



28 February 2022

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

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

Dear Sir/Madam,

**SMSF ASSOCIATION SUBMISSION – THE EXERCISE OF THE COMMISSIONER’S REMEDIAL POWERS**

The SMSF Association welcomes the opportunity to provide this submission in response to the Inspector-General of Taxation and Taxation Ombudsman’s review of the Commissioner’s Remedial Power.

We acknowledge that the Commissioner's remedial power (CRP) is a discretionary power of last resort. That its intended use is limited to where a law change is required to address circumstances where the law is not operating as intended.

Presently there is no transparency on when a matter is referred for consideration under the CRP. Once referred, consultations are limited and are not undertaken widely. Where the decision is made to not to use the CRP, the date the decision is made is not published and only very limited reasons are provided.

There needs to be greater clarity on when a matter is referred for consideration, the consultation process, and when a decision is made and why.

We are seeing an increase in legacy issues arising where decisions are made to not use the CRP and instead opting to wait for legislative change.

An example of this is where urgent relief is needed in relation to the commutation of market linked pensions. This is referred to as the *‘Debit value for certain capped defined benefit income streams’* in the online register of matters where CRP has been considered but not applied (ATO QC 58416).

Issues arose due to the untinted operation of the law resulting from legislative changes that came into effect on 1 July 2017.

The issue was considered by the CRP panel. However, a legislative solution was chosen to be pursued instead. Whilst there was limited industry consultation through professional associations on the issue at hand, there was no formal consultation on the use of the CRP.

There is no transparency on when the matter was referred to the CRP and at what point in time the decision was made to wait for a legislative change.



A legislative fix addressing the gap on the calculation of the exit value of the pension received Royal Assent in June 2020. An updated formula was inserted into the *Income Tax Assessment Act 1997*, remediating this part of the issue.

However, problems persist where a member has commuted and restarted certain market-linked, life expectancy pensions and similar products from 1 July 2017 and who have an excess transfer balance cap. Due to the nature of those superannuation accounts, an amount cannot be commuted to comply with the transfer balance cap rules.

An announcement to address the issue was made in the 2021 Mid-Year Economic and Fiscal Outlook – Budget papers, published in December 2020: *Superannuation – amendments to commutations rules for certain income stream products*.

Draft legislation was issued for consultation in late 2021.

We do not anticipate seeing any legislative change for some time. A Bill has not been introduced to the Parliament. A Federal election is soon to be called with very few sitting days remaining. Further delays will occur post-election regardless of the outcome. This will be further exacerbated if there is a change of Government. Legislative change does not appear to be on the horizon at any time soon.

It has been acknowledged by the ATO that this issue is a result of an unintended consequence from the drafting of the law. The law does not operate as was intended and falls within the remit and object of the CRP.

This issue is causing significant problems for those with market linked pensions who are seeking to exit their SMSF and need to cease their current pensions, rollover to a larger fund and commence a new market linked pension.

The current law is unworkable and has needed urgent relief since July 2017. Given the:

- ages of the members involved;
- the gross distortions created from unintended consequences;
- the compounding impacts due to the protracted time frames; and
- the matter is still not resolved under the legislative pathway

we consider this to have been an ideal candidate for the use of the CRP.

There is a need for the full impacts of choosing to not apply the CRP to be considered. Further, where a decision is made to await legislative change, the matter must be regularly reviewed, in the context of the time horizon for legislative change. A matter should be able to be re-opened for consideration where that legislative relief does not occur in a timely manner.

Where the decision to use the CRP is made, we acknowledge that an established consultation process occurs. Proposed legislative instrument and its supporting explanatory statement are published for broader consultation.

We are of the opinion that the CRP processes are not widely known or understood across the tax practitioner community. Increased consultation and engagement during the ‘consideration’ phase,



would go some ways to increasing practitioner awareness on the availability and operation of the CRP.

If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Peter Burgess', written over a faint circular watermark or background.

Peter Burgess  
Deputy CEO/Director of Policy and Education  
SMSF Association

#### **ABOUT THE SMSF ASSOCIATION**

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than \$820 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.