



RULE OF LAW
INSTITUTE OF AUSTRALIA

info@ruleoflaw.org.au

www.ruleoflaw.org.au

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Mr Tom Reid
Law Design Practice
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Mr Reid

Submission regarding the Commissioner of Taxation's power to modify taxation laws

The Rule of Law Institute of Australia thanks the Treasury for the opportunity to make a submission regarding the Exposure Draft of the Commissioner of Taxation's planned Remedial Power.

The Institute is an independent, non-partisan, not-for-profit body formed to promote and uphold the rule of law in Australia.

The Patron of the Institute is the Honourable James Spigelman AC QC, and the Governing Committee includes Richard McHugh SC, Professor Geoffrey de Q. Walker, David Lowy AM, Nicholas Cowdery AM QC, Professor Martin Krygier, and Hugh Morgan AC.

The objectives of the Institute include promoting good governance in Australia by the rule of law, and encouraging transparency and accountability in State and Federal government.

The Commissioner's planned Remedial Power raises a number of potential rule of law issues. Nevertheless, we are encouraged by the safeguards built into the Exposure Draft of the legislation.

However, we believe that the Commissioner's power to limit the application of a determination undermines the principle that laws are to be applied equally and fairly.

We also believe that the reporting mechanisms surrounding the Remedial Power should be strengthened, in order to maintain transparency and accountability.

As Lord Chief Justice Hewart noted in *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256:

Not only must Justice be done; it must also be seen to be done.

Please find our submission enclosed.

Yours faithfully

Robin Speed
President

Submission Regarding the Commissioner of Taxation's Planned Power to Modify Taxation Laws

I. Introduction

The Rule of Law Institute of Australia thanks the Treasury for the opportunity to make a submission regarding the Exposure Draft of the Commissioner of Taxation's planned Remedial Power.

The Institute is an independent, non-partisan, not-for-profit body formed to promote and uphold the rule of law in Australia.

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The objectives of the Institute include promoting good governance in Australia by the rule of law, and encouraging transparency and accountability in State and Federal government.

II. Safeguards built into the Commissioner's Remedial Power

The Institute notes that the Commissioner's planned Remedial Power raises a number of potential rule of law issues, as must any attempt to allow an unelected official to modify the impact of legislation on particular sections of the community.

Nevertheless, the Institute is encouraged by the safeguards built into the planned Remedial Power, both as contained in the Exposure Draft, and as drawn from extant legislation. The Institute notes that these safeguards include that:

1. The Commissioner must first consider whether the issue with the provision may be resolved by (a) applying purposive statutory interpretation principles to the provision, or (b) by using the Commissioner's general powers of administration of the relevant Act to seek an outcome

- consistent with the purpose or object of the provision, or even (c) if the issue is better dealt with by seeking parliamentary amendment of the primary legislation;
2. The Commissioner must undertake such public consultation on the determination as he considers to be appropriate and reasonably practicable to undertake, as required by the Legislative Instruments Act 2003 (Cth);
 3. The determination must not be inconsistent with the purpose or object of the provision;
 4. The Commissioner must consider the determination to be reasonable, having regard to (a) the purpose or object of the provision, and (b) whether the cost of complying with the provision is disproportionate to that purpose or object;
 5. The Commissioner must be advised that the impact of the determination on the Commonwealth budget would be negligible;
 6. The determination must be tabled in Parliament, may be disallowed during a period of 15 sitting days after that date, may not commence until the 15-day deadline has passed, and must be registered before it may be enforced, as required by the Legislative Instruments Act 2003 (Cth);
 7. The determination has no application where it would affect a right or liability of an entity under an order of a court made before the commencement of the determination;
 8. A determination must be treated by an entity as not applying to that entity, if the determination would produce a less favourable result for the entity;
 9. The determination is automatically repealed (sunsetting) after five years; and
 10. The determination is open to challenge in courts and tribunal, as is any legislative instrument.

The Institute appreciates the steps taken in the Exposure Draft to limit the impact of the Commissioner's planned Remedial Power, and the conscious effort to balance policy efficacy with respect for the rule of law.

Together, these safeguards provide some assurance that the Remedial Power will not be exercised in a manner that undermines parliamentary sovereignty, the consistent application of the legal taxation regime, the separation of powers, parliamentary control over public resources, or the principle against arbitrary use of power.

III. Capacity for preferential use of the Remedial Power

The Institute notes, however, that section 370-5(3) of the Exposure Draft anticipates the Commissioner being able to limit the scope of a determination to a specified class of entities, or specified circumstances.

It is a key principle of the rule of law that legislation is to be applied equally and fairly, ensuring that power is not exercised in a capricious or arbitrary manner. Indeed, paragraph [1.51] of the Explanatory Material recognises as much, saying, "having the Remedial Power apply broadly...ensures that the power properly relates to taxation and prevents it from being exercised in an arbitrary way."

The Institute considers that, as currently phrased, section 370-5(3) does not meet this principle of equal application of laws, insofar as it permits the Commissioner to identify a specified class of entities, or specified circumstances, for which a determination may operate. This deviates from the equal application of laws, and raises the possibility of the planned Remedial Power being exercised in a preferential or discriminatory manner. This is so, notwithstanding the 'no less favourable' test of section

370-5(4), as any modification of the law which is favourable to one may produce an unfavourable effect on the rest who are subject to the law unmodified.

Further, the Institute agrees with the view expressed in paragraph [1.51] of the Explanatory Material that the broad application of the planned Remedial Power “ensures that its use is consistent with the requirements of the Constitution.” Section 370-5(3), as currently phrased, undermines this broad application.

Recommendation 1

Accordingly, the Institute recommends that section 370-5(3) of the Exposure Draft be amended as follows, or similar:

- (3) A modification applies generally, ~~unless the determination states that the modification only applies:~~
- ~~(a) To a specified class of entities; or~~
 - ~~(b) In specified circumstances.~~

IV. Minimal reporting mechanisms

The Institute also notes that there are minimal safeguards concerning the transparency of, and accountability for, the use of the planned Remedial Power.

The Institute notes, for example, that the Australian Securities and Investments Commission regularly reports on the use of their relief powers, including their power under section 926A of the Corporations Act 2001 (Cth) to exempt persons or products from the operation of that Act, or to modify the application of that Act.¹

The Institute considers that transparency and accountability are integral values to the rule of law, and any power to modify the operation of legislation for particular sections of the community must be open to public scrutiny.

Informed public debate about the operation of powers like the Commissioner’s planned Remedial Power requires access to evidence and materials that reflect the manner in which such a power has actually been exercised. This is the foundation of evidence-based policy-making, and a robust civil society requires access to such information.

Further, such measures of transparency and accountability would help to ensure public confidence in the operation of the Commissioner’s planned Remedial Power.

Recommendation 2

Accordingly, the Institute recommends that the Commissioner of Taxation report annually on the uses of the Remedial Power, indicating at least:

¹ See, for example, ASIC Report 449, Overview of decisions on relief applications (February to May 2015), accessed at <<http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-449-overview-of-decisions-on-relief-applications-february-to-may-2015/>>

1. What issue arose with the original provision, which indicated to the Commissioner that the Remedial Power perhaps ought to be exercised;
2. What steps were taken to resolve that issue, prior to the Commissioner deciding to exercise the Remedial Power;
3. What public consultation, if any, was undertaken; and
4. Why the Commissioner considers the determination to be reasonable.

V. Conclusion

The Institute is encouraged by the safeguards built into the planned Remedial Power, both as contained in the Exposure Draft, and as drawn from extant legislation.

However, the Institute considers that the Commissioner's power to limit the application of a determination undermines the principle that laws are to be applied equally and fairly.

The Institute also considers that the reporting mechanisms surrounding the planned Remedial Power must be strengthened, in order to maintain transparency and accountability.