EM [1.39]

57 EM [1.40], citing paras [1.56]-[1.64] – for example, if a proposed modification would not be favourable to any entities, it would have no application, and it would therefore not be reasonable to use the Remedial Power in that situation: EM [1.40].

58 EM [1.41], citing the EM [1.56]-[1.64] – it might not be reasonable to make a modification which would lead to asymmetrical outcomes (which would be handled in other ways, either by declining to exercise the power, or by attaching conditions to the application of the modification – see the partnership Example 1.7 (EM [1.66]).

59 EM [1.42]

60 EM [1.43]

61 EM [1.43] – similarly where eg where there are different views on how an issue should be resolved: EM [1.44].

62 For example, Example 1.2 (EM [1.36] – credits for life insurance companies in respect of certain assets held on behalf of policy holders); Example 1.3 (EM [1.36] – denial of loss carry forward to widely held companies with large numbers of small shareholdings where a new holding company is interposed); and Example 1.4 (EM [1.36] – correction of error in wording of FBT in-house residual fringe benefit provision).

63 See e.g. s 5(1)(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

(d) *Advice that the budgetary impact will be negligible: s 370-5(1)(c)*

Prior to exercising the Remedial Power, the Commissioner must be advised by 'any of' the Secretary of the Department of Treasury or the Department of Finance (or an authorised employee of either department) that any impact of the modification on the Commonwealth budget would be 'negligible'. Again, the terms involved are vague. The Australian Macquarie Dictionary defines 'negligible' as 'that may be neglected or disregarded; very little'.[64] In addition, the boundary line may not be easy to discern and will vary from case to case – an amount that might be 'negligible' when dealing with modifications involving millions of dollars, may be very significant when smaller amounts are in issue. No doubt, reasonable minds will differ on where the boundary lies between negligible and non-negligible budgetary impacts in a particular context. The wording of s 370-5(c) also raises the question of what happens if – however unlikely this may be – one of the nominated persons advises the Commissioner that the budgetary impact will be minimal, but another (for example, from a different Department) advises that the impact will be substantial or non-negligible.

(e) *Public Consultation*

Under s 17(1)(a),(b) of the *Legislation Act* 2003 (Cth), before exercising the power to make a legislative instrument, the Commissioner must be satisfied that he has undertaken any consultation that *he considers* 'appropriate'[65] and which is 'reasonably practicable'[66] This may include consultation with the Commissioner's expert Technical Advisory Group[67]. The vague terminology of s 17(1)(b) of the *Legislation Act 2003* (Cth) would give the Minister considerable lee-way to determine what he or she 'considered' to be appropriate and 'reasonably practicable', and such a determination might be difficult to challenge effectively. Moreover, there is the usual provision in s 19 of the *Legislation Act 2003* (Cth), stating that a failure to consult adequately, or at all, 'does not affect the validity or enforceability' of the legislative instrument.

This provision is analogous to s 175 ITAA36 which has been held to insulate decisions against challenge in all but the most extreme circumstances (for example, 'conscious maladministration'.[68])

Specific safeguards:

In addition to the statutory prerequisites above, there are also a number of specific safeguards incorporated in the legislation, designed primarily to ensure that the remedial power is exercised properly and that its use is monitored:

(i) MINISTERIAL REVIEW

Under Schedule 1[69], the Minister can seek a written report reviewing the operation of the Remedial Power provisions within three to five years of the provisions commencing, and must table the report before each House of Parliament within 15 sitting days of receiving it[70]. The power to seek such a report appears to be discretionary rather than mandatory, and presumably, the Minister in the exercise of their discretion, could choose not to seek a report. Even where the

64 Australian Macquarie Dictionary above n 54, 1162.

65 Taking into account the factors listed in s 17(2) and (3) of the *Legislation Act 203* (Cth)),

66 Sec 17 *Legislation Act 2003* (Cth) – the EM at [1.49] also suggests that the Commissioner will consult with a technical advisory group comprising private sector experts, the Department of the Treasury and the ATO, and would also consult any other government agency which jointly administers a particular law (for example, APRA in relation to superannuation laws), and inform the Board of Taxation.

67 Cardan, above n 8, 2-3.

68 *FCT v Futuris Corporation Ltd* (2008) 237 CLR 146.

69 Sched 1, item 4, sub-item (1),(2).

70 Sched 1, item 4, sub-items 1 to 3.

Minister seeks a report, presumably they can stipulate which aspects of the Remedial Power's performance should be 'reviewed'.

(ii) NO ADVERSE IMPACT

A fundamental design feature of the Remedial Power provisions is that a modification will only apply to an entity where it would produce a more favourable result than the pre-existing situation. Under s 370-5(4), an entity must treat a modification as not applying to it and any other entity if the modification would produce a less favourable result for the first entity than the prior law.

In this context, a result will be 'favourable' if the entity's tax liability is reduced, or compliance costs are reduced, or where 'overall, taking into account changes in liabilities and compliance costs, the modification is favourable'. For example, where the tax liability is increased only slightly, but compliance costs are significantly reduced.[71]

The choice of a rule that a modification will not apply where it produces an unfavourable result, rather than a rule that the modification would apply only where it produces a favourable result, was made deliberately to ensure that it covered neutral outcomes[72]. Consistent with the self-assessment system, it is for the entity affected to self-assess whether it must treat a modification as not applying to it (or other entities), because the modification is less favourable to it. Where an entity 'is required to treat a modification as not applying … the Commissioner must also treat the modification' as not applying to the entity[73].

The modification will also apply to other entities for whom the modification produces a not less favourable outcome[74]. That is, the 'adverse impact' test is applied separately to each entity, and the fact that that there is no adverse impact on Entity A will be irrelevant when testing whether it has an adverse impact on (and therefore does not apply to) Entity B. As the EM observes, in classic draftsman style:

> [I]f one entity (the first entity) applied a modification because it was favourable to it, but a second entity would have a less favourable result because of the first entity applying the modification, then the second entity would treat the modification as not having been applied to itself or the first entity. This would be the case even though the first entity had in fact applied the modification (because it was favourable for the first entity). Requiring the second entity to treat the modification as not applying ensures that the second entity is not adversely affected by the first entity's application of the modification.[75]

Thus, for example[76], in relation to GST, if a supply is a taxable supply, the supplier "S" (generally) will be liable to pay GST on that supply, but the acquirer "A" may be entitled to an input tax credit for the GST paid. However, if a modification by the ATO to the operation of the relevant provision treated the supply as not being a taxable supply, this would produce a more favourable result for S, but a less favourable result for A if they can no longer claim an input tax credit in respect of the acquisition. In these circumstances, applying the adverse impact test separately to each entity, S would be able to apply the modification, but A could treat the modification as not applying to it (and S).[77]

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71 EM [1.57]
72 EM [1.60].
73 EM [1.58]-[1.59].
74 EM [1.59].
75 EM, [1.61].
76 The example given in EM [1.62]-[1.64]
77 Thus, the use of 'an *application rule* as opposed to a 'favourable only' limitation would prevent a modification from being found invalid because the modification would be less favourable to one entity in a class': EM [1.125].

(iii) MODIFICATION MAY BE LIMITED

The Commissioner may choose to impose a condition/s on a modification. For example, the modification might be stated only to apply in specified circumstances or to specified groups (or sub-groups) of taxpayers.[78] As noted earlier, the ability for the Commissioner to limit an exercise of the Remedial Power may on occasions create the *appearance* of favouring some taxpayers over others, and there is some weight in the suggestion by the Institute for the Rule of Law[79] that all modifications should be general.

(iv) COURT ORDERS

The Act expressly provides that a modification will not apply where it would affect a right or liability of an entity under a court order such as a judgment, conviction or sentence made before the commencement of the determination.[80] This exception was included with the specific aim of ensuring that the Remedial Power did not offend the separation of powers doctrine.

(v) ANNUAL REPORTING

As an 'ex post facto' safeguard, the Act requires the Commissioner to include in each Annual Commissioner's Report 'information' on the exercise of the Remedial Power[81]. This at least ensures that some relevant information is put into the public domain, though the scope of the required information is not specified. It would have been preferable to specify the minimum topics which the report is required to canvas, perhaps bolstered by a standard overarching clause requiring that the report also address 'all other relevant matters relating to the exercise of the power'.

(vi) REGISTRATION

The legislative instrument making the modification must be registered on the Federal Register of Legislation to be enforceable.[82] While a useful formality, in practical terms, this is unlikely to provide much protection.

(vii) REVIEW, REPEAL OR AMENDMENT

The Commissioner can review a modification where circumstances or legislative provisions change, and can by issuing an appropriate legislative instrument, repeal or amend a Remedial Power instrument: s 370-15(1)-(3). This is a useful provision, which will enable the Commissioner to monitor developments and adapt published modifications to take account of changed circumstances.

As the sunset date for a particular legislative instrument draws near, presumably the Commissioner will review the operation of that instrument to see whether it is still required[83]. Where it is felt that the modification is still required after the statutory 10 year period, the Commissioner can exercise the Remedial Power again and in effect 'remake' the instrument -subject to satisfying the same statutory requirements.

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78 Section 370-5(3)(b). See the examples given in the EM at paras [1.66], [1.67].

79 See the submission by Robin Speed, (President) on behalf of the Rule of Law Institute of Australia, to Mr Tom Reid, Law Design Practice, The Treasury, 8 January 2016, 2-3.

80 Sub-sec 370-5(5).

81 Subsection 3B (1AA)(e) *TAA* .

82 Ss 15H(1), 15K(1) *Legislation Act 2003* (Cth).

83 *Legislation Act 2003 (Cth)* ss 38, 42; EM [1.72]-[1.74]. This will also provide an opportunity consider whether changes should be made to the tax legislation.

(viii) PARLIAMENTARY SCRUTINY AND DISALLOWANCE

A legislative instrument made under the Remedial Power does not take effect until after the expiry of the 'disallowance period' – either House of Parliament[84] can bring a notice of motion to disallow that legislative instrument within 15 sitting days after the legislative instrument is tabled in that House.[85]

This is a useful provision, which means that both Houses of Parliament will have a guaranteed period within which – in theory at least – they can review the modification, seek input from expert or affected persons, and reach an informed view on whether the modification should be disallowed. The disallowance period of 14 days, while delaying the operation of the instrument, is unlikely in the ordinary case, to be significant, given the time that the creation and introduction of such instruments is likely to take.[86] There may however, prove to be an issue as to how much priority members of Parliament will give to a careful review of such instruments, given limited time, the range of competing issues to which they need to attend, and the higher (political) priority these other issues may carry.

(ix) AUTOMATIC SUN-SETTING

Under s 50(1) of the *Legislation Act 2003* (Cth), a legislative instrument made under the Remedial Power, automatically 'expires' on the first April 1 or October 1, falling on or after the tenth anniversary of registration of the instrument. However, the Attorney-General has a limited power under s 51 to 'defer' the expiry of a legislative instrument for a period.

The policy decision to give such instruments a finite life and require effectively an 'opt-in' approach to extend their currency, is sensible and should prevent the accretion of obsolete provisions which has bedevilled the income tax legislation. It will also mean that – hopefully – careful consideration will be given to the need for renewal of particular modifications, rather than the Commissioner simply 'rolling over' existing notifications automatically.

(x) TRANSPARENT GOVERNANCE PROCESSES

The EM indicates that appropriate processes would be introduced to counter any 'sensitivities around perceptions of an unelected official making the law'[87]. In common with other areas discussed above, these measures are not spelled out in the Act or EM, and precisely how 'appropriate' and useful such processes are, will have to await evaluation of their operation in practice.

Cumulatively, these safeguards provide useful protections against misuse of the Remedial Power, though the fact that the application of the Power depends upon the interpretation of a number of vague and malleable criteria, is perhaps unfortunate, and may reduce their effectiveness as safeguards.

IV CONCERNS ABOUT THE REMEDIAL POWER

The Remedial Power provides a number of benefits, including increasing flexibility, and should enable anomalous outcomes to be corrected without impinging significantly on scarce Parliamentary time. It should also help to reduce the complexity of legislation and arguably

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84 The Senate Standing Committee for the Scrutiny of Bills and Senate Standing Committee of Regulations and Ordinances.

85 Sec 370-20 of the *TAA*, with s 42 *Legislation Act 2003* (Cth).

86 See above n 15. The EM at [1.22] states that it 'is anticipated that [the Remedial Power] will reduce the time it takes to give effect to some minor legislative corrections … [and] may also, where appropriate, allow or some minor technical corrections to be addressed … where, due to their relatively low priority, this may not otherwise occur'.

87 EM [1.168].

improve the transparency of the law.[88] However, the TAA delegates considerable authority to the Commissioner (though the EM describes the proposed Remedial Power as 'not a broad delegation of power allowing the Commissioner to legislate at large').[89] The Government argues that the combination of the limited scope of the Remedial Power, together with the 'clear legislative limitations [and] … parliamentary oversight and scrutiny' will help to ensure the power does not offend the separation of powers doctrine,[90] properly relates to taxation, and cannot be exercised arbitrarily.[91] Nevertheless, the EM does note that:

> There could be the risk of adverse public perception that the Commissioner, being an unelected official, has the power to change taxation laws. Such a perception may undermine confidence in the taxation system. Another risk could be public perception that lobby groups influence issues which are considered …[92]

These are real concerns. Not surprisingly, therefore, despite the numerous safeguards built into exercise of the remedial power, there have been a variety of concerns expressed in relation to the scope of the power. The Rule of Law Institute of Australia, for example, was concerned that the Commissioner's power to limit the application of a determination to a specified class of entities or specified circumstances, undermines the principle that laws are to be applied equally and fairly, not capriciously or arbitrarily.[93] The Institute's concern was that this 'deviates from the equal application of laws, and raises the possibility of the … Remedial Power being exercised in a preferential or discriminatory manner' because any modification of the law which is favourable to one taxpayer may disadvantage those who are subject to the 'unmodified' law.[94] The Institute therefore recommended that all modifications apply generally, that is, to all relevant taxpayers.

The Institute's concern seems to have some justification – it was only a few years ago that the ATO ruling system was improperly manipulated by a senior ATO staff member to the advantage of particular taxpayers. Presumably, the Remedial Power process will be more public, and if ATO staff used the power intentionally to unfairly advantage one taxpayer/sector, that exercise could be more easily monitored and perhaps challenged by affected persons.[95]

Nevertheless, the Institute had suggested that:

> The reporting mechanisms for the Remedial Power need to be strengthened, to maintain transparency and accountability and ensure that the exercise of the power is open to informed public scrutiny.[96]

The Institute therefore recommended that the Commissioner be required to include in their annual report on the use of the Remedial Power: information on what issue arose with the original provision which required the Remedial Power's use, what steps were taken to resolve that issue before resort was had to the Remedial Power, what public consultation was undertaken, and why the Commissioner considered that the determination made was reasonable.

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88 Other benefits are suggested by Wilson-Rogers, above n 18, 34-43.
89 EM [1.127].
90 Compare Wilson-Rogers, above n 18.
91 EM, [1.127]-[1.129].
92 EM [1.198]
93 Covering letter, submission to the Treasury, 8 January 2016.
94 The Rule of Law Institute of Australia, Submission to the Treasury, 8 January 2016.
95 Above n 45.
96 Above n 85.

Clearly, as noted earlier, s 3B(1AA)(e) of the TAA requires that the Commissioner 'set out information' on any exercise of the Remedial Power in the Commissioner's Annual Reports[97]. However, the section does not specify the required scope and depth of such 'information', and it will be interesting to see if the ATO publishes all the information sought by the Institute.

In a similar vein to the Institute, Wilson-Rogers argued[98] that giving such broad quasi-legislative power to the unelected Commissioner and thus to the executive, creates a number of potential risks, including:

(i) *Impact On The Rule Of Law And The Separation Of Powers Doctrine*[99].

This concern reflects the view that '[b]road discretions represent the antithesis of the rule of law'[100], and the fear that '[e]xcessive delegation of legislative power to the executive defeats the purpose of the separation of powers doctrine and may threaten the rule of law by allowing the executive branch to subject the law to its capricious will'.[101]

On the other hand, in the context of the Remedial Power provisions, there is the requirement that all exercises of this Power must be brought promptly before Parliament, are subject to disallowance within 15 sitting days, and do not begin to operate until after the expiry of the disallowance period. This should mean that Parliament retains ultimate control and oversight of the process – subject to the concern expressed above, that competing political pressures may result in such matters being accorded a low priority.

(ii) *The Potential For Abuse*

The protections (above) built into the Remedial Power process might be thought to provide sufficient protection against abuse. However, giving what is effectively legislative power to a non-elected individual is not without risk, because it raises the potential for discriminatory application of the power (as occurred with the abuse of the ATO private rulings system some years ago by a senior ATO officer) and more recently, with leaking of confidential information about criminal investigations[102]. No doubt, those indirectly disadvantaged by the exercise (for example, because others are given a benefit denied to them) might seek legal redress where possible,[103] or alert their parliamentary members and business bodies, to the problem

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97 Section 3B (1AA)(e) of the *Taxation Administration Act* 1953 (Cth), as amended, provides that the Commissioner must, in the Annual report to Parliament, among other things, 'set out information on the exercise during the year of the Commissioner's powers under Subdivision 370-A in Schedule 1 (Commissioner's remedial power).'

98 Wilson-Rogers above n 18, 6-12.

99 See Wilson-Rogers, above n 18, 6, 18-43.

100 Wilson-Rogers, above n 18, 19.

101 At one extreme, this approach of broad delegations to bureaucrats has been described as 'the new Despotism', and some fear that it may (eventually) 'subordinate Parliament … evade the courts, and … render the will or the caprice, of the Executive unfettered and supreme': Lord Hewart of Bury, *The New Despotism*, quoted by Wilson-Rogers above, n 18), 21. While overstated in the context of the Remedial Power, the essence of the view has some force. See also Suri Ratnapala, Thomas John, Vanitha Karean and Cornelia Koch, *Australian Constitutional Law: Commentary and Cases* (Oxford University Press, 2007) 43. Compare the observation of Denise Meyerson, quoted by Wilson-Rogers, above n 18, 21: 'if we allow the unlimited transfer of legislative power to the executive we run the risk of subverting the rule of law ideal, fundamental to the control of government, that those who carry out the law should be restrained by those who make it'.

102 'Tax fraud scandal: ATO chaos as deputy Michael Cranston charged', *The Australian*, May 19, 2017.

103 See above n 50.

(however much use that might actually prove to be). This is an aspect that would need to be carefully monitored.

(iii) *Possible Increased Uncertainty*

Increased uncertainty might result from the need to refer to two pieces of legislation (one of which is highly discretionary) instead of one, in order to determine the meaning of the 'modified' provision. However, in a landscape currently inhabited by ATO Public and Private rulings, determinations, Law Administration Practice Statements ("LAPS"), Law Companion Guidelines ("LCG"), Practical Compliance Guidelines ("PCG), guidelines and the like, the addition of one more layer is unlikely to be a major problem.

V Conclusion

In an ideal world, a body of examples of the exercise of the Remedial Power would develop reasonably quickly, which would enable its operation and any concerns emerging from its operation, to be evaluated in a more informed way. However, given the direction that the Remedial Power is to be exercised 'infrequently', we may have to wait patiently while a body of jurisprudence develops. A the time of writing, the Remedial Power has been exercised on only one occasion[104].

In the meantime, we can conclude that conceptually, the Commissioner's statutory Remedial Power is rather like the Curate's egg – good and bad in parts. On the one hand, the Remedial Power offers some very positive benefits as it provides a speedier solution to an important problem – taxpayers being treated unfairly because legislative provisions on occasions do not achieve their intended purpose. It also enables scarce Parliamentary time to be devoted to broader macro-level issues, and it contains a number of procedural requirements and safeguards which represent genuine attempts to ensure that the provisions operate fairly and are not manipulated improperly.

On the other hand, there are some worrying aspects: the Remedial Power locates significant *discretionary* quasi-legislative power in an unelected bureaucrat, creating tensions with the principles of the Rule of Law and Separation of Powers doctrine – fundamental principles of our democratic system. The Remedial Power also opens up the *potential* for abuse. Hopefully, the constraints and safeguards in the process will minimise this risk, though as the private rulings imbroglio (above) and more recent events[105] show, this cannot be dismissed as a possibility.

Potentially, the Remedial Power seems likely to offer more benefits than problems, and as time passes, the meaning of vague terms such as 'disproportionate' and 'negligible' will – hopefully become clearer in this context, and the operation of the regime will thus become more certain and predictable. However, it is far too early to reach a conclusion on the Remedial Power, and it will be interesting to look back in a year's time or so, to evaluate how well it has operated in practice, and whether some of the concerns expressed above, have heightened or abated.

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104 As at 30 October 2017, the Remedial Power has been exercised on only one occasion: Taxation Administration (Remedial Power – Foreign Resident Capital Gains Withholding) Determination 2017 (F2017L00992).

105 'Tax fraud scandal: ATO chaos as deputy Michael Cranston charged', *The Australian* (Australia), 19 May 2017. <http://www.theaustralian.com.au/national-affairs/treasury/tax-fraud-scandal-ato-chaos-as-deputy-michael-cranston-charged/news-story/44cb4097db4b69679a0e83d3ed4b91bd>.