

# An 'extra-statutory concession' power for the Commissioner of Taxation?

Discussion paper

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## Background

1. The Tax Design Review Panel was appointed in February 2008 by the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, to examine how to reduce delays in introducing tax legislation, and how to improve the quality of changes to the tax laws. It reported to the Assistant Treasurer on 30 April 2008.<sup>1</sup> The Assistant Treasurer published the report on 22 August 2008 and announced the Government's support in principle for all its recommendations.<sup>2</sup>
2. The Tax Design Review Panel heard during consultation that many of the problems taxpayers experience in meeting their taxation obligations were due to relatively minor anomalies and unintended outcomes in the laws. It was claimed that the process of legislative amendment takes too long and, in the interim, leaves the operation of the law uncertain.<sup>3</sup> A suggestion put to the Panel was that these problems would be solved if the Commissioner had greater power to administer the law in a flexible way to deliver sensible and pragmatic outcomes.<sup>4</sup>
3. The Panel did not have time to examine this issue in detail and, accordingly, did not reach a concluded view on the idea. However, the Panel did make this recommendation:

### **Recommendation 24: Investigate powers to grant extra-statutory concessions**

The Government should consider whether the Commissioner of Taxation should be given further power to modify the tax law to give relief to taxpayers, or whether there are preferable ways in which the Commissioner could provide extra-statutory concessions in appropriate circumstances.<sup>5</sup>

4. This paper canvasses the issues associated with providing such a power. The community's views are sought on whether there should be such a power and, if so, what form the power should take and what limits there should be on its exercise.
5. Submissions may be emailed to: [extrastatutoryconcessions@treasury.gov.au](mailto:extrastatutoryconcessions@treasury.gov.au)

or posted to:

The General Manager  
Tax Design Division  
The Treasury  
Langton Crescent  
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6. Submissions must be received on or before 10 July 2009.

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1 Tax Design Review Panel, *Better Tax Design and Implementation*, 2008. The report can be found on the Treasury website at: [http://www.treasury.gov.au/documents/1342/PDF/tax\\_design\\_review\\_panel\\_report.pdf](http://www.treasury.gov.au/documents/1342/PDF/tax_design_review_panel_report.pdf).

2 Media Release 2008/069: *Release of Tax Design Review Panel's Report Better Tax Design and Implementation*. <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/069.htm&pageID=003&min=ceb&Year=2008&DocType=0>.

3 See, for instance, the submission from Ernst & Young of 28 March 2008, at p 6, [http://www.treasury.gov.au/documents/1363/PDF/Ernst\\_Young.pdf](http://www.treasury.gov.au/documents/1363/PDF/Ernst_Young.pdf).

4 Tax Design Review Panel, at p 40.

5 Tax Design Review Panel, at p 41.

7. Your submission (along with your name and address details) will be published on the Treasury website unless you expressly request that the submission (or some specified part of it) be kept confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose.
8. You should be aware that Treasury may be required to release some or all of your submission because of obligations imposed by the *Freedom of Information Act 1982* or other laws.
9. Submissions may be lodged by email or post, but electronic lodgement is preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

## DISCUSSION

### What is an extra-statutory concession power?

10. An extra-statutory concession power, of the sort contemplated by the Tax Design Review Panel, would grant the Commissioner of Taxation a legislative, or quasi-legislative, power to modify the tax laws. That is, the power would enable the Commissioner to actually *alter* the law, not merely to administer or interpret the laws passed by the Parliament.
11. The scope of the power would be subject to limits imposed by the Parliament. For instance, the parts of the law within which the power could be used might be expressly set out, or the ways in which the power could be used, or the factors the Commissioner should have regard to in exercising the power, could be included in the empowering legislation. One such limit expressly included within the Panel's recommendation was that the power should only be able to be used for the benefit of taxpayers. A limit implicit in its discussion of the issue was that the power should only be exercisable to correct anomalies or defects in the law.
12. Whatever limits the Parliament might set on the Commissioner's exercise of the power, the essence of the proposal is that the Parliament would delegate to the Commissioner a power to do what could otherwise only be done by an Act of the Parliament.

### What can the Commissioner do within existing powers?

13. In considering the merits of an additional power to allow the Commissioner to vary the tax laws, it is useful to consider the scope of the Commissioner's existing powers and how they differ from an extra-statutory concession power.

### General power of administration

14. The Commissioner has the general administration of the tax laws. This empowers the Commissioner to do whatever is fairly regarded as incidental to, or consequential upon, the things the law requires or authorises the Commissioner to do. It is based on the view that, to administer the tax laws efficiently, the Commissioner must make judgments and take actions that are not necessarily spelt out in detail in the laws. For example, the general administration power allows the Commissioner to decide which taxpayers to audit and when, whether to settle a tax dispute and on what terms, and whether to issue a public ruling.
15. The general administration power can be used to achieve outcomes that benefit taxpayers – a famous British case<sup>6</sup> held that a decision to agree not to audit particular taxpayers for past behaviour in return for their undertaking to behave properly in the future was a legitimate use of such a power.
16. This power is different from a power to grant extra-statutory concessions because it only grants the Commissioner a discretion in administering the tax laws; it does not authorise the Commissioner to change, or disregard, those laws.

### The rulings system

17. Since 1992, many Commonwealth tax laws have been covered by a rulings system under which the Commissioner advises taxpayers about his or her interpretation of the law.

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<sup>6</sup> *R v Inland Revenue Commissioner; ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617.

Taxpayers are able to rely on the Commissioner's interpretation even if it proves to be wrong. That is, taxpayers affected by a particular ruling can treat it as representing the law, or they can rely on the actual law if that is different.<sup>7</sup>

18. In some cases, the Commissioner is able to interpret the law in a way that avoids a suspected defect and taxpayers would be able to obtain the certainty they require by seeking a ruling that would bind the Commissioner. But the Commissioner cannot interpret the law to avoid a clear consequence, even if that was not the result intended by the Parliament. The Commissioner's duty is to apply the law as it stands and, where appropriate, draw the Government's attention to instances where the law may not be achieving what the Parliament intended.<sup>8</sup> That is the key difference between the binding rulings power and a power to grant extra-statutory concessions: the rulings power is to *interpret* the existing law but the extra-statutory concession power would be a power to *change* the existing law.

## How could an extra-statutory concession power be implemented?

19. There are several possible models for implementing such a power. The Tax Design Review Panel noted that there were precedents for giving administrators a power to grant extra-statutory concessions of the sort proposed by those the Panel consulted. It noted the British practice and the legislative powers granted to the Australian Prudential Regulation Authority (APRA) and also the Australian Securities and Investments Commission (ASIC), which allow those administrators to exempt people from certain provisions of the *Superannuation Industry (Supervision) Act 1993* and the *Corporations Act 2001*.
20. For many years, the United Kingdom revenue authority operated a system where certain problems in the tax law were dealt with by extra-statutory concessions that the revenue authority developed and published. For some time, the approach appeared to work well enough in practice and not to have attracted significant criticism.
21. However, in 2005 the House of Lords ruled in *R v Inland Revenue Commissioners; ex parte Wilkinson* that the practice was not lawful. Lord Hoffman said that the discretion granted by the general administration power 'does not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which the Parliament could have granted but did not grant ...'.<sup>9</sup>
22. The United Kingdom revenue authority has consulted on which of its extra-statutory concessions should be legislated.<sup>10</sup> It follows that the United Kingdom is now in broadly the same position as Australia.
23. The other three examples noted by the Tax Design Review Panel are Australian examples that establish a power legislatively, so avoiding the problem encountered in the United Kingdom. The examples cited were section 741 of the *Corporations Act 2001*, Part 29 of the *Superannuation industry (Supervision) Act 1993* and section 29-25 of the *A New Tax System (Goods and Services Tax) Act 1999*.
24. Section 741 of the *Corporations Act 2001* empowers ASIC to exempt a person or class of persons from the fundraising and disclosure provisions in Chapter 6D of that Act, or to vary the way those provisions apply to that person or class. Similar provisions can be found in

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<sup>7</sup> See section 357-60 of Schedule 1 to the Taxation Administration Act 1953.

<sup>8</sup> See Quigley B, *The Commissioner's powers of general administration: How far can he go?*, Address to the Taxation Institute of Australia, March 2009, pp 5-6.

<sup>9</sup> *R v Inland Revenue Commissioners; ex parte Wilkinson*; [2005] UKHL 30 at paragraph 21, [2006] 1 All ER 529 at p 536.

<sup>10</sup> See: [http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageExcise\\_ShowContent&propertyType=document&columns=1&id=HMCE\\_PROD1\\_028967](http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?nfpb=true&pageLabel=pageExcise_ShowContent&propertyType=document&columns=1&id=HMCE_PROD1_028967).

other parts of the Corporations Act (see, for example, sections 655A, 926A, 992B and 1020F). ASIC's powers to vary the law under those provisions are wide but apply only to specified parts of the Corporations Act rather than to that whole Act.

25. A declaration under section 741 must be published in the Commonwealth *Gazette*.<sup>11</sup> A declaration made in relation to a class of persons is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.<sup>12</sup> Therefore, such a declaration is disallowable by either House of the Parliament within 30 sitting days of being tabled.<sup>13</sup> A declaration that only applies to a specified person is *not* a legislative instrument.<sup>14</sup> Making such a declaration is therefore an exercise of administrative discretion and is reviewable by the Administrative Appeals Tribunal.<sup>15</sup>
26. Section 741 of the *Corporations Act 2001* therefore provides a model for two broad approaches to providing the Commissioner with a power to grant extra-statutory concessions: first, a power that is exercised by way of a legislative instrument disallowable by the Parliament and, second, and a power that is exercised by administrative discretion reviewable by the Administrative Appeals Tribunal.

### The legislative instrument model

27. The legislative instrument model essentially delegates to the Commissioner a power to make subordinate legislation. It would provide the Commissioner with a power to make a legislative instrument that varied the way a tax law applied to taxpayers generally or to a class of taxpayers.
28. In theory, such a power could be drafted to permit a variation of the law for a particular named taxpayer, as does the power granted to ASIC by the Corporations Act. However, the High Court's view is that taxes must be imposed by reference to criteria that are sufficiently general in their application, and which mark out the object and subject matter of the tax.<sup>16</sup> That view implies that the Parliament could not validly impose a tax liability on a particular named person. In that case, the Parliament could also not delegate a power to vary a tax law in relation to a particular named person, even if that power could only be exercised to benefit taxpayers.
29. The Commissioner would execute the legislative instrument and register it on the Federal Register of Legislative Instruments.<sup>17</sup> The instrument would be tabled in both Houses of the Parliament within six sitting days of that registration. Either House of the Parliament could disallow the instrument. This would be done by giving a notice of motion to disallow the instrument within 15 sitting days of its tabling, which would have to be passed (or not withdrawn or otherwise disposed of) within a further 15 sitting days. If the instrument were not tabled within the six sitting days, or were disallowed after being tabled, the instrument would cease to have effect from that time.<sup>18</sup>

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11 *Corporations Act 2001*, subsection 741(4).

12 *Legislative Instruments Act 2003*, subsections 5(1) and (2).

13 *Legislative Instruments Act 2003*, subsections 42(1) and (2). The instrument must be tabled within six sitting days of being registered: subsection 38(1).

14 *Legislative Instruments Act 2003*, subsection 7(1), table item 6.

15 *Corporations Act 2001*, section 1317B.

16 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at p 639; *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, at p 684.

17 <http://www.comlaw.gov.au>.

18 *Legislative Instruments Act 2003*, subsection 45(1).

30. Typically, a legislative instrument that is disallowed still has effect for the period before it is disallowed. In the taxation context, this could lead to uncertainty (or even more serious problems) in that interim period. Several possible solutions to this could be considered. One might be to suspend the operation of the instrument until the period for disallowance had passed. Another might be to add these instruments to the list in section 44 of the Legislative Instruments Act of those instruments that cannot be disallowed.
31. If the operation of the variation were suspended until the end of the disallowance period, there would be a longer delay before the defect was corrected. That would be inconsistent with the reason for giving the Commissioner a power to vary the law in the first place (namely, to speed up the correction process).
32. On the other hand, if the variation were implemented by a legislative instrument that could not be disallowed, this model would provide no answer to concerns about the weakening of the rule of law implied by preventing parliamentary scrutiny. Such an approach would also remove the major difference between the legislative instrument model and the discretion model.<sup>19</sup>

### The discretion model

33. The discretion model would give the Commissioner a discretionary administrative power to vary the application of the tax law in relation to taxpayers generally or to a class of taxpayers.
34. The Commissioner would exercise that discretion by publishing a declaration of the variation he or she had made. It would be usual for the making of declarations of that sort to be made reviewable by the Administrative Appeals Tribunal. In theory, uncertainty could arise if taxpayers relied on a declaration that was later overturned by the Tribunal but, given that the variation would be for the relief of taxpayers, the likelihood of it being challenged by a taxpayer whom it benefited would be small. Taxpayers who did not benefit from the variation would not normally have standing to challenge the declaration because they would not be persons 'whose interests are affected by the decision.'<sup>20</sup>
35. However, even the theoretical possibility of a variation being overturned might be a problem if certainty about the law is an important consideration. That possibility could be eliminated by not giving the Tribunal a power to review the exercise of the Commissioner's discretion.<sup>21</sup> That might address the certainty issue but could create other concerns about whether the Commissioner's exercise of the power was subject to appropriate scrutiny.

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19 There would still be some differences that might be important, such as the requirement for registration, the rules about interpreting legislative instruments, the limits on legislative instruments that apply retrospectively, and the sunsetting after 10 years of legislative instruments that are not renewed.

20 *Administrative Appeals Tribunal Act 1975*, subsection 27(1). See also the AAT decision *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No. 1)* (1980) 3 ALD 74 at pp 79-80.

21 The *Administrative Decisions (Judicial Review) Act 1977* might also need to be amended if it were desired to prevent the Federal Court reviewing the way the discretion was exercised. However, it would not be possible to legislate to deny the High Court's constitutional power to review how the Commissioner makes decisions (section 75 of the Constitution).

## Other issues relevant to giving the Commissioner an extra-statutory concession power

36. The Tax Design Review Panel noted that an extra-statutory concession power has both advantages and disadvantages.<sup>22</sup> Among the advantages it noted were giving relief more quickly than by legislation and with more certainty than by press release. Among the disadvantages were the likely increase in the Commissioner of Taxation's responsibilities and a weakening of the rule of law. This part of the paper discusses these and other issues that bear on whether the Commissioner should have such a power and on how it would be implemented.

### Can the Parliament delegate a power to vary its legislation?

37. High Court authority establishes that there is no necessary constitutional objection to the Parliament delegating its legislative authority to an officer of the executive, such as the Commissioner.<sup>23</sup> However, the need to ensure that the delegation is constitutionally valid could affect the design of the legislation (such as what limits there should be on the Commissioner's exercise of the extra-statutory concession power).<sup>24</sup>

### How long would it take to grant an extra-statutory concession?

38. If we are to know whether or not giving the Commissioner a power to grant extra-statutory concessions would be an effective solution to the delays in fixing legislative defects by statutory amendment, it is necessary to consider how long it might take to grant a concession.
39. It would obviously take the Commissioner some time to fully understand the problem, to conclude that it was not a matter that could be resolved by interpretation, and to decide on the best way to vary the law. That time would vary according to the complexity of the issue and the processes the Commissioner had instituted for making variations. Would there be consultation on a proposed variation and who would be involved in it? Would the variation have to be considered by many taxation officers or only a few?
40. In 2007-08, the median time taken between receiving a request for a private ruling and the ruling being issued was 56 days for requests from small to medium enterprises and 70 days for requests from large businesses.<sup>25</sup>
41. Currently, a defect the Government prioritises as important enough to correct as soon as practicable can usually be corrected by legislative amendment within six months. While it cannot reasonably be assumed that the time taken to issue a ruling equates to the time it would take the Commissioner to implement a variation to the law, these figures at least suggest that the Commissioner may be able to vary the law somewhat faster than the Parliament would be able to amend it.

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22 Tax Design Review Panel at p 40.

23 *Victorian Stevedoring and General Contracting Co v Dignan* (1931) CLR 73.

24 For instance, because the Parliament cannot delegate a power it could not exercise itself, it must be possible to trace the power delegated to one of the constitutional heads of power. A delegation that was too broad might not reasonably fall within one of the heads of power (*Victorian Stevedoring* at p 101). Similarly, a delegation that was too far removed from parliamentary supervision might amount to an impermissible abdication of power (*Victorian Stevedoring* at pp 102, 118 and 121).

25 *Commissioner of Taxation Annual Report 2007-08*, p 52. No similar information is provided for public rulings. At 30 June 2008, only 14 per cent of the ATO's priority technical issues (which are the most complex or significant technical issues) were more than six months old, down from 21 per cent at 30 June 2007 (p 54).

## Could the problem be solved in other ways?

42. Other processes are in place or being developed that are intended to speed up corrections to minor defects in the tax law and to reduce their incidence in the first place. These processes (at least when fully implemented) could affect whether one assesses the need to correct legislative defects in tax law as a growing problem or a diminishing one.
43. In recent years, taxation bills have included one or two Schedules of minor amendments each year.<sup>26</sup> Some of those amendments corrected defects in the way the law implemented policy. Including these annual packages of minor amendments has sped up the process of correcting those defects.
44. In late 2008, the Assistant Treasurer initiated the Tax Issues Entry System (TIES) website.<sup>27</sup> The TIES website allows taxpayers to submit problems they have found with the tax laws, records the Government's response to those problems and tracks progress on the solutions the Government proposes. The TIES process has only recently begun, but several issues have already been submitted and solutions to them are being considered. The TIES process will shorten the time it takes for the Government to become aware of emerging problems with the tax laws and therefore should speed up the solutions.
45. The use of principles-based tax legislation aims, among other things, to reduce the incidence of legislative defects, rather than to speed up the process of correcting them. Principles-based legislation expresses the law in outcomes instead of prescriptive mechanisms designed to reach those outcomes. When done well, principles-based legislation makes it easier for the Commissioner and the courts to interpret the law consistently with the Parliament's intent.

## Would such a power weaken the rule of law?

46. A concern some have with the proposal is that it could weaken the rule of law.<sup>28</sup> Broadly, the rule of law is a doctrine under which government must obey the law, as interpreted and applied by the superior courts, rather than being able to do whatever it wants.<sup>29</sup> In our democratic system, the Government proposes laws to the Parliament, which chooses whether to pass them or not. Both the Government and the Parliament are answerable to the electorate for their decisions. Some think the proposal might weaken the rule of law because it would empower the Commissioner of Taxation to vary the laws that the Parliament had passed. The Commissioner is not an elected official, is not answerable to the electorate and is not subject to ministerial direction.
47. This concern may be mitigated to an extent by a limitation that the power could only be used to provide taxpayers with relief. That limitation would ensure that giving the Commissioner such a wide-ranging power could not lead to particular taxpayers or groups of taxpayers being disadvantaged by an exercise of discretion.

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26 Technical amendments were made by Schedule 16 to the *Taxation Laws Amendment Act (No. 3) 1997* and have been made in every year since. The time taken to enact these amendments forms the basis for the six months estimate mentioned earlier.

27 <http://www.ties.gov.au>.

28 See, for example, the views of UNSW associate professor Dr Margaret McKerchar reported in 'ATO proposal divides experts', an article by John Kehoe, *Australian Financial Review*, 27 August 2008, p 17.

29 The classic exposition of what the rule of law is comes from Dicey AV; *Law of the Constitution*; 1885. Dicey identified three elements to the rule of law: (1) Everyone is equal before the law; (2) No one can be punished unless they are in clear breach of the law; and (3) There are no laws which are above the Courts. The last principle has not been generally accepted, especially in societies, like ours, governed by a written constitution.

48. However, it does not address the whole concern because there could be cases where the Parliament consciously intended to tax, or impose other obligations on, particular groups of taxpayers. If the Commissioner were to use the power to relieve those taxpayers of that liability, the intention of the Parliament could be defeated. A use of the power in that case could defeat the right of the general body of citizens, through elected representatives, to raise revenue for community purposes in whatever way it judged appropriate. This concern could be addressed, at least in part, by implementing the power by a model that provides a measure of parliamentary scrutiny. One such model is discussed earlier in the paper (see paragraphs 27-32).

### Would such a power weaken good legislative practice?

49. It can also be argued that conferring a power on the Commissioner to grant extra-statutory concessions would have a corrosive effect on taxpayers' rights and liberties. This would be the case if a future Parliament began to enact legislation expressed in inappropriately broad terms in the expectation that the Commissioner would deal with 'problem cases' through granting extra-statutory concessions. That could lead to a situation where taxpayers were not taxed according to law but untaxed by concession.<sup>30</sup>

### Relationship between Commissioner variations and enacted tax law

50. If the Commissioner were to exercise the extra-statutory concession power extensively, over time there could be a growing problem in establishing what the current state of the law is. The income tax law (to take the largest example) is lengthy and complex legislation but is largely self-contained. If an area of the law were also the subject of a series of Commissioner variations, it would become more difficult to work out what the law actually says and more difficult to ensure that future amendments to the law do not contain material errors. In addition, interactions with other laws (for example, the child support law and the social security law) could become significantly more complex.
51. A possible solution to problems of that sort might be for the Parliament to amend the enacted law to reflect the Commissioner's variation, as was suggested in one submission to the Tax Design Review Panel.<sup>31</sup> However, it is not possible to bind the Parliament to act in this way, so cases where the Parliament did not endorse the Commissioner's variation by enacting it could still exist. In those cases, the relationship between the enacted law and the variations would remain complex.

### Is the tax law different?

52. While there might be good arguments for providing an administrator with a power to vary laws, such as the corporations law, that regulate behaviour, some may think the force of the arguments is weaker (or that the arguments do not apply at all) in the taxation context. The legitimacy of taxation laws depends to a great extent on perceived equity, and a power to vary the law to the advantage of some taxpayers could be seen as inequitable. Taxation laws exist to raise money for the common purposes of the community. If people benefit from those common purposes but are excused from making their full contribution towards them by an administrator's exemption, other people may be less accepting than they are when someone is exempted from the mechanical requirements of a regulatory law.

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<sup>30</sup> To use the famous words of Walton J in *Vestey v Inland Revenue Commissioners* [1979]1 Ch 177 at p 197.

<sup>31</sup> See the Ernst & Young submission to the Tax Design Review Panel at pp 6-7,

[http://www.treasury.gov.au/documents/1363/PDF/Ernst\\_Young.pdf](http://www.treasury.gov.au/documents/1363/PDF/Ernst_Young.pdf). A similar view is contained in the Corporate Tax Association/Ernst & Young joint submission to the review of Australia's Future Tax System at p 13, [http://taxreview.treasury.gov.au/content/submissions/Corporate\\_Tax\\_Association\\_and\\_Ernst\\_and\\_Young.pdf](http://taxreview.treasury.gov.au/content/submissions/Corporate_Tax_Association_and_Ernst_and_Young.pdf).

## Keeping the power limited to relieving taxpayers

53. The Tax Design Review Panel recommended that the Government consider enacting a power for the Commissioner to grant *relief* to taxpayers to ensure that the tax laws work as intended. However, an unintended defect in a tax law can work to taxpayers' advantage, not just to their disadvantage. For example, correcting a defect in an anti-avoidance provision would not benefit taxpayers who were otherwise avoiding the tax the Parliament intended they should pay.
54. Section 741 of the *Corporations Act 2001* allows ASIC to vary the way the law applies to persons and is not limited to variations that benefit those persons. On the other hand, section 328 of the *Superannuation Industry (Supervision) Act 1993* only empowers APRA to exempt persons from compliance with particular provisions, and so can only be used for their benefit.
55. An important policy issue is whether the proposed power should be limited to variations that provide relief or be available to correct all cases where the law departs from the Parliament's intention.
56. If it should be limited to providing taxpayers with relief, the question arises what 'relief' means under either the legislative instrument model or the discretion model. There will be some situations where it will not be clear whether a particular variation does provide relief or not and that could lead to disputes between the Commissioner and taxpayers. There will also be situations where relief for one party would disadvantage another. Such situations can arise in superannuation, fringe benefits tax, GST and PAYG cases.
57. Perhaps the simplest model that could be used to give effect to the relief limitation would be to allow taxpayers to *choose* whether or not to apply the variation. An example of this approach can be seen in the provisions that deal with whether the Commissioner is bound by a ruling about the tax law. Those provisions ensure that the Commissioner is bound if the taxpayer 'relies' on the ruling by acting in accordance with it.<sup>32</sup> Typically, taxpayers would rely on a ruling by lodging returns that are consistent with it. The same approach could work in relation to variations made by the Commissioner: taxpayers would rely on the variation by lodging their returns in accordance with it if they chose to.

## Should there be any other limits?

58. The powers to vary the law that are granted to ASIC by the *Corporations Act 2001* and to APRA by the *Superannuation Industry (Supervision) Act 1993* apply only in relation to specific parts of those laws. The power considered by the Tax Design Review Panel would apply to the entirety of the tax laws; the Commissioner would be given a power to vary any part of the tax law.
59. If limits on the Commissioner's power are to be considered, an important question is what those limits should be. Many people would think it acceptable for the Commissioner to be able to vary mechanical parts of the law, like obligations to provide particular information or time limits for making elections. But what about more central elements of the tax law, like the GST rate? Would it be right to allow the Commissioner to reverse the Parliament's denial of income tax deductions for bribes or entertainment expenses? If the Commissioner varied the law in relation to a past year, would it be permissible to also vary the time limits on amending assessments in order to give effect to that first variation? There is likely to be more debate about the suitability of a power to relieve taxpayers of the consequences of such legislative provisions.

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<sup>32</sup> *Taxation Administration Act 1953*, subsection 357-60 of Schedule 1.

60. However, it is clear enough that the proposal put to the Tax Design Review Panel was that the power should give the Commissioner some capacity to act in any case where the application of a tax law would not achieve the result the Parliament intended. The practical implementation of that idea would not be easy because it is not reasonable to assume that the result the Parliament intended would always be known. The explanatory memorandum and parliamentary debates might be silent or ambiguous on the point and cases could arise that the Parliament had never considered. In practice, the Commissioner would sometimes end up having to guess at the Parliament's intention.
61. It follows that the design of any limitation on the Commissioner's power to grant an extra-statutory concession would be a difficult balancing exercise between allowing the Commissioner to exercise the power in all cases where problems might arise and ensuring that any exercise of the power could not stray too far from what the Parliament would have intended.

## Consultation

62. The Tax Design Review Panel made several recommendations about consulting on changes to the tax laws.<sup>33</sup> The recommendations about consultation on the design of announced policy are probably not relevant to correcting defects but those about consulting on the draft legislation clearly could be. While consultation on tax law changes has many benefits (such as greater community involvement, law that better integrates with commercial practice and law that has fewer mistakes), a disadvantage is that it lengthens the development process.
63. That delay might make consulting on a possible variation inconsistent with giving the Commissioner a power to vary the law in order to speed up corrections to the law. On the other hand, not consulting on a variation would be inconsistent with the objectives that led the Panel to recommend consultation as the default position for tax law changes.

## Consultation questions

### Whether the Commissioner should have a power to vary the tax laws

1. Taking all the considerations into account, do you think the Parliament should give the Commissioner a power to vary the tax laws? What were the most important considerations in reaching your conclusion?
2. Are there any other issues that should be taken into account in considering whether the Commissioner should have a power to grant extra-statutory concessions?
3. Are there any other ways that defects in the tax laws could be fixed faster than by legislative amendment?

### The appropriate model to deliver such a power

4. If the Commissioner were to have a power to vary the tax laws, should it follow the legislative instrument model or the discretion model? Are there any other models that should be considered?

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<sup>33</sup> Tax Design Review Panel, *Better Tax Design and Implementation*, 2008. See recommendations 6, 7, 8, 9, 10, 11 and 12.

## Design of the power

5. If the Commissioner were to have a power to vary the tax laws:
  - (a) Should it be a power to vary the law to achieve what the Parliament intended, regardless of whether it provides taxpayers with relief, or should it be limited to providing taxpayers with relief?
  - (b) Should there be any limits on what matters the Commissioner could vary and, if so, what should they be?
  - (c) What criteria should the Commissioner take into account in deciding whether, and how, to exercise the power?
6. Should the Commissioner consult on all variations? If not, what criteria should be used to determine when there should, and when there should not, be consultation?