



Australian Government
Inspector-General of Taxation

Review of aspects of the Australian Taxation Office's administration of private binding rulings

A report to the Assistant Treasurer

Inspector-General of Taxation

May 2010

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3 May 2010

Senator the Hon Nick Sherry
Assistant Treasurer
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Dear Minister

I am pleased to present to you my report on findings and recommendations in respect of the review of aspects of the Australian Tax Office's (ATO) administration of private binding rulings. This report has been prepared under section 10 of the *Inspector-General of Taxation Act 2003* (the Act).

I have provided the Commissioner of Taxation with the opportunity to respond to the report's findings and recommendations. The ATO's response is in Appendix 2 to the report. In finalising the report, I have fully considered the ATO's response.

Overall, the review found that, up to the time when the ATO introduced a new computer system for the management of its private rulings, it had a strong performance in relation to the production of quality, timely and consistent private rulings. However there is an issue as to whether the new Siebel system which the ATO has introduced for the management of these rulings has already led or will lead to a deterioration in this previously strong performance.

The review led to six key recommendations, one of which (Recommendation 5) involves a recommendation to the Government to consider abolishing the oral rulings system given its continuing low level of usage.

Five key recommendations were directed to the ATO. Of these, the ATO has fully agreed or agreed in principle with three (Recommendations 1 to 3) and partly agreed with two (Recommendations 4 and 6).

The three recommendations the ATO has fully agreed (or agreed in principle) with involve the ATO taking steps to:

- identify, track and report publicly on the most frequently requested private ruling topics;
- notify private ruling applicants and the public of when rulings on particular topics may be delayed because of escalation arrangements put in place for such rulings; and

- address delays and productivity issues that may arise from having large teams from different areas of the ATO working on private rulings.

One of the key recommendations the ATO has only partly agreed with concerns the register of private binding rulings. The ATO has agreed with the review's conclusion that this register should be retained, but it has not agreed with a number of suggestions that the review has made to enhance this register.

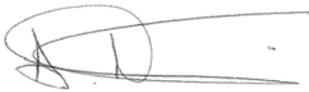
The second key recommendation with which the ATO has only partly agreed concerns the introduction of the new Siebel computer system for the management of private rulings. The ATO has agreed to a post-implementation review of this new system but it has not agreed to give priority to ensuring that this new system's search facility for locating other private rulings on a given topic matches the search facility for such rulings that was available under the old system.

As part of this review, I also examined the extent to which the ATO has implemented recommendations from the IGT's 2008 *Review of the potential revenue bias in private binding rulings involving large complex matters*. The ATO fully agreed with six of the recommendations from this earlier 2008 review and partly agreed with the remaining four. I have concluded that the ATO has implemented all of the recommendations (or parts thereof) that the ATO agreed to implement as a result of this earlier 2008 review.

I offer my thanks for the support and contribution of professional bodies and individuals to this review. Their willingness to provide their time in preparing submissions and discussing issues with myself and my staff is greatly appreciated.

I would also like to thank my staff who have worked hard to conclude this review. As well, I would like to thank the ATO's staff for their co-operation and assistance in this review.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ali Noroozi', written over a horizontal line.

Ali Noroozi
Inspector-General of Taxation

EXECUTIVE SUMMARY

Private rulings are legally binding written advices that taxpayers may obtain from the ATO under Australian tax law. The key taxpayer benefit is that the private ruling binds the ATO, such that no additional income tax, penalties and interest can be levied on the taxpayer even if that advice is wrong.

Private rulings are issued directly to taxpayers by the ATO. They are also published in an edited form on a register of private binding rulings that is publicly accessible via the ATO's website.

The Inspector-General's review looks at the ATO's administration of private rulings and the purpose, use and ongoing relevance of the edited private binding rulings register. It also examines the extent to which the ATO has implemented recommendations from the Inspector-General's 2008 review on the potential revenue bias in private rulings for large business taxpayers.

The review has been conducted both on the IGT's own initiative and in response to a specific request to review aspects of the private rulings system from the Commissioner of Taxation.

The Commissioner's request was made shortly after community concerns were voiced about a proposal of the Commissioner (which has since not been proceeded with) to remove the detailed content of private rulings from the register of private binding rulings. The ATO had planned to streamline this register so that it showed only the subject matter of any private ruling and its authorisation number. The request was also made against the background of a major change that the ATO was about to implement to its computer system for the management of private rulings. Implementation of this major system change occurred after the major fieldwork for this review had been completed.

In submissions made to this review, taxpayers and tax practitioners primarily focussed on the ATO's original proposal to alter the current content of the publicly accessible register of private binding rulings. These submissions all urged the Commissioner to retain the register in its current form.

Concerns that were raised in submissions about other aspects of the ATO's administration of private rulings were that private rulings take too long to issue, that private rulings on the same topic can be inconsistent and that private rulings cannot be obtained on certain topics.

During the review the ATO acknowledged that it needs to improve the timeliness of its responses to requests for private rulings.

However, overall, the review found that, up to the time when the ATO introduced a new computer system for the management of its private rulings, it had a strong performance in relation to the production of quality, timely and consistent private rulings. There is, though, an issue as to whether the new Siebel system which the ATO has introduced for the management of these rulings has already led or will lead to a deterioration in this previously strong performance.

The small sample of Siebel-generated cases to date that the IGT has reviewed in the final stages of this review is too small to come to a definitive conclusion on these issues.

The review led to six key recommendations, one of which (Recommendation 5) involves a recommendation to the Government to consider abolishing the oral rulings system given its continuing low level of useage.

Five key recommendations were directed to the ATO. Of these, the ATO has fully agreed or agreed in principle with three (Recommendations 1 to 3) and partly agreed with two (Recommendations 4 and 6).

One of the key recommendations the ATO has only partly agreed with concerns the register of private binding rulings. The ATO has agreed with the review's conclusion that this register should be retained, but it has not agreed with a number of suggestions that the review has made to enhance this register.

The second key recommendation which the ATO has only partly agreed with concerns the introduction of the new Siebel computer system for the management of private rulings. The ATO has agreed to a post-implementation review of this new system but it has not agreed to give priority to ensuring that this new system's search facility for locating other private rulings on a given topic matches the search facility for such rulings that was available under the old system.

The three recommendations the ATO has fully agreed (or agreed in principle) with involve the ATO taking steps to:

- identify, track and report publicly on the most frequently requested private ruling topics;
- notify private ruling applicants and the public of when rulings on particular topics may be delayed because of escalation arrangements put in place for such rulings; and
- address delays and productivity issues that may arise from having large teams from different areas of the ATO working on private rulings.

As part of this review, the Inspector-General also examined the extent to which the ATO has implemented recommendations from the IGT's 2008 *Review of the potential revenue bias in private binding rulings involving large complex matters*. The ten recommendations arising from this 2008 review suggested improvements in the areas of ATO transparency, communication and objectivity, the interactions between the ATO and Treasury and the time frames for private rulings.

The ATO fully agreed with six of the recommendations from this earlier 2008 review and partly agreed with the remaining four. The IGT has concluded that the ATO has implemented all of the recommendations (or parts thereof) that the ATO agreed to implement as a result of this earlier 2008 review.

CHAPTER 1: INTRODUCTION

1.1 This is the report on the review conducted by the Inspector-General of Taxation (Inspector-General or IGT) of aspects of the Australian Taxation Office's (Tax Office or ATO) administration of private binding rulings. This report is made under Section 10 of the *Inspector-General of Taxation Act 2003* (IGT Act).

1.2 The review was announced on 6 April 2009. Its terms of reference are reproduced in Appendix 1 to this report. Details of how the review was conducted are also given in Appendix 1.

1.3 The decision to undertake the review was prompted by concerns raised with the IGT by industry and tax practitioners and also by a specific request from the Commissioner of Taxation to review the private rulings system.

1.4 A number of key recommendations arose from the review. These are listed and summarised in the Overview at Chapter 2.

1.5 The ATO's private ruling administrative processes and the register of private binding rulings are dealt with in Chapter 3 and 4 respectively.

1.6 Chapter 5 discusses the extent to which the ATO has implemented the recommendations of the IGT's previous 2008 review on revenue bias in private rulings.

1.7 During the course of the IGT's review, the ATO made or proposed a number of changes to its processes for private rulings. Some of those changes directly addressed concerns raised with the IGT. All changes made or proposed by the ATO are noted in this report wherever relevant.

1.8 The Commissioner of Taxation's response to the review is in Appendix 2. The Commissioner's detailed comments on each recommendation of the report are set out immediately below the recommendations set out in chapters 3 and 4.

CHAPTER 2: OVERVIEW

2.1 Private rulings are legally binding written advices that taxpayers may obtain from the ATO under Australian tax law. The key taxpayer benefit is that the private ruling binds the ATO, such that no additional income tax, penalties and interest can be levied on the taxpayer even if that advice is wrong.

2.2 Private rulings are issued directly to taxpayers by the ATO. They are also published in an edited form on a register of private binding rulings that is publicly accessible via the ATO's website.

2.3 The Inspector-General's review looks at the ATO's administration of private rulings and the purpose, use and ongoing relevance of the edited private binding rulings register. It also examines the extent to which the ATO has implemented recommendations from the Inspector-General's 2008 review on the potential revenue bias in private rulings.

2.4 The review has been conducted both on the IGT's own initiative and in response to a specific request to review the private rulings system from the Commissioner of Taxation.

2.5 The Commissioner's request was made shortly after community concerns were voiced about a proposal of the Commissioner (which has since not been proceeded with) to remove the detailed content of private rulings from the register of private binding rulings. The ATO had planned to streamline this register so that it showed only the subject matter of any private ruling and its authorisation number. The request was also made against the background of a major change that the ATO was about to implement to its computer system for the management of private rulings. Implementation of this major system change occurred after the major fieldwork for this review had been completed.

2.6 The review did not examine certain types of rulings that are, or are similar to, private rulings on income tax for various reasons. Goods and services tax (GST), luxury car tax and wine equalisation tax rulings currently have a different legislative regime to income tax and were so excluded, (although the Government has indicated that this will change). Superannuation regulatory issue rulings are not legally binding on the ATO, unlike income tax, and were also therefore excluded. The ATO's Aggressive Tax Planning area rulings were not included due to their unique circumstances. Finally, the review did not examine class or product rulings as the ATO issues these rulings as public rulings rather than as private rulings.

2.7 In submissions made to this review, taxpayers and tax practitioners primarily focussed on the ATO's original proposal to alter the current content of the publicly accessible register of private binding rulings. These submissions all urged the Commissioner to retain the register in its current form.

2.8 Concerns that were raised in submissions about other aspects of the ATO's administration of private rulings were that:

- private rulings take too long to issue;
- private rulings on the same topic can be inconsistent; and
- private rulings cannot be obtained on certain topics.

2.9 Overall, the review found that, up to the time when the ATO introduced a new computer system for the management of its private rulings it had a strong performance in relation to the production of quality, timely and consistent private rulings. However there is an issue as to whether the new Siebel system which the ATO has introduced for the management of these rulings has already led or will lead to a deterioration in this previously strong performance.

2.10 The small sample of Siebel-generated cases to date that the IGT has reviewed in the final stages of this review is too small to come to a definitive conclusion on these issues.

2.11 The review's detailed findings and recommendations are summarised in this chapter.

ADMINISTRATIVE PROCESSES FOR PRIVATE RULINGS

2.12 In 2008/09 the ATO finalised 8,917 private rulings. A significant number – about 33 per cent – of these private rulings were on the topic of the assessability of South Australian workers compensation receipts. Private rulings on the topic of the undeducted purchase price of an annuity were the next largest segment (6 per cent) of all finalised private rulings, although legislative changes made in 2007 mean that in future years of income the volume of these rulings will decrease significantly.

2.13 Both these types of private rulings are straightforward in nature and have standardised arrangements for their preparation which are adopted by both applicants (when requesting these rulings) and by the ATO (when generating these rulings).

2.14 Despite the significant volume of rulings dealing with both these types of rulings in 2008/09, and their standardised preparation arrangements, neither category of rulings is specifically identified in any ATO-wide internal reports prepared by the ATO for this year, although the individual business lines dealing with these rulings are themselves aware of the volume of rulings on these topics.

2.15 This has meant that the ATO has missed opportunities for enhancing its management of these types of rulings, other private rulings, public rulings or other forms of interpretative assistance.

2.16 For example, a lack of separate ATO-wide reporting on these and other types of standard rulings, which have a very quick turnaround time, has meant that the ATO has been reporting that it has met its overall service standards for the timely issue of

rulings, when in fact it has not been meeting this standard for certain categories of more complex rulings (for example in the superannuation area).

2.17 It has also meant that the ATO has missed an opportunity to significantly improve the ATO's published register of private binding rulings.

2.18 This register currently consists of over 80,000 separate edited rulings. The ATO has had concerns that taxpayers may be labouring under a misapprehension that they carry a burden to review the register prior to making tax decisions or providing taxation advice. However, based on the above ATO statistics, over a third of the rulings on this register are likely to be standardised responses on two topics. This suggests that the current number of edited rulings on this register could be significantly reduced by separately identifying private rulings on South Australian workers compensation and undeducted purchase price issues, or other similar high volume rulings, publishing a standard form ruling on these topics and then associating each individual advice on these topics with the relevant standard form without publishing the actual edited private ruling in its entirety.

2.19 The IGT considers that the ATO should introduce a process to identify, track and report on high volume rulings to better manage its resources and to support better decision making.

2.20 Rulings grouped into high volume or broader category topics would, for example, provide useful information to the ATO about high demand private ruling topics that may benefit from alternative ATO approaches. It would also provide tax policy makers with useful information about the areas of the tax law that may require amendment to assist taxpayer needs. Publication of the top five or ten private rulings topics would facilitate this process.

2.21 The IGT has therefore made the following recommendation:

KEY RECOMMENDATION 1

The Inspector-General recommends that the ATO should:

- to better manage its resources for the production of private rulings, improve its existing management systems to identify, track and report, on a Tax Office wide basis, the most frequently requested private ruling topics; and
- to facilitate the process of providing useful information to the ATO about high demand private ruling topics that may benefit from alternative ATO approaches and also to tax policy makers about areas of the tax law that may require amendment, publish the top five or ten (or whatever number is the most appropriate) of the most frequently requested private rulings topics.

2.22 Submissions to this review stated that there are, or have been in the recent past, examples of 'no go' topics upon which the ATO has refused to issue private rulings. The existence of 'no go' topics would run counter to the design of Australia's

private rulings system which, unlike many other countries, allows private rulings on income tax issues to be issued on a very broad range of topics.

2.23 During the review, the IGT found that the ATO does not have a list of certain specific topics upon which it refuses to rule. However, from time to time, it does put in place special arrangements for the processing of rulings on particular topics which have the effect that private rulings on these topics are delayed for very significant periods.

2.24 An example of such a topic was the application of section 40-880 of the *Income Tax Assessment Act 1997*. This section allows certain expenditure known as 'blackhole' expenditure to be deducted over a period of five years. During the 2008/09 year the ATO had a directive in place which meant that all private rulings on this topic had to be reviewed by a particular member of the Tax Counsel Network prior to being issued. This had the effect that a number of private rulings on this topic were delayed for significant periods – in some cases for over a year and a half. Delays of this kind fuel perceptions that the ATO will not rule on certain topics.

2.25 To address these perceptions, the IGT has made the following recommendation:

KEY RECOMMENDATION 2

The ATO should address perceptions that it may have topics on which it will refuse to make private rulings by adopting measures such as:

- notifying applicants for private rulings on particular topics of any key issue escalation arrangements put in place for private rulings on those topics and what impact those arrangements may have on the timeliness of rulings on those particular topics; and
- also notifying (where appropriate) the public of the nature of any such arrangements and what impact these arrangements may have on the timeliness of rulings on those particular topics.

2.26 Submissions to the review also strongly asserted that private rulings in general take too long to issue.

2.27 Delays in issuing private rulings are clearly inappropriate, given the purpose and design of the private rulings system. The aim of this system is to provide taxpayers with certainty, on a timely basis, of the ATO's view of an arrangement. Generally any revenue risk is limited because, if any private ruling is incorrect, it is confined in its application to only that taxpayer.

2.28 The IGT found that one of the causes of ATO delay in issuing certain private rulings is the ATO's management arrangements for these rulings. In certain cases, such as those which involve the creation of an ATO view to support the private ruling, these

management arrangements involve large numbers of ATO staff (that is, a minimum of 6 people)¹. In these and other cases delays can arise because the ultimate decision-maker in the case is organisationally separate from the ATO staff who have the primary carriage of the private ruling and this decision-maker is not engaged in the process of developing the private ruling until a very late stage.

2.29 To address the delays and productivity issues that can arise from these management arrangements, the IGT has made the following recommendation:

KEY RECOMMENDATION 3

To address delays and productivity issues that may arise from having large teams from different areas of the Tax Office working on private rulings, the Tax Office should:

- implement measures to ensure that only the minimum number of Tax Office personnel necessary to produce a timely and high quality product are employed on any private ruling;
- introduce and develop productivity benchmarking, exploring both internal and external criteria for Tax Office personnel engaged in the private ruling decision-making process; and
- ensure that the minimum necessary number of personnel on a private ruling case includes the ultimate case decision-maker from the time when this ultimate decision-maker has been identified.

2.30 Submissions to, and other work performed by the IGT during the course of this review, raised other issues relating to the productivity, timeliness, quality and integrity of private rulings issued by the ATO. The IGT's findings in relation to each of these other issues are set out below and are followed by a single recommendation which covers all these issues.

Productivity issues

2.31 The review found that, although the number of private rulings finalised by the ATO has been steadily declining in recent years, ATO resources devoted to generating these rulings has increased by 25 per cent.

2.32 An ATO internal review which looked at this issue concluded that this trend was justifiable but that there was room for improvement and for further work. This ATO review found that this trend was explained by factors such as the increased complexity of the subject matter of rulings and deliberate ATO strategies to switch private ruling requests where appropriate to faster, lower cost, less resource intensive products such as oral rulings or guidance or written interpretative advice. This ATO review found that when total non-private ruling guidance work was combined with

1 The ATO has advised that, in 2008/09, 300 issues pertaining to private rulings were escalated to the Centres of Expertise or to the Tax Counsel Network.

private rulings work, historic trends showed that there was a slight decrease in both the total volume of this work and the resources devoted to it over time.

2.33 The IGT found that this internal ATO review did not seek the views of taxpayers or their representatives on why they were seeking fewer private rulings. It did not take into account that, at least for large taxpayers, a perception of revenue bias tends to deter these taxpayers from seeking a private ruling unless it is necessary. It also did not acknowledge that many taxpayers, and in particular large businesses, generally consider that external professional advice is a better risk management strategy than a private ruling. These types of views may also be a reason for the decline in private rulings over recent years.

Timeliness issues

2.34 The ATO's service standard for private rulings is that 80 per cent of private rulings should be finalised within 28 days of receipt of all information or by a negotiated due date. The ATO's Annual Report for 2008/09 indicates that service standard was met in the year ended 30 June 2009. However the ATO has advised the IGT that this standard has not been met for the 6 months to 31 December 2009. In these six months only 69 per cent of private rulings have been finalised within 28 days of receipt of all information or by a negotiated due date. During these six months the ATO progressively switched to a new computer system, known as the Siebel system, for the management of its private rulings work.

2.35 The 2008/09 Annual Report also includes data showing the median and mean number of elapsed days from the date of receipt of a ruling request in the ATO to the date of issuing a ruling.

2.36 The period of lapsed days is not the time used by the ATO to measure its performance in the delivery of rulings as it does not take into account periods of delay which are due to the ATO requesting information from the taxpayer. Nevertheless, this lapsed day measure period does provide a supplementary means of assessing the ATO's performance in the timely delivery of private rulings.

2.37 The Annual Report data on the lapsed days measure indicates that in 2008/09 for all types of taxpayers other than individuals the median number of elapsed days for private rulings exceeded 28 days from receipt of the original ruling request. This data appears to confirm statements made in submissions to this review that private rulings are not issued within 28 lapsed days. This means that, if non-individual taxpayers have a 28 day period or less for entering into the transaction that is the subject of a private ruling request, they cannot generally expect to receive a ruling within this time frame.

2.38 Submissions stated that one possible cause of these delays was a perceived practice of ATO staff making requests for further information from taxpayers in all private ruling matters, even where this did not seem to be justified. The IGT's previous review on potential revenue bias in private rulings also examined this concern and recommended that the ATO should take steps to vet requests for further information, should (if requested) provide reasons why the information is relevant and should

identify the specific aspect of the technical issue that turns on the requested information. The ATO agreed with this recommendation.

Quality issues

2.39 Submissions to this review raised some concerns about possible inconsistencies in some private rulings, but otherwise submissions raised no concerns about the quality of private rulings issued by the ATO. A number of submissions, all of which were prepared prior to the ATO's switch to a new computer system for managing private rulings, praised the quality of written rulings issued by the ATO.

2.40 The IGT's fieldwork for this review, which was based on rulings finalised or on-hand during the 2008/09 year did not reveal any examples of inconsistent rulings.

2.41 The IGT's fieldwork for this review has however raised concerns that the quality of private rulings being generated in the 2009/10 year under the new Siebel system may have deteriorated from previous years, which could be serious.

Integrity issues

2.42 The review also found that the ATO's new Siebel computer system for managing private rulings work which was introduced in August 2009 does not yet replicate all the important integrity controls that were in place in the previous Technical Decision Making System (TDMS) used for private rulings. The ATO is working to address this issue, but does not expect to fully complete this work until 18 months time.

2.43 The new Siebel system, unlike the TDMS, also does not allow case officers who prepare rulings to conduct an effective free text search to specifically locate any other interpretative advice, including private rulings, the ATO may have provided on a particular topic. When the TDMS system was in place, such searches were regularly carried out by ATO officers as part of the process of preparing a private ruling. The inability to carry out such effective free text searches under the new Siebel system raises significant concerns about the integrity and consistency of private rulings being generated under this new system.

2.44 The ATO has advised the IGT that it is satisfied that Siebel's advanced search provides enhanced functionality over that of the TDMS search. However it acknowledges that there are issues with the accuracy of the search functionality within Siebel, which the ATO considers are being addressed through appropriate mechanisms within the ATO.

NEED FOR A FURTHER REVIEW

2.45 The IGT's current findings in relation to the timeliness, quality and integrity of private rulings being generated under the new Siebel system raise concerns about whether the new system has already led or will lead to a deterioration in the ATO's previously strong performance in relation to the production of quality and/or timely and/or consistent rulings. The small sample of Siebel-generated cases to date that the

IGT has reviewed in the final stages of this review is too small to come to a definitive conclusion on these issues.

2.46 The IGT notes that, as with the introduction of any new system, especially those of the magnitude being implemented by the ATO under its overall Change Program, it would be expected that it will take some time for its staff to get accustomed to the new functionality and proper ways to use the new system to produce high calibre rulings.

2.47 The IGT therefore makes the following key recommendation:

KEY RECOMMENDATION 4

To address possible concerns that the new Siebel computer system for handling private rulings may have led to a deterioration in the Tax Office's previous strong performance in the delivery of timely, high quality and consistent private rulings, the Inspector-General recommends:

- that a review which addresses the timeliness, quality, consistency and integrity of private rulings being produced by the Tax Office under the Siebel computer system be conducted after the Tax Office has fully completed its phasing-in work for this new system; and
- that the ATO takes steps, as soon as possible, to ensure that ATO staff can conduct effective searches across the ATO's internal databases for any private rulings on a particular topic.

ORAL RULINGS

2.48 During the review the IGT, with the agreement of the ATO also examined the extent to which taxpayers and the ATO were making use of the system of oral rulings which is provided for in Division 360 in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). The current oral rulings system has been in place since 1 January 2006.

2.49 Oral rulings are expressions of the Commissioner's opinion of the way in which the tax law applies to a particular arrangement which are given orally rather than in writing. They are given only to individuals (or their legal personal representative) and are only available on straightforward income tax matters. They cannot be given on business or complex matters, nor can they be given to tax agents. The Commissioner is legally bound by an oral ruling in the same manner as he is legally bound by written private rulings.

2.50 The IGT found that during the 2008/09 year there were only 13 oral rulings issued by the Tax Office.

2.51 During fieldwork for the review, ATO staff advised the IGT that they perceived that the amount of work required to prepare an oral ruling was similar to that required for a private ruling. Because of this, ATO staff preferred to issue a private ruling, rather than an oral ruling, as this type of ruling provided a tangible response to the taxpayer.

2.52 The administrative costs associated with the oral rulings system are disproportionate to the low level of useage of the system. The Tax Office maintains detailed administrative processes for these types of rulings. These processes include a number of publicly available ATO practice statements and fact sheets dealing with oral rulings² as well as a number of internal ATO documents and training packages on this subject.

2.53 In the light of these comments, the Inspector-General is of the view that the Government should consider abolishing the oral rulings system and removing the relevant provisions dealing with oral rulings from the TAA 1953.

2.54 The IGT notes that the Board of Taxation made a similar recommendation in its 2008 *Review of the Legal Framework for the Administration of the GST*.³

2.55 The IGT therefore makes the following recommendation:

KEY RECOMMENDATION 5

In view of the continuing low level of usage of the oral rulings system, the Inspector-General recommends that the Government should consider abolishing the oral rulings system and removing the relevant provisions dealing with oral rulings from the *Taxation Administration Act 1953*.

ATO'S PUBLISHED REGISTER OF PRIVATE BINDING RULINGS

2.56 The ATO publishes on its website the content of private binding rulings in the form of a register of private binding rulings. The published content of these rulings is edited to remove any material (such as names) which could identify the taxpayer to whom the relevant ruling has been issued.

2.57 In November 2008 the ATO flagged a proposal to convert this register into one which displayed the number and subject title of the relevant rulings, without any content. This proposal was to be implemented in January 2009. However, following representations from the IGT and from other bodies the Commissioner announced in March 2009 that he had decided not to proceed with this proposal and that he would maintain the register in its current form.

2 See for example the material contained in PS LA 2008/3 at paragraphs 161 to 191.

3 Board of Taxation, *Review of the Legal Framework for the Administration of the GST*, December 2008 at p. 77.

2.58 When he made his announcement to keep the register, the Commissioner also asked the IGT to conduct this present review of the private rulings system. The first agreed term of reference for this review was that the IGT would examine the purpose, use and ongoing relevance of the edited private rulings register and the relationship of this register to the ATO's more authoritative forms of guidance, such as ATO Interpretative Decisions.

2.59 In this review, the IGT has considered in detail the arguments raised for and against maintaining a detailed public register of edited private rulings.

2.60 The arguments for maintaining such a register are that:

- a detailed register promotes transparency. Publication of detailed edited private rulings gives taxpayers an indication of whether they are being treated equally or fairly when compared to other taxpayers in similar circumstances;
- a detailed register helps to improve the quality of ATO private rulings. It allows any errors in these rulings to be detected either by parties external to the ATO or by ATO officers. Publication therefore helps to ensure consistency in the private rulings being issued by the ATO;
- a detailed register helps tax practitioners and their clients to determine whether or not to apply for a private ruling on a topic, and if they do decide to apply for a private ruling it gives them guidance on what points they should include in their application;
- a detailed register assists tax compliance. Sometimes publication of a particular edited private ruling has deterred taxpayers from entering into particular arrangements. On other occasions a detailed edited private ruling has alerted tax practitioners to aspects of a tax issue that they had not yet considered;
- a detailed register assists the self assessment process because it provides some types of assistance to taxpayers and tax practitioners which is not available from other ATO sources. For example, private rulings are often about matters which involve an application of the law to particular facts rather than about an interpretation of the law. In these circumstances no ATO product (such as an ATO Interpretative decision (ATOID)) will exist to help guide taxpayers as ATOIDs and similar products only deal with interpretative issues;
- the existing detailed register is actually being used by a significant number of taxpayers and tax practitioners;
- a detailed register ensures that large legal and accounting firms (who are able to maintain their own library of previous ATO private rulings issued to their clients) do not obtain an unfair advantage over smaller firms who do not have access to the type of private rulings material accumulated by larger firms;
- the existing detailed register may be supported by the majority of the ATO's staff; and

- other overseas jurisdictions have considered that the benefits of maintaining a detailed register outweigh any costs associated with such as register.

2.61 The arguments against maintaining such a register are that:

- a detailed register involves costs (estimated by the ATO to be in the order of \$1,095,321);
- a detailed register increases the risk of a possible loss to the revenue because an edited private ruling on the register may be wrong and may in fact be relied on by other taxpayers even though the register itself makes clear that edited private rulings may not be relied on by taxpayers;
- a detailed register can lead to a mass of material that is difficult to effectively manage or use;
- a detailed register may deter people from applying for private rulings; and
- a detailed register may delay the timely issue of private rulings.

2.62 The IGT has weighed the above arguments for and against keeping a detailed register and has concluded that on balance the ATO should continue its practice of publishing edited and searchable versions of binding private rulings.

2.63 The IGT also considers that the ATO should work towards making further enhancements to these published rulings such as by introducing a process of grouping rulings which have the same subject matter, introducing a better search engine and noting which rulings on the register have been withdrawn or are known to be incorrect.

2.64 The IGT considers that the ATO should also continue with its current processes to fully overcome its current backlog of edited versions that have not yet been published on the register. This backlog arose because, when the ATO made the decision in late 2008 to cease publishing the content of private rulings on the register, it also at that time significantly reduced the level of resources that were devoted to maintaining the register.

2.65 The IGT therefore makes the following key recommendation:

KEY RECOMMENDATION 6

The Inspector-General recommends that the Tax Office should:

- retain its practice of publishing on its website edited and searchable versions of binding private rulings;
- further enhance this register by introducing a process of noting which rulings on the register have been withdrawn;

- work towards introducing a process of grouping rulings which are of a standardised nature and publishing only the details of the relevant ruling which differ from the standard version;
- work towards introducing a better search engine for the register and the removal or notation of rulings known to be incorrect or out of date; and
- work towards ensuring that all private rulings are published on the register within 49 days after the provision of the ruling to a taxpayer.

ATO'S IMPLEMENTATION OF RECOMMENDATIONS OF IGT'S 2008 REVIEW ON REVENUE BIAS IN PRIVATE RULINGS

2.66 As part of this review, the Inspector-General examined the extent to which the ATO has implemented recommendations from the IGT's 2008 *Review of the potential revenue bias in private binding rulings involving large complex matters*. The ten recommendations arising from the 2008 review suggested improvements in the following areas:

- Tax Office transparency, communication and objectivity;
- the interactions between the Tax Office and Treasury; and
- the time frames for private rulings.

2.67 Chapter 5 of this report includes the Inspector-General's findings on the implementation status of these recommendations. Provided for each recommendation is the:

- the ATO position on the implementation of that recommendation; and
- the IGT's conclusion on the ATO's implementation of that recommendation.

2.68 Appendix 4 of this report also lists the recommendations and the Tax Office's original responses that were included in IGT's 2008 report.

2.69 The IGT has concluded that the ATO has implemented all of the recommendations (or parts thereof) that the ATO agreed to implement as a result of this earlier 2008 review.

CHAPTER 3: THE PRIVATE BINDING RULINGS SYSTEM — ADMINISTRATIVE PROCESSES

INTRODUCTION

3.1 Under Australia's tax laws, the ATO is able to issue legally binding written advices (called private rulings) to particular taxpayers on how the ATO considers that the income tax law applies to a particular arrangement. Subject to certain conditions, these private rulings are legally binding on the ATO. This means that if a taxpayer follows the advice in a private ruling that has been issued to them, the ATO cannot levy additional income tax, penalties and interest if that advice is wrong.

3.2 Private rulings are published in an edited form in a register of private binding rulings that is accessible to the public via the ATO's website.

3.3 Private rulings are a part of the ATO's advice and guidance framework. ATO advice is advice that is generally issued in the form of material which binds the Commissioner. Private rulings, public rulings and oral rulings are examples of ATO advice. ATO guidance is not binding on the Commissioner and provides more general information that assists taxpayers in a wide variety of circumstances to deal with their tax obligations. Written guidance provided to a particular taxpayer is an example of ATO guidance. The ATO has stated that if a taxpayer wants binding advice about the applicability of the law to their individual circumstances, they should apply for a private ruling or an oral ruling.⁴

PREVIOUS RECENT REVIEWS OF THE PRIVATE RULINGS SYSTEM

3.4 Aspects of the ATO's administration of the private rulings system have been subject to three other major reviews over recent years.

Treasury's RoSA review

3.5 The most far-reaching recent review of the private rulings system was conducted by Treasury in its 2004 *Review of Aspects of Income Tax Self Assessment* (the RoSA review).

3.6 This review made 54 recommendations, 14 of which related to private rulings. Of these 14 recommendations, 6 were to be addressed administratively and 8 by legislative change. There were 2 recommendations which related to oral rulings, one of which was to be addressed administratively and the other, by legislative change.

4 The ATO's advice and guidance framework is set out in more detail in Practice Statement PS LA 2008/3 - *Provision of advice and guidance by the Tax Office*.

3.7 The legislative RoSA recommendations concerning private and oral rulings were implemented via a total re-write of the legislative provisions concerning public, private and oral rulings, which came into effect on 1 January 2006.

3.8 The six recommendations of the RoSA report concerning private rulings and one recommendation concerning oral rulings that were to be addressed administratively have also now been implemented.

3.9 The RoSA legislative and administrative recommendations were aimed at providing greater certainty to taxpayers from the private rulings process. These recommendations involved an expansion of the range of topics on which private rulings could be issued, measures to help the ATO better manage changes to private rulings, measures to improve the timeliness of private rulings, measures to make private rulings more readable and measures to improve confidence in the objectivity of private rulings.

3.10 Of the six RoSA recommendations for private rulings that were to be addressed administratively, one involved the IGT conducting a review of whether the pattern of private rulings indicated a pro-revenue bias. This review was completed in 2008 and is discussed further below.

3.11 The remaining five administrative recommendations for private rulings, all of which have now been implemented, were that the ATO should:

- (where appropriate) use assumptions in private rulings and not consider matters not raised by applicants;
- modify its private ruling application forms and processes to reduce the need for taxpayers to conform to complex procedures or for the ATO to seek additional information from taxpayers;
- write rulings in plain language with a minimum of qualifying statements and, where necessary, provide in addition a more detailed or technical statement of its position;
- include in private rulings, where appropriate, an indication of whether Part IVA has been considered;
- enhance its published performance reporting on private rulings to distinguish response times to individuals and very small businesses from those for larger businesses and separately report agent and non-agent case statistics.

3.12 The administrative recommendation concerning oral rulings which has now been implemented was that the ATO was to explore ways to record oral advice as had been previously suggested by the Ombudsman.

IGT's review of potential revenue bias in private rulings involving large business taxpayers

3.13 On 7 February 2005, the then Minister for Revenue and Assistant Treasurer asked the Inspector-General to review and report on whether there is a 'pro-revenue'

bias evident in private binding rulings issued by the Commissioner of Taxation under Part IVAA of *Taxation Administration Act 1953*. As a result of this request and industry representations to do so, the Inspector-General then conducted a review of the potential revenue bias in private rulings involving large complex matters. This review focussed on private rulings involving large business taxpayers.

3.14 The review found that because of the ATO's dual role as a rulings administrator and a revenue collector it was generally accepted that the ATO would have an inherent revenue bias in finely balanced matters. However, the review found that there was no evidence of undue revenue bias in large complex PBRs.

3.15 Based on a representative survey, however, around 70 per cent of large business PBR applicants perceived the Tax Office to have a revenue bias in its PBRs. A major cause of these perceptions was identified as being a lack of transparency – taxpayers observed unexplained Tax Office behaviours and in the absence of cogent explanations interpreted those behaviours as being motivated by a revenue bias. The Inspector-General made ten recommendations to address this. The Tax Office fully agreed with six of these recommendations and partly agreed with four.

3.16 The ten recommendations suggested improvements in the following areas:

- Tax Office transparency, communication and objectivity – Recommendations 1 to 6 (Recommendations 1 and 2 were partly agreed to by the Tax Office)
- the interactions between the Tax Office and Treasury – Recommendations 7 and 8 (Recommendation 7 was partly agreed to by the Tax Office)
- the time frames for private rulings – Recommendations 9 and 10 (Recommendation 10 was partly agreed to by the Tax Office).

3.17 As a recent initiative, the IGT also conducted a 'follow up review' on the extent to which the original 10 recommendations, referred to above, had been implemented. The Inspector-General's conclusions are included in this report at Chapter 5.

JCPAA Report 410 — June 2008

3.18 In 2008 the Australian Parliament's Joint Committee of Public Accounts and Audit (JCPAA) conducted a review of the ATO's administration of rulings. The report from this review noted that the timeliness of private rulings was the main issue raised in evidence about rulings.

3.19 The JCPAA made two recommendations on this issue.

3.20 The first recommendation was that the ATO should publish in its Annual Report a comparison of its performance in relation to its 28 day service standard for private rulings requests with information on total elapsed time for these applications. (Interestingly, the IGT made this same recommendation in the 2008 revenue bias private rulings report discussed above but on that occasion the ATO only agreed to the recommendation 'in part'. For further discussion refer to the follow up review at Chapter 5.)

3.21 The second recommendation was that the ATO should divide the 'large businesses' category used for its performance reporting of the timeliness of private rulings into 'medium businesses' and 'large businesses'.

3.22 The ATO implemented both these JCPAA recommendations in its 2007/08 Annual Report.

FOCUS OF THIS REVIEW

3.23 This present review by the IGT has been conducted both on his own initiative and in response to a specific request from the Commissioner of Taxation.

3.24 The Commissioner's request was made shortly after community concerns were voiced about a proposal of the Commissioner (which has since been not proceeded with) to remove the detailed content of private rulings from the register of binding private rulings that is currently accessible to the public via the ATO's website. The ATO had planned to streamline this register so that it showed only the subject matter of any private ruling and its authorisation number. The request was also made against the background of a major change that the ATO was about to implement to its computer system for the management of private rulings. Implementation of this major system change occurred after the major fieldwork for this review had been completed.

3.25 Against this background, the terms of reference for this review are broader than those set for the IGT's previous 2008 review of the private rulings system. This previous review focussed on a particular concern (revenue bias) and a particular taxpayer group (that of large businesses). This review focussed on private rulings issued to all types of taxpayers and on a number of identified concerns. It has also examined oral rulings.

3.26 In submissions made to this review, taxpayers and tax practitioners primarily focussed on the ATO's original proposal to alter the current content of the publicly accessible register of private binding rulings. These submissions and the ATO's former proposals for this register are discussed in detail in chapter 4 of this report.

3.27 Concerns that were raised in submissions about other aspects of the ATO's administration of private rulings were that:

- private rulings take too long to issue;
- private rulings on the same topic can be inconsistent; and
- private rulings cannot be obtained on certain topics.

3.28 The first concern about rulings taking too long to issue, or delays, was the most frequent type of complaint made to the ATOs' Internal Complaints Unit on private rulings issues during the two years ended 30 June 2009⁵.

3.29 The IGT's findings in relation to these concerns and others that were identified during the fieldwork for this review are set out in this chapter.

3.30 These findings do not cover private rulings prepared by the ATO's Aggressive Tax Planning area. Early in the review process, the IGT made a decision to exclude private rulings prepared by this area from the scope of this review. This was because of the unique circumstances which apply to private rulings which are handled by this area of the ATO, which may involve what the ATO considers to be possible tax avoidance. Furthermore, no submission to this review raised concerns about private rulings handled by this area of the ATO. The subject of private rulings handled by this area may be the subject of a later review by the IGT.

3.31 The findings also do not cover class or product rulings. This is because the ATO issues these types of rulings as public rulings rather than private rulings. Issues concerning class rulings did however feature prominently in submissions made to this review. These types of rulings are now the subject of a separate review by the IGT.

3.32 The review did not examine private rulings issued by the ATO on the goods and services tax (GST), the luxury car tax or the wine equalisation tax as rulings on these topics are currently covered by a legislative regime that is different to that which applies to income tax (although the Government has flagged that rulings on these topics will shortly be brought into the same regime as that which applies to income tax rulings). Similarly, the review did not cover rulings or superannuation regulatory issues as these types of rulings are not legally binding on the ATO.

NUMBER AND SUBJECT MATTER OF PRIVATE RULINGS

Number and results of private rulings

3.33 Over the last five financial years, the total number of private rulings on income tax finalised by the ATO has been steadily declining. This is shown in the following table:

5 The ATO has advised the IGT that its internal complaints area received 98 complaints relating to private rulings issues in 2007/08 and 2008/09. Of these, 78 related to the time taken to provide the ruling. Of these 78 complaints, 59 complaints were upheld.

Table 3.1: Numbers of private rulings on income tax finalised from 2004-05 to 2008-09

ATO business line	2004-05	2005-06	2006-07	2007-08	2008-09
ATP	268	99	179	192	172
LBI	274	261	278	222	246
MEI/Ptax	6009	6412	7078	6896	6766
SME/SB	2911	2683	727	753	753
SPR	1608	1659	1665	1576	947
L&P/OCTC	39	37	36	37	33
Total	11109	11151	9963	9676	8917

3.34 Around 56 per cent of all private rulings finalised during 2008/09 were favourable to taxpayers.

Subject matter of private rulings

3.35 The ATO does not prepare ATO-wide management reports which show the subject matter or topics of private rulings or how these might vary from year to year.

3.36 During this review the ATO identified that the following two topics each accounted for a significant percentage of the 1345 edited private rulings that were awaiting publication on the ATO's register of private binding rulings as at 30 November 2009:

Table 3.2: High volume rulings topics based on ATO data

Topic	Number of edited private rulings on hand as at 30 November 2009	Per cent of all edited private rulings on hand at 30 November 2009
Assessability of workers compensation lump sum (SA)	488	32.5%
Undeducted purchase price of an annuity (domestic or foreign)	75	5.6%

3.37 The IGT's fieldwork for this review indicated that, over the 2008/09 year as a whole, the above two topics also appeared to account for similar percentages of all private rulings finalised during that year.

3.38 The rulings on the assessability of South Australian workers compensation receipts are prepared by the ATO's Microenterprise and Individuals (MEI) business line. Based on the ATO statistics quoted above, these types of rulings accounted for 52 per cent of all private rulings from that business line that were awaiting publication as at 30 November 2009.

3.39 Rulings on the amount of the undeducted purchase price (UPP) of an annuity (foreign or domestic) are prepared by the ATO's Superannuation business line. These types of rulings accounted for 60 per cent of all private rulings from that business line

that were awaiting publication as at 30 November 2009. These types of rulings are however expected to decrease in future years because of changes to superannuation which came into effect from 1 July 2007.

3.40 Both types of private rulings are straightforward in nature and have standardised arrangements for their preparation which are adopted by both applicants (when requesting these rulings) and by the ATO (when generating these rulings).

3.41 Despite the significant volume of rulings dealing with both these types of rulings, and their standardised preparation arrangements, neither category of rulings is specifically identified in any internal ATO-wide reports prepared by the ATO, although the individual business lines dealing with these rulings are themselves aware of the volume of rulings on these topics.

3.42 This has had a number of effects.

3.43 One effect of the ATO's lack of ATO-wide separate reporting on these and other types of standard rulings, which have a very quick turnaround time, is that the ATO has been reporting that it has met its overall service standards for the timely issue of rulings, when in fact it has not been meeting this standard for certain categories of more complex rulings. This problem has been particularly evident in the Superannuation business line where for the 2008/09 year the IGT's fieldwork found that more than 50 per cent of that business line's non UPP rulings had a lapsed time frame of more than 90 days, which was outside that set by its internal service benchmarks. This aspect of the Superannuation business line's performance on private rulings was not evident in any ATO internal corporate reports provided to the IGT during his fieldwork for this review which dealt with that business line's performance in meeting timeliness standards for private rulings.

3.44 Another effect is missed opportunities, as detailed in the following paragraphs, for further enhancements to the Tax Office's management of its overall resources for producing these types of rulings, other private rulings, public rulings or other forms of interpretative assistance.

3.45 During the course of this review IGT staff raised with the ATO changes to the law on workers compensation in South Australia which appear to have the effect of significantly reducing the demand for rulings on this topic in the future. The ATO is now working jointly with the relevant workers compensation regulator in South Australia on the production of a class ruling that should significantly decrease future demand for rulings on this topic. This should have the effect of freeing up ATO resources that are currently devoted to the production of these types of rulings.

3.46 A further effect is that an opportunity to significantly improve the ATO's published register of private binding rulings has been missed. As discussed in the next chapter, this register currently consists of over 80,000 separate edited rulings. However, based on the above ATO statistics, over a third of these rulings may take the form of one of a very small number of standardised responses on two topics. This suggests that the current number of edited rulings on this register could be significantly reduced by the following means. The above types of edited private rulings could be separately identified on the register, a standard form ruling could be published and each individual advice on these topics could then be associated with the

relevant standard form without publishing the actual edited ruling in its entirety. This proposal is also discussed in the following chapter.

3.47 There are also other types of rulings which are a significant percentage of the volume of private rulings in particular business lines. Some of these types of rulings also have standardised preparation arrangements. These include rulings on the sovereign immunity exemption for withholding tax which are prepared by the ATO's Large Business and International (LBI) business line.⁶ They also include rulings on the assessability of foreign salary income and on the application of the foreign investment fund rules to life policies both of which are handled by the ATO's MEI business line. Again, the ATO has no ATO-wide processes in place to identify, track and report on these types of high volume rulings.

3.48 A process of identifying, tracking and reporting on high volume rulings would allow the ATO to better manage its resources and would also provide useful information to the ATO about private ruling topics that may benefit from alternative ATO approaches. Rulings grouped into high volume or broader category topics would also provide tax policy makers with useful information about the areas of the tax law that may require amendment to assist taxpayer needs. Publication of the top five or ten (or whatever number is appropriate) of the most frequently encountered topics in private rulings would facilitate this process.

3.49 These comments lead to the following key recommendation:

KEY RECOMMENDATION 1

The Inspector-General recommends that the ATO should:

- to better manage its resources for the production of private rulings, improve its existing management systems to identify, track and report, on a Tax Office wide basis, the most frequently requested private ruling topics; and
- to facilitate the process of providing useful information to the ATO about high demand private ruling topics that may benefit from alternative ATO approaches and also to tax policy makers about areas of the tax law that may require amendment, publish the top five or ten (or whatever number is the most appropriate) of the most frequently requested private rulings topics.

ATO response

3.50 The ATO agrees with this recommendation.

3.51 As the Inspector-General has acknowledged at paragraphs 2.14 and 3.41, the ATO already takes into account information about the volume of private ruling requests on particular issues at a business line level to help manage our resources and

⁶ The recent Sovereign immunity law change announcement is expected to address this specific case, but the principle remains the same.

the operation of business processes (as evidenced by our approach to the management of the high volume of Undeducted Purchase Price cases in our Superannuation business line and the South Australian Work-cover cases in our Micro-Enterprises and Individuals business line).

3.52 The ATO agrees to undertake reporting and analysis of the most frequently requested private ruling issues on an ATO-wide basis to be available for consideration in ATO business planning and management processes. Initially this will draw on existing subject data and manual analysis as a pilot exercise to support implementation of recommendation 1.2. We will then review the process (including cost analysis) and investigate the use of analytics to determine what it might usefully provide, with the opportunity for more frequent use as appropriate.

3.53 Where there is a large demand for private rulings on a particular issue, the ATO has a number of options open to it to reduce the need for taxpayers to apply for a private ruling. These include, where appropriate, the issue of a public ruling that can be relied on by all taxpayers experiencing the same issue, making available a fact sheet on our website or by advising government, where a change in the law could be considered. All of these continue to be used as required.

3.54 The ATO agrees, in the interests of transparency, that there is value in informing the community of those issues that comprise the most requests for a private ruling. We will need to consider the level of granularity when revealing the details of those requests to ensure that it is providing information of interest. For instance, information that simply states that the top two issues related to the assessability of income and the deductibility of expenses may not be of great use. More granularity requires more system sophistication and analysis. Consequently, we will need to consider what can be achieved in the short term, compared with the medium term and its priority against other requests for system enhancements.

Whether private rulings cannot be obtained on certain matters

3.55 The circumstances in which the ATO can refuse to issue a private ruling are limited. In many other countries, the circumstances in which revenue authorities can refuse to rule are broader.

3.56 Private rulings can be issued on both prospective and past transactions whereas in several countries private rulings can only be obtained on prospective transactions.

3.57 Under the present legislative regime for rulings the only circumstances in which the ATO can refuse to issue a private ruling are as follows:

- the applicant for the ruling is not the taxpayer or their representative (although there are some limited exceptions to this rule);
- the ruling would prejudice or unduly restrict tax administration;

- the matter is already being, or has been, considered by the Commissioner (for example, the relevant taxpayer is under audit and the audit will consider the relevant issue);
- the ruling applicant fails to provide further information that the Commissioner requests during the rulings process;
- the matter involves the exercise of a power and the Commissioner has decided or decides whether or not to exercise the power; or
- the assumptions to be made by the Commissioner affect the correctness of the ruling (for example, because they are too numerous or substantial).

3.58 The ATO has stated to the IGT that it does not, unlike many other countries, have a list of certain specific topics upon which it refuses to rule for income tax purposes.⁷

3.59 However, submissions to this review have stated that there are, or have been in the recent past, examples of ‘no go’ topics in the income tax area upon which the ATO has refused to rule.

Private rulings on Part IVA issues

3.60 The possible application of Part IVA (which is a general anti-avoidance provision) was one topic on which, according to submissions, the ATO would not rule.

3.61 Fieldwork conducted by the IGT, which was based on private rulings finalised or on hand during the 2008/09 year and part of the 2009/10 year, did not validate this concern. The sample of private ruling cases reviewed by staff of the IGT included cases where the ATO had positively confirmed that Part IVA would not apply, as well as cases where it had stated that Part IVA would apply.

3.62 All cases reviewed by the IGT which involved either the positive or negative application of Part IVA had however taken a lengthy time to finalise. All involved elapsed time frames that were well over the 28 day period referred to in the ATO’s service standard. These lengthy time frames were partly due to the ATO seeking further substantial information from taxpayers to determine if Part IVA applied and waiting for that information to be provided but were also partly due to ATO internal procedures. These procedures require business lines to refer cases where Part IVA may apply to a member of the Tax Counsel Network (TCN). This network is organisationally separate from the business lines which prepare private rulings and it has work priorities that may not match those of the business lines. This can lead to delays in the finalisation of private rulings that are referred to this network. These delays may have fuelled perceptions that the ATO will not rule on Part IVA issues.

⁷ The ATO does publicly state that it has an embargo on private rulings in other areas. In this context, the term ‘embargo’ refers to a delay in the issue of ruling rather than a refusal to ever issue a ruling on the relevant matter. A recent example of this has arisen in the area of superannuation regulation. The minutes of the National Tax Liaison Group meeting of December 2009 at agenda item 18.12 confirms that the ATO, as at that date, had an embargo on the issue of advice about borrowings (instalment warrants) referred to in section 67 (4A) of the *Superannuation Industry (Supervision) Act 1993*.

Other perceived 'no go' issues

3.63 During fieldwork for this review the IGT found that from time to time the ATO puts in place special arrangements for the review of rulings on particular topics. For example, for part of the 2008/09 year, there was an internal directive in place that all private rulings dealing with so-called blackhole expenditure, being expenditure for which a deduction may be claimable under section 40-880 of the *Income Tax Assessment Act 1997*, were to be reviewed by a particular member of TCN prior to being issued. This directive had the effect that a number of private rulings on this topic were delayed for very significant periods – in some cases for over a year and a half – as the relevant TCN member was unable to work on these rulings due to other overriding work priorities.

3.64 Again, the private rulings on this topic that were the subject of significant delay were eventually issued. However, the delays that occurred appear to have fuelled perceptions that the ATO would not, during at least the period of delay, rule on certain section 40-880 issues.

3.65 To address perceptions by taxpayers and their advisers that the ATO will not rule on certain topics, the IGT makes the following recommendation:

KEY RECOMMENDATION 2

The ATO should address perceptions that it may have topics on which it will refuse to make private rulings by adopting measures such as:

- notifying applicants for private rulings on particular topics of any key issue escalation arrangements put in place for private rulings on those topics and what impact those arrangements may have on the timeliness of rulings on those particular topics; and
- also notifying (where appropriate) the public of the nature of any such arrangements and what impact these arrangements may have on the timeliness of rulings on those particular topics.

ATO response

3.66 The ATO agrees with this recommendation.

3.67 The ATO does not have a list of issues on which it will refuse to rule. The Inspector-General found no evidence to counter this view. Where the issues raised in a private ruling are complex or raise novel issues, the ATO does have processes in place to ensure that the appropriate expertise is engaged to enable an accurate and consistent response to be given to the applicant. These processes also apply where the officer responding to the private ruling needs an ATO precedential view on the interpretation of that part of the law relevant to the private ruling, and one needs to be created. Tax officers with specialist knowledge are engaged for this purpose.

3.68 Part of the responsibility of the case officer preparing the response to a private ruling is to keep the taxpayer informed of progress, especially where there may be

likely delays. In fact, our published service standards for private rulings require the case officer to negotiate a new timeframe for the response if it will not be issued within 28 days of receipt of all information required to prepare the answer. This is the usual case where escalation along the lines mentioned above is necessary. It is at this time that the case officer will inform the taxpayer of the escalation or other arrangements.

3.69 In addition to the personal notification mentioned above, there may be instances where it would be appropriate to inform the general public along the lines recommended by the Inspector-General. For instance, following the decision in *Bamford v Commissioner of Taxation* [2009] FCAFC 66, the Commissioner issued Practice Statement Law Administration PS LA 2009/7 to explain the actions he would take on a range of fronts while the matter is on appeal in the High Court. For rulings, paragraph 53 is relevant. It states

‘Should a request be made for a private, product or class ruling that requires the Commissioner to express a view on the extent of a particular beneficiary’s liability to tax under sections 97 or 100, or a trustee’s liability under sections 98, 99 or 99A, the ruling should reflect the Commissioner’s views as to ‘income of the trust estate’ and ‘share’ in Division 6. However in such cases, staff should first seek to obtain agreement from the ruling applicant to defer the issue of the ruling pending the outcome of the *Bamford* litigation.’

ATO RESOURCE ARRANGEMENTS FOR PREPARING PRIVATE RULINGS

3.70 Private rulings on income tax are not prepared by one centralised area within the ATO, unlike some overseas countries. Instead, private rulings on income tax issues can be worked on by ATO staff in one or more of four major business lines, together with (in some cases⁸) staff in one or more of six separate Centres of Expertise as well as (again, in some cases) staff from the Tax Counsel Network.

3.71 While each of these ATO areas that may possibly be involved in private rulings work adopts the same computer system for processing these rulings, each area has developed certain unique management processes for this work.

3.72 Appendix 3 contains a brief description of the management processes for private rulings adopted in:

- each of the Tax Office’s four major business lines (other than the Aggressive Tax Planning area) which are responsible for preparing private rulings. These business lines are the lines for Microenterprises and Individuals (MEI), Small and Medium Enterprises (SME), Large Businesses and International (LBI) and Superannuation (Super);
- the ATO’s Centres of Expertise, who must be involved in any private ruling which involves the creation of an ATO precedential view; and

8 The ATO has advised that, in 2008/09, 300 issues pertaining to private rulings were escalated to the Centres of Expertise or to TCN.

- the Tax Counsel Network, who must be involved in any private ruling which involves the possible application of Part IVA (the general anti-avoidance provision) or section 45B (which involves demergers of corporate groups) of the *Income Tax Assessment Act 1936* or which involves a significant issue that has been designated as a Priority Technical Issue (PTI).

3.73 During his fieldwork for the review the IGT found that these management processes for private rulings could lead to large numbers of ATO staff being involved in any one private ruling. Where a private ruling involved the creation of an ATO ID, a minimum of six ATO personnel (three from the relevant business line and three from the relevant Centre of Expertise) would be involved in the creation of the relevant private ruling. Where multiple business lines and multiple Centres of Expertise (CoE) were involved (as was the case for several of the private rulings examined by staff of the IGT) each new area of the ATO that came in would add at least two and sometimes three additional ATO personnel to the ruling creation process.

3.74 The IGT found that the creation by the ATO of a large team to handle a private ruling did not cause significant delays where the ruling was subject to the ATO's priority rulings process. This priority process is only available in respect of significant issues for large business taxpayers and some small to medium enterprise taxpayers and, in the 2008/09 year, applied to only a limited number (16) of all private ruling cases.

3.75 For rulings that were not subject to this priority process, the IGT found that the creation of a large ATO team for the ruling did lead, in some cases, to significant delays in the timely processing of the relevant ruling request. Such delays are clearly inappropriate, given the purpose and design of the private rulings system. The aim of this system is to provide taxpayers with certainty, on a timely basis, of the ATO's view of an arrangement. Generally any revenue risk is limited because, if any private ruling is incorrect, it is confined in its application to only that taxpayer.

3.76 Staff of the IGT also found examples of situations where the existence of a large ATO team working on a single ruling matter gave rise to significant productivity issues.

3.77 For example, cases were encountered where extensive work on a ruling continued to be done by one area of the ATO when another area of the ATO was aware that the taxpayer no longer actively wished to pursue the ruling request.

3.78 Other cases were encountered where there appeared to be no need for the sequential involvement of multiple centres of expertise and/or business lines and/or Tax Counsel. For example, in a number of cases involving the single issue of the application of the section 40-880 (blackhole expenditure) provisions (to, say, a claim to deduct legal expenses) where no existing ATO precedent existed, at least two ATO Centres of Expertise would always be involved, as well as a business line and a Tax Counsel.

3.79 A business line would first look at the ruling and prepare a detailed written analysis of why it thought section 40-880 did or did not apply. It would then refer the ruling to the Centre of Expertise for Losses and Capital Gains. This centre would look at the ruling because section 40-880 is a section which allows a deduction only where

no other provisions apply. It therefore does not apply if the relevant expense is taken into account in calculating a capital gain. This centre would therefore examine how the capital gains tax provisions applied to the expense under consideration. When this centre had finalised its deliberations, the ruling would then be considered by the Centre for Administration, Business and Personal Taxes which handles miscellaneous business tax issues. This centre would also prepare a detailed view on the application of section 40-880, based on the findings of the first centre on the capital gains tax aspects. Finally, TCN would also then look at the ruling because, at the time, all rulings involving the application of section 40-880 needed to be authorised by TCN.

3.80 In these types of cases the ATO could have significantly reduced the volume of work involved by obtaining and applying the views of the known ultimate decision maker – in this case this was TCN – within a reasonable time of the very beginning of the case.

3.81 The ATO has recognised that the sequential involvement of multiple areas of the ATO in certain private rulings is a factor which can lead to delays in the issue of that ruling and productivity issues. During the course of this review it advised the IGT that it was undertaking a review which was examining options for reducing the numbers of separate areas of the ATO that can be involved in private ruling cases. These options include the possible amalgamation of its current Centres of Expertise with the TCN. The IGT considers that these options should be pursued because, if implemented appropriately, it should have the effect of reducing a major source of delay in the ATO's current processes for issuing private rulings.

3.82 These comments lead to the following key recommendation:

KEY RECOMMENDATION 3

To address delays and productivity issues that may arise from having large teams from different areas of the Tax Office working on private rulings, the Tax Office should:

- implement measures to ensure that only the minimum number of Tax Office personnel necessary to produce a timely and high quality product are employed on any private ruling;
- introduce and develop productivity benchmarking, exploring both internal and external criteria, for Tax Office personnel engaged in the private ruling decision-making process; and
- ensure that the minimum necessary number of personnel on a private ruling case includes the ultimate case decision-maker from the time when this ultimate decision-maker has been identified.

ATO response

3.83 The ATO agrees in principle with this recommendation.

3.84 The ATO's approach is to ensure that staff with the appropriate expertise are engaged early in the process. The ATO does not believe that an emphasis on raw numbers achieves this.

3.85 The ATO is currently in the implementation stages of an initiative designed in part to achieve this. Its features include an early engagement and triage model that classifies private rulings according to factual and technical complexity and ensures that both the right people are involved and the information gaps are identified early. The model also mandates the completion of a case plan in the first 14 days of receiving a request for a private ruling which will establish the expectations of both the ATO and the taxpayer. Discussions with the taxpayer are a crucial element. Our initial focus is the large market. Based on our experience during implementation, we will look to embed appropriate features in other markets, remembering that one size does not necessarily best suit all circumstances. Our overall aim is to ensure that we get the correct answer in the quickest time and that we keep the taxpayer informed.

3.86 The ATO is concerned about the delays that do occur in responding to some requests for private rulings. Often these involve complex or novel issues that require specialist expertise and often emanate from the large market. The initiative mentioned in 3.85 above should make inroads in addressing the issue of timely responses to these requests for private rulings. When an applicant can give us notice of a prospective transaction early, establishing expectations up front, it can result in a better quality private ruling request, which in turn helps us get back to the applicant in a more timely manner.

3.87 We agree with the Inspector-General that undertaking relevant benchmarking could be useful and we will explore it with pilot projects to test our approaches. This is, however, not new ground for us. We have sought to find benchmarks in the past. We know from that experience how challenging it is to find comparable external organisations that are leaders in this area.

3.88 The ATO reiterates that it is not so much about the numbers of staff but the appropriate staff. As explained above, the ATO prefers to focus on having the appropriate expertise engaged early to resolve the issue/s raised in the request for a private ruling. This includes those officers that contribute to the final decision. The time of engagement is subject to the needs identified as part of the triage process and ongoing management of the private ruling.

OTHER PRODUCTIVITY AND TIMELINESS ISSUES WITH PRIVATE RULINGS

Productivity issues

3.89 Although the number of private rulings finalised by the ATO has been steadily declining in recent years, ATO resources devoted to generating these rulings has increased by 25 per cent. This raises a further issue of ATO productivity in relation to this type of work.

3.90 Concern about this productivity issue and with timeliness issues for private rulings led to an internal ATO review on the productivity of private rulings that was

completed late in 2008. This review noted that overall the ATO was using more staff and taking longer to do fewer private rulings. However, it concluded that although this was justifiable, there was room for improvement and for further work.

3.91 The internal review pointed to the complexity of the subject matter of rulings as a possible reason for increased resourcing. The review also noted that the historic decline in the number of requests for private rulings was due to a number of factors, such as:

- the availability of better alternative sources of assistance, such as information from the ATO's website and assistance from ATO call centres; and
- deliberate ATO strategies to switch private ruling requests where appropriate to faster, lower cost, less resource intensive products such as oral or written guidance.

3.92 The ATO's review found that when total non-private ruling guidance work was combined with private rulings work, historic trends showed that there was a slight decrease in both the total volume of this work and the resources devoted to it over time. This, when combined with other data and information, led the report to conclude overall that there was no evidence of widespread or systemic deficiencies in its productivity performance on private rulings but that there was room for improvement in some areas and that it needed to do more work to understand and verify the resourcing data.

3.93 As a result of this internal report, the ATO resolved to take a range of steps including :

- to better differentiate between complex and routine private rulings cases for the better management of risks, resources and reporting;
- to include in its Annual Report data showing the shift from binding private rulings to more practical and user friendly interpretative advice;
- to continue with business line benchmarking and improvement strategies;
- to continue to better understand and monitor workload and workforce data and reporting systems; and
- to continue to encourage and evaluate innovative suggestions for improvement.

3.94 The IGT notes that this internal review did not seek the views of taxpayers or their representatives on why they were seeking fewer private rulings. The ATO has advised the IGT that this was because it relied on a survey of taxpayers and advisers conducted in 2006 to reach its conclusions rather than canvassing taxpayers' and advisers' views specifically for this internal review.

3.95 In his review of potential revenue bias in private rulings, which was conducted over the period of 2005 to 2008, the IGT concluded that, for large taxpayers, a perception of revenue bias tends to deter these taxpayers from seeking a private ruling unless it is necessary. The IGT also found that large businesses generally consider that external counsel advice is a better risk management strategy than a

private ruling. These types of views may therefore be another reason for the decline in private rulings over recent years.

Timeliness issues

3.96 In its 2008/09 Annual Report the ATO noted that its service standard for private rulings was 80 per cent finalised within 28 days of receipt of all information or by a negotiated due date. It noted that it met this service standard but that concerns were raised about the timeliness of responses where there was a negotiated due date.

3.97 The 2008/09 Annual report also includes the following data showing the median and mean number of elapsed days from the date of receipt of a ruling request in the ATO to the date of issuing a ruling. The ATO has provided data for both median and mean elapsed time but has noted that the median is the better measure because it is not impacted by relatively small numbers of rulings that take a long time to complete.

Table 3.3: Private ruling cases completed, 2007-08 to 2008-09 based on ATO data

Category	Cases completed (2007-08)	Cases completed (2008-09)	Percentage within standard (2007-08)	Percentage within standard (2008-09)	Elapsed time in days		Elapsed time in days	
					Mean (2007-08)	Mean (2008-09)	Median (2007-08)	Median (2008-09)
Income tax								
Individuals	5,392	5,330	83.3	94.5	46	30	28	17
Micro enterprises	1,709	1,575	78.0	84.8	64	54	49	31
Small to medium	761	783	88.9	84.2	84	90	56	55
Large businesses	232	278	94.0	95.3	95	108	70	81
GST	2,264	2,130	91.7	93.3	52	62	34	39
Superannuation	1,612	1,202	90.7	91.8	59	54	43	35
Excise	112	122	92.9	94.3	45	45	31	35

NOTE: Annual turnover ranges: micro enterprises — up to \$2 million; small to medium enterprises — between \$2 million and \$250 million; large business — more than \$250 million.

3.98 The period of lapsed days is not the time used by the ATO to measure its performance in the delivery of rulings as it does not take into account periods of delay which are due to the ATO requesting information from the taxpayer. Nevertheless, this lapsed day measure period does provide a supplementary means of assessing the ATO's performance in the timely delivery of private rulings.

3.99 The Annual Report data on the lapsed days measure indicates that in 2008/09 for all types of taxpayers other than individuals the median number of elapsed days for private rulings exceeded 28 days from receipt of the original ruling request. This data appears to confirm statements made in submissions to this review that private rulings are not issued within 28 lapsed days. This means that, if non-individual taxpayers have a 28 day period or less for entering into the transaction that is the subject of a private ruling request, they cannot generally expect to receive a ruling within this time frame.

3.100 The ATO has also advised the IGT that in the six months to 31 December 2009, it has not met its set service standard for private rulings. In these six months only 69 per cent of private rulings have been finalised within 28 days of receipt of all information or by a negotiated due date. During this period the ATO progressively switched to a new computer system, known as the Siebel system, for the management of its private rulings work.

3.101 As noted above, concerns about the timeliness of rulings featured prominently in submissions made to this and other previous reviews on private rulings. Submissions stated that one possible cause of these delays was a perceived practice of ATO staff making requests for further information from taxpayers in all private ruling matters, even where this did not seem to be justified. The IGT's previous review on potential revenue bias in private rulings also examined this concern and recommended that the ATO should take steps to vet requests for further information, should (if requested) provide reasons why the information is relevant and should identify the specific aspect of the technical issue that turns on the requested information. The ATO agreed with this recommendation.

3.102 The IGT's findings in relation to the productivity and timeliness of private rulings arising from this present review are incorporated into Key Recommendation 4, which is set out later in this chapter. This key recommendation takes into account the IGT's findings in relation to quality and integrity issues associated with the administration of private rulings, which are discussed in the next two sections of this chapter.

QUALITY ISSUES WITH PRIVATE RULINGS

3.103 Submissions to this review raised some concerns about possible inconsistencies in some private rulings, but otherwise submissions raised no concerns about the quality of private rulings issued by the ATO. A number of submissions, all of which were prepared prior to the ATO's switch to a new computer system for managing private rulings, praised the quality of written rulings issued by the ATO.

3.104 The IGT's fieldwork for this review, which was based on rulings finalised or on hand during the 2008/09 year did not reveal any examples of inconsistent rulings. Submissions did provide examples of inconsistent edited private rulings that were on the ATO's register of private binding rulings, but these involved rulings issued in years of income prior to 2008/09 and were therefore not examined during the course of this review.

3.105 The IGT's fieldwork for this review has however raised concerns that the quality of private rulings being generated under the new Siebel system may have deteriorated from previous years, which could be serious.

3.106 The IGT's fieldwork was conducted in two phases.

3.107 The first, and major, fieldwork phase involved examining 163 randomly selected private rulings that were completed or on hand during the 2008/09 year. These rulings were drawn from the following business lines: LBI (26 rulings), MEI (82

rulings) Superannuation (16 rulings) and SME (39 rulings); and involved interviewing ATO staff working at a number of different ATO sites around Australia. All of these rulings were completed during the time that the ATO was using a computer system known as the Technical Decision Making System (TDMS) to manage its private rulings.

3.108 These private rulings showed that the ATO had a strong performance in the issuing of high quality private rulings as only three of these rulings examined during this fieldwork displayed any quality issue.

3.109 A quality issue associated with a particular ATO private ruling has also been publicly referred to in a recent Administrative Appeals Tribunal decision. The case was that of *Investa Properties Limited v Commissioner of Taxation* [2009] AATA 121 25 February 2009. The quality issue identified in the decision of the Tribunal was that the ATO had not, in the private ruling it had given to the taxpayer, addressed the original question raised by the taxpayer in their application for a ruling. The AAT found that it had no power to restate the scheme that was the subject of the review of objection decision. Accordingly, it dismissed the application for review of the objection decision and expressed the hope that the Commissioner would reconsider the actual scheme identified and issue a new ruling on the subject matter of the scheme about which the taxpayer sought a private ruling.

3.110 The second phase of the IGT's fieldwork involved examining, by way of a desktop review, a smaller sample of private rulings (20) that had been finalised after the ATO switched to the new Siebel computer system for managing its rulings. These private rulings were from the following business lines: LBI (3 cases), MEI (11 cases), SME (3 cases) and Superannuation (3 cases). The aim of the review was to see if the new Siebel system was giving rise to any obvious problems with the generation of private binding rulings.

3.111 The IGT found that 10 of the 20 sampled Siebel cases (that is, 50 per cent) had quality problems. These quality problems included statements in the ruling that appeared to be technically inaccurate, statements that were unclear or incomplete, an absence of any cited ATO precedent in the ATO's internal working documents for the private ruling, a failure to address the question raised, and inappropriate notations, such as exclamation marks.

3.112 In the IGT's sample, the MEI business line had the most number of rulings with quality problems. The LBI area had the next highest number of private rulings with a quality problem, although these were of a relatively minor nature compared to the MEI rulings. There were also superannuation rulings which had a quality problem. None of the SME rulings had an obvious quality problem.

3.113 During the period in which the sampled Siebel cases were generated, the ATO was applying an Integrated Quality Framework (IQF) system to assess the quality of its private rulings. This quality system differed from the Technical Quality Review (TQR) system which was used during most of 2008/09. The IGT's findings on the 20 sampled Siebel cases also therefore raises issues as to the effectiveness of the ATO's IQF system for private rulings, at least during the time of transition between the TDMS and Siebel systems. However, the small sample of Siebel-generated cases to date that the IGT has

reviewed in the final stages of this review means that it is not possible to come to a definitive conclusion on this issue.

INTEGRITY ISSUES WITH PRIVATE RULINGS

3.114 The computer system for managing private rulings which the ATO had in place prior to August 2009, the TDMS, was tailor-made to handle ATO interpretative and other work and in particular private rulings work. The TDMS system was introduced in 2001/2 after the release of the findings of two significant reviews of the ATO's rulings system that was then in operation.⁹ The Siebel system which has now substantially replaced TDMS¹⁰ is more generic in nature and is not specifically designed for rulings work. This leads to an issue of whether the new system will maintain the ruling-specific integrity, quality and other controls that were built into the previous TDMS system.

3.115 Quality and timeliness issues concerning Siebel-generated private rulings have already been discussed in this report. This section examines the extent to which the design of the new Siebel system maintains the integrity and other controls of the previous TDMS system.

Integrity controls

3.116 Early in this review the IGT obtained from the ATO a comparison of the integrity controls of the TDMS system and their equivalents in the new Siebel environment.

3.117 This comparison indicated that not all integrity controls that were in the previous TDMS system have been replicated to the same extent in the new Siebel environment. On the other hand, in some cases, Siebel's integrity controls were superior to those which previously existed in TDMS.

3.118 Based on this comparison, the ATO is working on ensuring that *all* important integrity controls for private rulings are adequately replicated in the new environment. This work is expected to be fully completed within 18 months.

3.119 One example of an integrity control which has not been replicated to the same degree in the new Siebel system relates to the process of having all rulings that are issued by the ATO published in an edited form. This integrity control, and the measures the ATO are taking to ensure that there is an effective substitute in the new Siebel environment, are both discussed in the next chapter of this report.

9 These reviews were as follows: Sherman, Tom, *Report of an Internal Review of the Systems and Procedures relating to Private Binding Rulings and Advance Opinions in the Australian Taxation Office*, 7 August 2000, available at www.ato.gov.au and Australian National Audit Office, *The Australian Taxation Office's Administration of Taxation Rulings*, Audit Report No. 3 of 2001-2, 17 July 2001.

10 The ATO has advised that all new private ruling requests have been handled in Siebel since the deployment of this system in August 2009. However, requests on hand at the time of this deployment continue to be handled in TDMS which is due for decommissioning (at least as a case actioning system) in May 2010.

ATO's internal search engine for private rulings on particular topics

3.120 The new Siebel system, unlike TDMS, does not allow case officers who prepare rulings to conduct an effective free text search to specifically locate any other interpretative advice, including private rulings, the ATO may have provided on a particular topic. The previous TDMS system allowed such searches to be made. These searches were regularly made by ATO officers as part of the process of preparing private rulings. The current Siebel advance search facility for a given topic produces all Siebel-generated ATO documents which contain the designated search terms. Searches of this kind generate very large volumes of ATO material and only some of this material will be private rulings or other interpretative advice on a designated search topic. The current search facility is also case-sensitive. This means that the results of a search for particular topic will depend on whether or not the search terms contain any capital letters. These issues regarding the new Siebel system's free text search function raise significant concerns relating to the integrity and consistency of private rulings being generated under the new Siebel system.

3.121 The ATO has advised the IGT that it is satisfied that the Siebel system's advanced search provides enhanced functionality over its TDMS equivalent. However it acknowledges that there are issues with the accuracy of the search functionality within Siebel, which the ATO considers are being addressed through appropriate mechanisms within the ATO.

Other controls, including management reports

3.122 During the second phase of fieldwork for this review which involved selecting 20 Siebel-generated private rulings cases, IGT staff found that there were a number of problems with internal ATO management reports for all private rulings cases that were being generated under Siebel.

3.123 The ATO has confirmed that it is currently working on improving the types of management reports on private rulings generated under the Siebel system.

NEED FOR A FURTHER REVIEW

3.124 The IGT's current findings in relation to the timeliness, quality and integrity of private rulings generated under the new Siebel system raises concerns about whether the new system has already led or will lead to a deterioration in the ATO's previously strong performance in relation to the production of quality and/or timely rulings. The sample of Siebel-generated cases to date that the IGT has reviewed in the final stages of this review is too small to come to a definitive conclusion on these issues.

3.125 The IGT notes that, as with the introduction of any new system, especially those of the magnitude being implemented by the ATO under its overall Change Program, it would be expected that it will take some time for its staff to become accustomed to the new functionality and proper ways to use the new system to produce high calibre rulings.

3.126 The IGT has discussed these issues with the ATO and notes that the ATO intends to examine these issues further over the coming months. The IGT proposes that a review of private rulings generated under the Siebel system be conducted after the ATO has completed its phasing-in work for this new system.

3.127 These comments lead to the following key recommendation:

KEY RECOMMENDATION 4

To address possible concerns that the new Siebel computer system for handling private rulings may have led to a deterioration in the Tax Office's previous strong performance in the delivery of timely, high quality and consistent private rulings, the Inspector-General recommends:

- that a review which addresses the timeliness, quality, consistency and integrity of private rulings being produced by the Tax Office under the Siebel computer system be conducted after the Tax Office has fully completed its phasing-in work for this new system; and
- that the ATO takes steps, as soon as possible, to ensure that ATO staff can conduct effective searches across the ATO's internal databases for any private rulings on a particular topic.

ATO response

3.128 The ATO agrees with recommendation 4.1 and agrees in part with recommendation 4.2.

3.129 The ATO notes the Inspector-General's acknowledgment that with the introduction of any new system, especially those of this magnitude, it would be expected that it will take some time for staff to become accustomed to the new functionality and proper ways to use the new system most effectively and efficiently.

3.130 Over the first nine months of operation of the IT system for the ATO's interpretative assistance work (including private rulings) we have identified a range of issues across system functionality, operation and systems usage, including those mentioned in this report, and more broadly across our interpretative assistance work practices, processes and procedures.

3.131 We also acknowledge that these issues have had some flow on effect to the quality of some private rulings, although we were surprised by your assessment of our quality given our own quality assessment results (based on assessment of a larger sample of cases, established criteria, and in some cases involving independent community representatives) do not support your findings. Our latest quality results show timeliness as the most prevalent issue (with approximately twenty percent of cases assessed as being outside standards), and with correctness, administrative soundness, appropriateness, integrity and consistency all within normal (pre-Siebel) parameters. However, given the improvement we have already seen and the action we are taking to bed down the new system we are confident that we are on track to mirror

the strong performance observed by the Inspector-General of our earlier handling of private rulings.

3.132 The ATO will ensure that timeliness, quality, consistency and integrity of private rulings is addressed in the current project focussed on addressing issues arising from our migration of interpretative assistance work to the new IT system, with input to the broader evaluation of the Change Program as appropriate. Any resulting corrective action will be considered along with other identified IT change requirements and priorities arising from that broader evaluation.

3.133 As the Inspector-General has acknowledged at paragraphs 2.44 and 3.121 of the report, the ATO has identified issues with the accuracy and reliability of the search engine behind the Siebel advanced search functionality. This is currently being investigated and once fixed will enable the designed free text search across all cases and content within Siebel, including private rulings.

3.134 The Inspector-General expressed concern at paragraphs 2.43 and 3.120 about the risk to integrity and consistency of private rulings being generated under the new system. The process for ensuring the correct application of the law to the facts in response to each private ruling request is that ATO officers:

- Identify and understand the issues raised in the request and ensure there is sufficient information on which to rule
- Identify and understand the relevant legal provisions that apply to the issues
- Identify any relevant ATO precedential document (which does not include earlier private rulings) with respect to the provisions of the relevant law and the relevant facts, which are readily available to ATO staff via the ATO's searchable legal database
- Escalate the issues for the creation of an ATO precedent if no such precedent exists and one is required
- Prepare a response to the request
- Refer for authorisation and quality control by a duly accredited authorising officer prior to issuing to the applicant.

We will continue to reinforce this process to our staff, the reasons for this approach, and the risks of not following it.

3.135 Consequently, design and delivery of the specific functionality being recommended by the Inspector-General – that is, enabling Siebel searches to be limited to private rulings – is not a priority in the current climate.

ORAL RULINGS

3.136 During the review the IGT, with the agreement of the ATO, also examined the extent to which taxpayers and the ATO were making use of the system of oral rulings

which is provided for in Division 360 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). The current oral rulings system has been in place since 1 January 2006.

3.137 Oral rulings are expressions of the Commissioner's opinion of the way in which the tax law applies to a particular arrangement which are given orally rather than in writing. They are given only to individuals (or their legal personal representative) and are only available on straightforward income tax matters. They cannot be given on business or complex matters, nor can they be given to tax agents. The Commissioner is legally bound by an oral ruling in the same manner as he is legally bound by written private rulings.

3.138 Oral rulings are separate from what the ATO calls oral guidance. Oral guidance involves advice that is provided orally on matters of a general, straightforward or simple nature. The Commissioner is not legally bound by oral guidance but taxpayers are protected from penalties, if there was full and true disclosure of the material facts relevant to the enquiry, and also interest, if the taxpayer has relied on the oral guidance reasonably and in good faith.

3.139 The RoSA review by Treasury in 2004 examined the oral rulings system. At that time the system was resulting in only a handful of successful requests for oral rulings.¹¹ The system at this time restricted binding oral rulings to a limited class of individuals who were not in business, had simple tax affairs and whose tax enquiries were 'simple'. Matters of administration, procedure, collection and ultimate conclusions of fact were not within the scope of binding oral rulings.

3.140 The RoSA review made a number of recommendations which were aimed at encouraging the expansion of the oral rulings system for non-business self-preparers. These recommendations expanded eligibility for oral rulings and were implemented in the oral rulings legislation that came into effect on 1 January 2006.

3.141 Under current ATO processes, oral rulings can be provided to an individual who orally request an oral ruling. An oral ruling can be offered by the ATO when a taxpayer makes a phone enquiry or when they have made a request for written advice. Taxpayers receive a registration identifier for an oral ruling but are not entitled to receive a written record of the ruling. Taxpayers who are treated by the ATO as restricted access taxpayers are ineligible for oral rulings because of ATO systems issues.

3.142 Tax officers are instructed only to provide an oral ruling if the question posed is covered by an approved response that fully answers the query. This will generally be in the form of an existing client contact script. If an approved response does not exist, but an oral ruling is appropriate, the response needs to be cleared by a technical specialist based on the specific facts of the case.¹²

11 The discussion paper for the RoSA review issued on 29 March 2004 noted that, during the 2002/3 year there were only 9 oral rulings issued on income tax matters: see Australian Treasury, *Discussion Paper, Review of Aspects of Income Tax Self Assessment*, 20 March 2004 at paragraph 2.1.1.

12 Practice Statement PS LA 2008/3 at paragraph 182.

3.143 The IGT found that during the 2008/09 year there were only 13 oral rulings issued by the Tax Office. The MicroEnterprises and Individuals business line issued 11 of these oral rulings, while the Operations Business line issued the other two. In the previous 2007/08 year there were 82 oral rulings. During 2008/09 the ATO provided 13,982 items of interpretative guidance on income tax matters of which 2,915 were oral guidances not in the form of an oral ruling.

3.144 During fieldwork for the review, ATO staff advised the IGT that they perceived that the amount of work required to prepare an oral ruling was similar to that required for a private ruling. For instance, similar research and approval processes need to be followed. In addition, where it could be feasible to give an oral response to a written request, that request needs to be withdrawn in writing by the taxpayer before an oral ruling can be provided. Because of this, ATO staff preferred to issue a private ruling, rather than an oral ruling, so as to provide a tangible response to the taxpayer.

3.145 The administrative costs associated with the oral rulings system are disproportionate to the low level of usage of the system. The Tax Office maintains detailed administrative processes for these types of rulings. These processes include a number of publicly available ATO practice statements and fact sheets dealing with oral rulings¹³ as well as a number of internal ATO documents and training packages on this subject.

3.146 In the light of these comments, the Inspector-General is of the view that the Government should consider abolishing the oral rulings system and removing the relevant provisions dealing with oral rulings from the TAA 1953.

3.147 The IGT notes that the Board of Taxation made a similar recommendation in its 2008 *Review of the Legal Framework for the Administration of the GST*.¹⁴

3.148 The IGT therefore makes the following recommendation:

KEY RECOMMENDATION 5

In view of the continuing low level of usage of the oral rulings system, the Inspector-General recommends that the Government should consider abolishing the oral rulings system and removing the relevant provisions dealing with oral rulings from the *Taxation Administration Act 1953*.

ATO response

3.149 This is a matter for government.

13 See for example the material contained in PS LA 2008/3 at paragraphs 161 to 191.

14 Board of Taxation, *Review of the Legal Framework for the Administration of the GST*, December 2008 at p. 77.

CHAPTER 4: ATO'S PUBLISHED REGISTER OF PRIVATE BINDING RULINGS

INTRODUCTION

4.1 The ATO publishes on its website the content of private binding rulings in the form of a register of private binding rulings. The published content of these rulings is edited to remove any material (such as names) which could identify the taxpayers to whom the relevant ruling had been issued.

4.2 In November 2008 the ATO flagged a proposal to convert this register into one which displayed the number and subject title of the relevant rulings, without any content. This proposal was to be implemented in January 2009. However, following representations from the IGT and from other bodies in March 2009 the Commissioner announced that it had decided not to proceed with this proposal and that he would maintain the register in its current form.

4.3 When he made his announcement to keep the register, the Commissioner also asked the IGT to conduct this present review of the private rulings system. The first agreed term of reference for this review was that the IGT would examine the purpose, use and ongoing relevance of the edited private rulings register and the relationship of this register to the ATO's more authoritative forms of guidance, such as ATO Interpretative Decisions.

4.4 This chapter sets out the IGT's findings on this term of reference.

BACKGROUND

4.5 The creation of the register of private binding rulings was in response to the recommendations of an internal review conducted in 2000 by Mr Tom Sherman¹⁵. The Sherman review was commissioned by the ATO in response to media criticisms of the integrity of the private binding rulings system. Some of these criticisms related to the then pending prosecution of a former senior ATO officer who was alleged to have issued private rulings in inappropriate circumstances.

4.6 From the outset, the ATO has considered that the register is a transparent historical record of advice that has been provided.

¹⁵ Sherman, Tom, *Report of an Internal Review of the Systems and Procedures relating to Private Binding Rulings and Advance Opinions in the Australian Taxation Office*, 7 August 2000, available at www.ato.gov.au.

4.7 Initially, the ATO provided no search engine for the register. However, a search engine for the register was provided by January 2005 in response to requests by members of the National Tax Liaison Group and other bodies.¹⁶

PRESENT NATURE OF REGISTER

4.8 The register currently contains over 80,000 edited versions of private binding rulings. These documents are not grouped on the register according to subject matter.

4.9 The ATO has no processes for removing edited versions which are either out of date or which are incorrect. It also has no processes for removing an edited version from the register when the ATO has subsequently withdrawn that ruling, even when that withdrawal occurs immediately after the issue of the ruling.

4.10 The ATO's internal policy for not removing withdrawn or incorrect rulings from the register is explained in the following internal guidelines which it has issued to its staff and which are available on its intranet (emphasis added):

The initial Edited version (EV) is not affected by the creation of a revised ruling. It exists as a transparency and accountability measure to show that advice issued to a client matches advice recorded on Tax Office systems. *The fact that advice may be incorrect, or subsequently revised, is immaterial. The EV is retained as an historical record and does not need to be altered or withdrawn.*

4.11 The ATO notifies users of the register of its limitations via a disclaimer that users must acknowledge they have read before searching the register. A slightly different disclaimer also appears at the bottom of any copy of an edited ruling on the register.

4.12 The disclaimer which users must acknowledge they have read before using the register's search facility, contains the following words:

DISCLAIMER

The *Register of Private Binding Rulings* is a historical public record of written binding advice the Tax Office has issued to specific entities. It exists to enhance the integrity and transparency of the Tax Office's decision-making processes. In essence, it enables the recipient of written binding advice to confirm that what they have is official Tax Office advice.

Each record is based on the facts of a specific situation as advised to the Tax Office and reflects our view of the law in force at the time the advice was issued. Before we place a record on the register, we edit it to protect the applicant's privacy.

¹⁶ The absence of a search engine for the register and other difficulties with accessing the register (such as the fact that it was located under the Individuals homepage on the ATO's website when not all PBRs were applied for on behalf of individuals) were referred to by members of the ATO's National Tax Liaison Group at the meeting of this group held on 14 November 2003. On 24 January 2005, the Institute of Chartered Accountants advised its members, via their electronic Tax Bulletin, that the ATO had enhanced the register to enable online search by subject matter.

Records on the Register cannot be relied upon as precedent or used for determining how the Tax Office will apply the law in other cases because:

- the advice is binding on the Commissioner *only* in relation to the specific entity named in the written binding advice
- some material facts that formed the arrangement on which our advice was given may have been removed or altered for privacy, secrecy or confidentiality reasons
- we do not update records to reflect:
 - changes in legislation
 - changes in the Tax Office's application of the law resulting from tribunal or court decisions
 - changes to the Tax Office view on how the law applies, and
 - changes to decisions resulting from review processes after entities have disputed the Tax Office's decision.

Given the above, a record in the Register is not a publication approved in writing by the Commissioner. It is not intended to provide you with advice, nor does it set out the Tax Office's general administrative practice. Therefore a record on this Register is non-binding and provides you with no protection (including from any penalty or interest). In addition, a record on the Register is not an authority for the purposes of establishing a reasonably arguable position for you to apply to your own circumstances.

The Tax Office provides a legal database that contains the Commissioner's view on how the law would apply in various circumstances. If you need to clarify how the law applies to your circumstances, you should seek expert advice or apply for a private binding ruling from the Tax Office.

4.13 The disclaimer at the bottom of each copy of an edited ruling on the register specifically states that the register is not updated to reflect withdrawal of the relevant advice or any other changes in circumstances.

4.14 The IGT considers that the above disclaimers are appropriate, given the limitations of the register.

REASONS FOR THE ATO'S 2008 PROPOSED CHANGES TO THE REGISTER

4.15 Historically, revenue authorities have been reluctant to publish the detailed texts of private rulings for cost reasons and also because publication increases the risk of a possible loss to the revenue from an incorrect ruling.

4.16 In a number of jurisdictions (for example, the United States of America) the reluctance of revenue authorities to publish binding private rulings has been overcome by governments enacting legislation which compels the revenue authority to publish these rulings. In Australia, the freedom of information legislation may have this effect.

4.17 At the end of 2008 the ATO became concerned that the register was being used inappropriately by taxpayers and their advisers as a research tool and that taxpayers may be labouring under a misapprehension that they carry a burden to review the register prior to making tax decisions or providing taxation advice. The ATO also considered that reducing the extent of the publication process would lead to speedier ATO response times for private rulings.

VIEWS RAISED IN SUBMISSIONS OR OTHER PUBLIC DOCUMENTS

4.18 All the submissions made to this review urged the Commissioner to retain the register of private binding rulings in its current form. Some submissions suggested a number of ways in which the current register could be improved.

4.19 Similar views were expressed in a number of other, publicly available, documents that were prepared by organisations during the consultation process undertaken by the ATO in relation to its original proposal to cease publishing the detailed content of the register.

Use of the register as a research tool

4.20 A number of submissions or other public documents pointed to a number of different areas where the register was considered to be useful to tax practitioners. These documents stated that the register was useful as a tool for obtaining information on particular tax issues.

4.21 Submissions and/or other public documents also stated that the register was useful because it assisted tax practitioners and their clients in determining whether or not to apply for a ruling on the topic. On this point, the Taxation Committee of the Business Law Section of the Law Council of Australia (the Law Council) stated that:

If the ATO has ruled negatively, and the reasoning is persuasive, then practitioners may be dissuaded from applying unnecessarily for ruling guidance. In other words, it may be useful in freeing up the overburdened rulings systems.

4.22 The Institute of Chartered Accountants stated:

It is also useful to be able to ascertain the ATO's approach to technical issues and compare it with the approach taken by clients. If the facts are similar and favourable then clients can apply for a similar ruling. If the facts are similar and clients are not following the ruling then clients can review their position which seems eminently sensible.

4.23 Submissions and/or other public documents also stated that the register was useful for giving guidance to practitioners on what points they should include in any applications for a private ruling. On this point the Law Council stated that:

Where a ruling is applied for on a similar fact pattern (this will often occur as applicants will be aware that the edited Private Binding Rulings do not provide binding advice) it is useful to see the format and issues which are discussed since they give guidance to the

points which it may be expected the ATO will want to see in any Private Binding Ruling application.

4.24 The register was also considered to be useful in alerting practitioners to arguments they may not be aware of for a specific issue. On this point, the Law Council stated:

Edited private rulings obtained from the register often set out in specific detail arguments which practitioners may not have thought about which could be relevant to the matters they are considering. The arguments are often set out in much greater detail, compared to ATO IDs which may have issued on similar issues. Practitioners are well aware that they cannot rely on these arguments in order to protect their clients' position. However, it is nonetheless helpful to have access to this type of information.

4.25 Submissions and/or other public documents also stated that the register assisted with tax compliance. On this point, CPA Australia gave the following example:

A year before the ATO released a Taxpayer Alert on the use of hybrid trusts, there were several PBRs where the ATO ruled that the full interest was not deductible to the unitholder – this information was crucial to persuading many taxpayers not to enter into these arrangements despite urgings to do so from hybrid promoters.

Whether other ATO advice and guidance products have replaced the need for the register

4.26 Submissions and/or other public documents provided a number of examples of issues of importance where information on the relevant issue was *only* available on the register and not in any other ATO material such as ATO IDs or other rulings. Examples included edited private rulings on CGT Event D3, trusts resettlements, debt/equity issues and section 128F.

4.27 CPA Australia noted that its members asserted that:

Unlike public binding rulings (including ATO Interpretative Decisions or ATO IDs) which are general in nature, the private binding rulings apply the law to a particular set of circumstances and thus are more useful to tax agents/ taxpayers.

PBRs are also much more useful than ATO IDs as their coverage is wider and many useful PBRs appear not to be translated into ATO IDs.

4.28 The ATO asserts that, since the Sherman report, it has developed ATO Interpretative decisions (ATO IDs). These arise from issues raised in private binding rulings and other technical decision making activities where an ATO precedential view on an interpretative issue needs to be established.

4.29 It has asserted that, unlike the edited private rulings on its register, ATO IDs are correct and kept up to date.¹⁷ The ATO also notes that under current ATO work

¹⁷ See item 10: Issues Log of the Minutes of the National Tax Liaison Group meeting held on 14 November 2003.

practices, a tax officer cannot generally issue a private binding ruling unless either an ATO ID (or another type of document which the ATO regards as being an ATO precedential view) exists on the relevant topic or the issue under consideration involves a straightforward application of the law.

4.30 The ATO considers that ATO IDs are publications approved in writing by the Commissioner. Taxpayers are therefore provided with legislative protection against penalties and interest if they follow guidance contained in an ATO ID and that advice is wrong. The ATO states that ATO IDs are:

... not published as a form of advice. They are published to meet freedom of information requirements because they may be applied by tax officers in making other decisions.¹⁸

Whether the register is inappropriately used

4.31 A number of submissions and/or other public documents noted that, if the register was being inappropriately used by tax practitioners, then this would involve ignoring the disclaimers on the register itself and would also raise professional negligence issues. The Institute of Chartered Accountants noted:

... it is difficult to accept that the register represents “an unacceptable level of risk” to users. The Register is risky only if the user ignores the warnings posted on the register and displays a complete lack of reasonable care in discharging their obligations as a tax professional.

4.32 The Law Council of Australia noted that:

It is surely for taxpayers and their agents to assess, for themselves whether they find the Register useful, despite its acknowledged limitations.

Extent of use of the register

4.33 Submissions and/or other public documents stated that large numbers of tax professionals used the register.

4.34 The Institute of Chartered Accountants stated:

Our information shows that a large number of tax professionals use the Register.

4.35 CPA Australia stated:

Many agents currently rely on the PBR register (contrary to the ATO’s claim) to properly advise their clients on the law.

¹⁸ PS LA 2001/8 at paragraph 5.

Cost of the register

4.36 Submissions and/or other public documents queried whether the register involved enormous additional cost to the ATO given that the ATO would still need to maintain an internal register for use by its own staff.

4.37 Submissions and/or other public documents also pointed to other alternative savings the ATO could make instead of removing the content from the register.

4.38 The Law Institute of Victoria submitted:

If the issue is one of funding for the retention of the register in its current form then we urge that funding be made available to enable this valuable service to continue.

4.39 Some submissions or other public documents urged that more funding be applied to the register to enhance its usefulness.

4.40 The Institute of Chartered Accountants suggested that:

Improvement involving possible edits to the register, such as indicating if rulings are still representing the current application of the law would be helpful.

4.41 Other submissions or public documents urged that the ATO introduce a better search engine for the register¹⁹ and that the edited versions of private rulings on the PBR register should also include an edited version of the original application for ruling.

Need for a detailed register for integrity, transparency and other purposes

4.42 A number of submissions or public documents stated that the register provided significant enhancements to the integrity and/or transparency of the general administration of taxation law by the ATO.

4.43 The Law Institute of Victoria noted that it considered that any removal of the detailed content of edited private rulings on the register was:

... a reduction in the transparency of the rulings process (and, accordingly, a reduction in the transparency of the Commissioner's processes). Without the publication of these rulings there is no ability to check consistency of rulings and quality of advice being given. Moreover, good tax administration depends on taxpayers in like circumstances being treated equally and fairly. The Register provides a useful check on whether the ATO is adopting similar positions on legal issues.

4.44 The Law Council stated:

¹⁹ A request to be able to search the register more readily for material on the application of section 45B to demergers was made at a meeting of the ATO's Small to Medium Business Enterprises Sub-committee held on 27 October 2006, the minutes of which are available on the ATO's website www.ato.gov.au. The request was denied because the ATO considered that there were inherent risks with using the register as a research tool.

The retention of the register would result in a greater level of confidence (as a result of a greater level of transparency) that the major issues which are being ruled on are being extracted and reflected in ATO IDs or other Public Rulings. In other words, the retention of the Register would give rise to a greater level of confidence in practitioners that the system is in fact working and the transparency the register provides is a good test in this regard. In essence, the transparency serves a different purpose of that originally envisaged but it is a purpose which is probably more useful for the vast majority of practitioners.

4.45 In their submission, the Institute of Chartered Accountants noted:

Occasionally, the edited private rulings have highlighted inconsistencies of approach, for example, between the private rulings and the position taken by an ATO auditor.

4.46 CPA Australia noted that an issue raised by its members was that:

As our current tax administration system is based on self assessment it is inappropriate for the ATO to withhold information relating to its view of the law from taxpayers, let alone 80,000 PBRs.

4.47 Other submissions or public documents noted that the original reason for the creation of the register was to enhance transparency and authenticity in light of the (named tax officer) affair and that nothing had occurred in the eight years to date mean that those reasons do not still stand.

IGT'S FINDINGS

4.48 The IGT notes any cessation of publishing the edited texts of private binding rulings would be contrary to the recommendations of a number of previous reviews of the ATO's private binding rulings system. The review conducted by Tom Sherman in 2000 was one of these.²⁰ The main recommendation of his review was as follows:

The ATO should publish all private rulings on a public database. The published ruling is to be the private ruling with taxpayer identifiers deleted. The text of the published ruling will otherwise be the same as the private ruling.²¹

4.49 Other reports which have made a similar recommendation include the 1993 report of the Australian Parliament's Joint Committee of Public Accounts and Audit²² and the 1999 report from the Review of Business Taxation chaired by Mr John Ralph AO (called the Ralph review).

20 Sherman, Tom, *Report of an Internal Review of the Systems and Procedures relating to Private Binding Rulings and Advance Opinions in the Australian Taxation Office*, 7 August 2000, available at www.ato.gov.au.

21 Ibid at paragraph 5.12.

22 Joint Committee of Public Accounts, *Report No. 326 - An assessment of tax*, November 1993. See Recommendation 36.

Arguments in favour of maintaining the existing PBR register

4.50 The arguments in favour of continuing the publication of edited private rulings, and the IGT's findings in relation to these arguments are outlined in the following sections. Arguments against are discussed in later sections.

Transparency

4.51 The principal argument in favour of continuing the publication of edited private rulings is transparency. Publication of such rulings gives taxpayers an indication of whether they are being treated equally or fairly when compared to other taxpayers in similar circumstances.

4.52 Transparency is a fundamental principle which underlies Australia's current freedom of information legislation. There is therefore a serious issue as to whether any ATO proposal to remove the detailed content from the register addresses this legislation.

4.53 In his 2001 report Tom Sherman noted that the publication of private rulings (at least in an edited form) may not simply be an option for the ATO, but may be a legal obligation under FOI laws²³. He noted that section 9 of the *Freedom of Information Act 1982 (Cwth)* places obligations on Commonwealth agencies to make certain documents available for inspection and purchase. Amongst those documents are:

(a) manuals or other documents containing interpretations, rules, guidelines, practices or precedents including, but without limiting the generality of the foregoing, precedents in the nature of letters of advice providing information to bodies or persons outside of Commonwealth administration.

4.54 He goes on to state that:

There is I believe a sound argument that any private ruling on the internal ATO databases which is used as a precedent (for example, on the CRS system) is a precedent within the terms of paragraph 9(1) (a) of the *Freedom of Information Act 1982* and is therefore required to be available for public inspection.

The fact that a document may contain exempt material (eg the identity of a taxpayer) does not protect it from disclosure. Section 9(4) of the *Freedom of Information Act 1982* requires agencies to excise the exempt material and make the edited document available to the public.

The significance of these statutory provisions is that the publication of private rulings (at least in an edited form) may not simply be an option for the ATO, it may be a legal obligation. And the situation may not be very different from Canada.

23 Sherman, Tom, *Report of an Internal Review of the Systems and Procedures relating to Private Binding Rulings and Advance Opinions in the Australian Taxation Office*, 7 August 2000, at paragraph 4.78 available at www.ato.gov.au.

4.55 This opinion was published prior to the introduction of ATO changes to its processes concerning the use of private rulings as precedents. These processes include the introduction of the system of published ATO IDs. The ATO has since obtained internal legal advice that Mr Sherman's advice no longer applies. However, given the importance of this issue, the IGT considers that it would have been more prudent to have sought external legal advice on this matter.

4.56 Any removal may also be contrary to proposed changes to FOI laws that are currently contained in bills that are before the Australian Parliament.²⁴

Improving the quality and consistency of ATO advice

4.57 Another argument in favour of publication is that this helps to improve the quality of ATO private rulings as public exposure of the content of ATO rulings allows any errors in these rulings to be detected either by parties external to the ATO or by ATO officers. A further argument is publication ensures consistency. If the ATO were to issue inconsistent rulings on the same subject matter, external scrutiny allows this to be detected.

4.58 The IGT has been provided with numerous examples during the course of this review where material contained in an edited private ruling on the register has either not been consistent with other private rulings on the register, or has identified incorrect technical views being adopted inside certain areas of the ATO.

4.59 A submission from the Institute of Chartered Accountants stated that the issue of detecting inconsistent private rulings was particularly important for practitioners in indirect taxes. It stated:

Many practitioners in indirect taxes have expressed their experience that competitive neutrality can be extremely important as far as transactions taxes such as GST, WET and LCT are concerned. One way in which competitive neutrality is achieved is when one cell within the ATO advises one taxpayer that its product (goods or services) is input taxed or GST free while another ATO cell is advising competitors that its product is taxable. To help guard against this, or to detect conflicting rulings early, it is useful to allow industry participants and their external advisers to monitor developments in an informal manner by researching issues via the Register.

Assisting the operation of the private binding rulings system

4.60 Publication of edited private rulings also assists the efficient operation of the private binding rulings system. The register helps tax practitioners and their clients to determine whether or not to apply for a ruling on a topic. If these parties do decide to apply for a private ruling, it also helps them by giving guidance on what points they should include in their applications for a private ruling.

24 These bills are the Information Commissioner Bill and the Freedom of Information Amendment (Reform) Bill.

Assisting tax compliance

4.61 Publication also assists tax compliance. Some submissions gave examples of where publication of a particular edited private ruling had deterred taxpayers from entering into particular tax arrangements. Other submissions noted that the publication of an edited private ruling could also alert tax practitioners to aspects of a tax issue that they had not yet considered.

Assisting the self assessment process

4.62 During its consultation processes on its original proposal to remove the detailed contents of private rulings from the register the ATO asserted that there may be no need for such a register because its full suite of advice and guidance products, which includes published ATO Interpretative Decisions (ATO IDs) now meets the needs of taxpayers and tax practitioners for information on the ATO's view on particular interpretation issues in a self assessment system.

4.63 However, as submissions noted, publication of edited version of private rulings provides some types of assistance to taxpayers and tax practitioners which is not currently available from other ATO sources. The PBR register in its current form therefore actively assists the self assessment process.

4.64 The IGT's fieldwork for this review has confirmed that there are topics dealt with in edited private rulings that are not dealt with in any other publicly available ATO material, including ATO IDs and public rulings. These topics generally involve matters where the ruling involves an application of the law to the particular facts that arise in the ruling request, rather than an issue which involves the interpretation of the law. These types of matters arise in all the business lines that prepare private rulings, including the LBI line, where the IGT's fieldwork indicated that they were particularly prevalent.²⁵ For these types of cases no ATO ID (or similar ATO material such as a public ruling or determination) will exist to guide taxpayers and tax practitioners on what the ATO's view of the relevant matter will be, because ATO IDs only deal with interpretative issues.

4.65 Only a very small number of ATO IDs are generated each year as a result of a private ruling request. For example, in the 2008 calendar year, only 166 ATO IDs were issued of which only 74 were generated in response to a private ruling request. The remaining ATO IDs were generated as pre-emptive ATO IDs, hypothetical ATO IDs, to replace outdated earlier ATO IDs or for internal ATO advice purposes. This data tends to support the Inspector General's finding that the many private rulings, particularly for large business taxpayers, concern matters for which there is no relevant ATO ID or other publicly available ATO material such as a public ruling or determination.

4.66 Where a matter does involve the interpretation of the law, and there is a relevant ATO ID on the matter, edited private rulings on the same topic are also considered by tax practitioners to be more useful than the associated ATO ID. This is

²⁵ For this review, the ATO prepared an internal analysis which showed that, for the LBI line, during the years 2006 to 2008, 47 of the 146 most frequently cited references for rulings were that no interpretation was required as the law was clear.

because the ATO ID will be general in nature, while the edited private binding rulings apply the law to one or more particular sets of circumstances.

4.67 Furthermore, since 2001, the number of ATO IDs that have been issued each year has been in dramatic decline.

4.68 Part of this decline is due to the ATO actively withdrawing a number of previous ATO IDs. While many of these withdrawals have been to ensure that only up to date ATO IDs are published by the ATO, at least 469 ATO IDs have been withdrawn for the reason that they are considered to be a simple statement of the law rather than an interpretative decision.

4.69 During this review, staff of the IGT examined a number of the ATO IDs that had been withdrawn on this basis. They found that a number of these withdrawn ATO IDs did in fact assist taxpayer and tax practitioners to better understand the relevant law that was the subject of the ATO ID by applying that law to particular fact scenarios. The withdrawal of the relevant ATO ID now means that ATO guidance on these specific fact scenarios is no longer available. In this environment, the only publicly available documents on the relevant matter that will provide anything on the ATO's possible view (even though this may be flawed material because of the editing process) will be in any edited private ruling that is on the ATO's private rulings register.

Other arguments in favour of publication of edited private rulings

4.70 Other arguments in favour of continuing to publish edited private rulings are as follows

- The register is in fact being used by a significant number of taxpayers and tax practitioners and not just a few. Internal research carried out by the ATO on the use of the register prior to 26 November 2008 indicated that professionals were making use of the register for research purposes. This research included a Tax Office provision of advice survey which was conducted in 2006. The report from this survey is available on the ATO's website.²⁶ This survey indicated that 26 per cent of the 528 tax professionals who responded to the survey were using the register.
- Publication may ensure that large tax and accounting firms do not obtain an unfair advantage over smaller firms. Both before and during the time edited private rulings have been published, large tax and legal firms have accumulated substantial libraries of private rulings issued to their own clients. Small firms have not had this capacity. The introduction of the PBR register has allowed smaller firms to have access to private rulings material similar to that accumulated by larger firms. Any removal of the register would recreate the disadvantages previously suffered by smaller firms. This disadvantage was cited specifically by the US Congress as one of

26 See: <http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00095773.htm&page=10&H10>

the reasons why it introduced legislation to compel the US revenue authority to publish edited versions of private rulings.²⁷

- Publication is supported by all of the tax practitioner bodies which made submissions to this review.
- Publication may also be supported by the majority of the ATO's staff. Although the ATO, prior to flagging its recent proposals to dismantle the register, did not conduct a detailed consultation process with its own staff on this issue, the ANAO did conduct such a survey as part of their 2001 report on the ATO's administration of taxation rulings.²⁸ This survey found that most (59 per cent) ATO staff considered that, subject to adequate protection of taxpayer confidentiality and privacy, private binding rulings should be published by the ATO. This survey also found that 79 per cent of private tax professionals felt the same way.²⁹

Arguments against maintaining the existing PBR register

4.71 The arguments against publication of edited versions of private binding rulings, and the IGT's findings on these arguments, are as follows.

Cost of the register

4.72 Prior to announcing its proposal to remove the content of the register to NTLG members the ATO did not perform a cost/benefit analysis for this proposal.

4.73 In January 2009 the ATO advised the IGT that the potential budget savings estimated to arise from the proposal amounts to a total of \$1,095,321, comprising \$530,346 of saving from its Law and Practice area and \$564,975 from its business lines. However, these cost savings do not include any estimates of additional ATO costs that may arise from the proposal. These additional costs would arise from:

- a likely increase in the number of private binding ruling applications on matters previously covered only in the register;
- a possible increase in the level of work ATO officers would be required to undertake to ensure that applications for private binding rulings address all appropriate issues, in view of the absence of sample rulings on the same topic in the register that may in the past have assisted taxpayers as to what to include in their applications; and
- a possible increase in non-compliance in areas no longer the subject of edited private rulings.

27 Holden, J. P. and Novey, M.S., *Legitimate Uses of Letter Rulings Issued to other Taxpayers – a reply to Gerald Portney*, Tax Lawyer Vol 7, No 2 at p. 343.

28 Australian National Audit Office, *The Australian Taxation Office's Administration of Taxation Rulings*, Audit Report No. 3, 2001-2002, 17 July 2001 available at www.anao.gov.au.

29 *Ibid* at pp 253-254.

4.74 The IGT also notes that the ATO's costings do not quantify any overall benefits to tax administration (in terms of detecting wrong or inconsistent advice within certain areas of the ATO) that would arise from making its private rulings transparent.

4.75 The costings also do not appear to take into account any cost efficiencies that may arise from the ATO adopting alternative internal processes for publishing edited private rulings. Currently, the ATO has a small team of officers, separate to those that actually prepare the private rulings and their edited versions, who check edited versions of PBRs to ensure that they meet privacy and other requirements. Submissions have asserted that there could be potential cost efficiencies if this work was transferred to the officers that actually prepare the private rulings.

Publication of rulings gives them a binding status that they do not have

4.76 As noted above, historically, revenue authorities have been reluctant to publish the detailed texts of private rulings because publication increases the risk of a possible loss to the revenue from an incorrect ruling.

4.77 Private rulings were developed to provide single taxpayers with the ATO's view of the tax consequences of a particular transaction or course of action and, being limited in this way, could be delegated to non-executive level officers to issue.

4.78 Private rulings also allow revenue authorities to issue, within a short period of time, a private ruling on a matter that may be about an area of the law that is not clear. If further private rulings on the same issue are sought and/or granted, the revenue authority is able to develop a more mature response to the relevant issue, based on the scale of the problem. This may culminate in a public ruling for the benefit of all taxpayers.³⁰

4.79 Revenue risk concerns appear to be one basis for ATO concerns about tax practitioners inappropriately using the register for research purposes. The ATO has also advised the IGT that it is concerned that the register poses a reputation risk for the ATO as community confidence in tax administration may be eroded if taxpayers improperly rely on material that is on the register. Furthermore, the ATO has advised the IGT that it is concerned that taxpayers may be labouring under a misapprehension that they carry a burden to review the register prior to making tax decisions or providing taxation advice.

4.80 However, these concerns about revenue risk and other matters need to be balanced against the following aspects of the private rulings system.

4.81 The first aspect is the legislative structure of the private binding rulings system. As a former Commissioner noted, the private binding rulings system is a legislative exercise in risk management.³¹ The legislation is designed on the basis that

30 These issues are discussed in: Rogovin, M and Korb, D.L. *The Four R's Revisited: regulations, rulings, reliance and retroactivity in the 21st century: A view from Within*, Duquesne Law Review, Volume 46 Spring 2008 at page 346.

31 Carmody, Michael, *The Integrity of the Private Binding Rulings System*, Speech, Melbourne, 15 November 2000.

the ATO may get some rulings wrong but ensures that any risk associated with an incorrect ruling is limited to:

- the taxpayer who receives the ruling;
- the relevant years of income; and
- the relevant arrangement.

4.82 A number of internal reports prepared by or for the ATO have referred to the ATO's risk averse approach to private binding rulings generally. One of these reports³² notes that this risk approach may be due to various factors, including:

- an ATO culture that places a high importance on 'getting it right';
- a concern that a ruling may be used to widely market a particular tax strategy;
- a concern that others with different factual circumstances will rely on the ruling or the associated ATO ID;
- a recognition that an ATO ID creates a precedent that must be followed by ATO officers;
- a suspicion that the full facts have not been disclosed; and
- a perceived need to obtain and verify all the facts about the arrangement.

4.83 This same internal ATO report however noted that the above risk averse approach appears to be misplaced, given that it is the applicant for a ruling that has the most to lose if all material facts are not provided because, in this event, they will not have a binding ruling.

4.84 Secondly, any potential losses that could arise from an incorrect ruling being on the PBR register should be reduced if the ATO has appropriate internal processes in place to minimise the situations where incorrect private rulings are issued, or are relied on. As noted above, these current processes include the existence of disclaimers on the register which make it clear to those who may look at the texts of binding private rulings that they are not to be relied on as evidence of the Commissioner's view on any topic.

4.85 Thirdly, the marketing of private tax rulings or aggressive tax arrangements is now heavily constrained by the statutory tax promoter penalty regime.

4.86 Finally, the ATO could, assuming that adequate resources were available for it to do so, take steps to either actively remove, or make a suitable notation to identify, those edited rulings on the register which it knows, or which other parties let it know, are clearly wrong or out of date. As indicated above, the ATO currently has no processes in place to do this.

³² Australian Taxation Office, *Complex Binding Rulings Review Blueprint*, a report prepared by Amity Consulting Group, Version 4.3, October 2004.

4.87 In the light of the above comments, the IGT has concluded that the PBR register in its current form has some residual risk to the tax system. A few examples were found during the course of the review where taxpayers or their representatives were, on various publicly accessible websites, citing edited private rulings as being the ATO's view on a particular topic. However, in the IGT's view, this residual risk is not sufficient justification for the revival of any proposal to remove the detailed content of private rulings from this register. The IGT also considers that the ATO should continue to take any steps that are within its power to mitigate this risk. One such step would be to introduce a process to ensure that any rulings on the register that the ATO withdraws are noted as having been withdrawn. A one-line annotation next to the relevant rulings would assist in addressing this issue.

Publication has led to a mass of material that taxpayers and their advisers have to decipher

4.88 As noted above, there are currently 80,000 edited private rulings on the register, some of which are clearly wrong and out of date. There is therefore a legitimate concern that the current register has created a mass of material for taxpayers and their advisers to decipher.

4.89 However, as noted in a previous chapter, this problem could be addressed through the ATO adopting a process of segregating out the large volume of rulings that involve standardised responses (such as the private rulings concerning South Australian workers compensation issues and undeducted purchase price issues) and publishing only the full text of the standard private rulings responses that are issued on these matters, rather than setting out the full text of the standard response in every individual ruling.

Other arguments against publishing binding private rulings

4.90 In the 2001 Sherman report two other arguments were canvassed as possible reasons against publishing binding private rulings.

4.91 The first of these was that publication may deter people from applying for private rulings. It is certainly true that over the time the register has been in existence the number of private rulings has been declining progressively. However, as discussed in the previous chapter, it seems more likely that other factors have had a bigger role in bringing about this result.

4.92 The second argument was that the publication process may delay the timely issue of private rulings. Again, as discussed elsewhere in this report, factors other than the actual publication process probably play a greater role in causing these delays.

Overseas comparisons

4.93 Australia is somewhat unique in having a system where public and private rulings are legally binding on the revenue authority. In many countries only private rulings are legally binding. Public rulings, where they exist, are only generally administratively binding on the relevant revenue authority.

4.94 In some countries where there is no legally binding public rulings system, (such as the United States of America and Canada), the process of publishing the edited contents of private binding rulings is in effect a substitute for the lack of an extensive public rulings system. In both the United States and Canada, the revenue agencies themselves do not broadly publish these edited private rulings – this task is performed by commercial publishers. The revenue agencies receive income from these commercial publishers which assists in covering the revenue agencies' costs of the publishing regimes. The external publishers provide certain 'value adding' services to the publishing process, such as eliminating minor and duplicated advice.

4.95 As in Australia, these edited published rulings are not binding on the revenue authority in respect of taxpayers generally. They are however generally binding on the relevant authority in respect of the taxpayers to whom they were originally issued. Nevertheless, they are widely relied on by taxpayers and tax advisers in those countries as an indication of how the revenue authority will apply the tax law to particular fact situations.

4.96 Some of these countries (for example, the United States) have periodically reassessed whether they should discontinue their practice of publishing edited private rulings. However the result of such a process has always been to continue with this practice. This is because it has been considered that the benefits of this practice outweigh the costs. The ATO did not consider this international material during its recent reassessment of the PBR register.

ATO INTERNAL PROCESSES FOR CREATING THE REGISTER

4.97 During the period of this review, the Inspector-General examined the ATO's internal processes for creating edited versions of private rulings.

4.98 Currently the ATO has a small team of officers, located in a Practice Management Unit (PMU) in Newcastle who check edited versions of PBRs to ensure that they meet privacy and other ATO requirements. These officers work in the ATO's Law and Practice area, which is separate from the business lines that prepare private rulings.

4.99 The process for creating edited versions under the ATO's previous TDMS computer system for preparing private rulings was as follows. The TDMS system would automatically generate a version of the ruling for editing purposes at the same time as the actual private ruling was created. Case officers in the relevant business line would check this edited version to ensure that all specific references to the taxpayer or their business were removed. Any information that was confidential to the taxpayer or third parties, or that enabled the identity of the taxpayer or of third parties to be ascertained, was also removed.

4.100 Once an edited version was approved within the relevant business line, it was forwarded to the taxpayer who was asked to provide comments on the proposed edited version prior to its publication. The taxpayer received this edited version at the same time as they received their actual ruling. The edited version was also at this time automatically forwarded by the TDMS system to the Practice Management Unit.

4.101 The process for creating edited versions under the current Siebel system is similar. However, under this system, an edited version is not automatically created for a case officer. Instead, case officers must copy and paste from the original ruling to create the edited version. Furthermore, under the new system, a copy of the edited version is not automatically sent to the PMU. Instead, case officers must send a copy to the PMU manually.

4.102 The process of manually preparing edited versions under the Siebel system, and manually sending them to the PMU means that there is a risk that under the Siebel system private rulings may be generated within a business line but their edited versions are not sent to the PMU area for publication. This is an example of an integrity issue that did not arise under the TDMS system.

4.103 The ATO has advised that it is addressing this problem in the following way. The PMU unit is sending each business line a summary of the number of edited versions received from that business line with a request that the numbers received equals the number of pieces of written advice finalised by them. Any gaps identified are to be investigated in a joint effort between the business line concerned and the PMU.

4.104 During the first phase of the IGT's fieldwork for this review his staff found that a significant percentage (over 50 per cent) of the TDMS-managed cases selected for review, and which had led to the issue of a private ruling, did not yet have their associated edited version published. Further examination revealed that one third of these cases that were missing a published edited version had been finalised more than nine months previously.

4.105 This backlog issue was immediately raised with the ATO who advised that this backlog had arisen as a result of a redirection of resources that had occurred in the ATO early in 2009. This redirection was based on the ATO's original proposal to cease publication of the content of private rulings from early 2009.

4.106 To address this backlog the ATO has taken the following steps.

4.107 Firstly, the Practice Management Unit is using an internal working measure that edited versions must be published on the register 49 days after the provision of written advice. This 49 days measure is based on the 28 days that is allowed to the taxpayer to comment on the document, 7 days to allow for mail to be delivered and a further 14 days for the PMU to process any changes.

4.108 Secondly, in October 2009 the ATO conducted a review of the Register to identify any missing versions.

4.109 This review found that 324 edited versions generated under the TDMS system were stored in a 'processed folder' that had not in fact been published. This accounted for 100 per cent of all missing edited versions, including those identified by the IGT. The ATO has advised that all these edited versions have now been published and staff of the IGT have confirmed that all the missing versions from the IGT's sample that were more than nine months old have now been published on the register.

4.110 The ATO has also conducted further investigations to ensure that its systems are operating correctly so that all versions sent for publication are in fact appearing on the public register.

4.111 To clear the current backlog, the ATO has taken steps to publish as many edited versions that are within the 49 day performance standard as possible and to then work on the older edited versions. This approach gives priority to keeping currency as useful as possible.

4.112 The ATO has advised that the current approach is reducing stock on hand and is producing an understanding of the aged nature of the edited versions not yet published.

4.113 The ATO has also provided statistics to the IGT which show that, as at 30 November 2009, the oldest edited versions that have not been published date from 20 July 2009 (for private rulings processed under the TDMS system) and from 29 August 2009 (for rulings processed under the Siebel system). This means that the backlog has now been reduced from over nine months to around four months.

CONCLUSION

4.114 The IGT has considered in detail the arguments raised for and against removing the detailed content of private binding rulings. He has concluded that on balance the ATO should continue its practice of publishing edited and searchable versions of binding private rulings.

4.115 The IGT also considers that the ATO should work towards making further enhancements to these published rulings such as by introducing a process of grouping rulings which have the same subject matter, introducing a better search engine and noting which rulings on the register have been withdrawn or are known to be incorrect.

4.116 The ATO should also continue with its current processes to fully overcome its current backlog of edited versions that have not yet been published on the register.

4.117 The IGT therefore makes the following key recommendation:

KEY RECOMMENDATION 6

The Inspector-General recommends that the Tax Office should:

- retain its practice of publishing on its website edited and searchable versions of binding private rulings;
- further enhance this register by introducing a process of noting which rulings on the register have been withdrawn;
- work towards introducing a process of grouping rulings which are of a standardised nature and publishing only the details of the relevant ruling which

differ from the standard version;

- work towards introducing a better search engine for the register and the removal or notation of rulings known to be incorrect or out of date; and
- work towards ensuring that all private rulings are published on the register within 49 days after the provision of the ruling to a taxpayer.

ATO response

4.118 The ATO agrees with recommendations 6.1 and 6.5, and disagrees with recommendations 6.2 to 6.4.

4.119 The ATO established the Register of Private Binding Rulings to ensure integrity by enabling recipients of a private ruling to test the authenticity of the ruling received and to provide greater transparency of the private rulings system. This followed the recommendation of an internal review of the private rulings system by an eminent independent person (the Sherman review). We believe that the register is performing this role adequately in its current form.

4.120 It was acknowledged at that time that publishing edited versions of private rulings ran the risk of giving private rulings a status they do not have. A specific legislative design feature is that private rulings apply only to the taxpayer to whom the ruling relates. Publishing private rulings on a public database could lead to them being seen as binding forms of advice. However, at that time, the then Commissioner acknowledged that benefits of transparency outweighed the risk.

4.121 When the Commissioner agreed in early 2009 to retain the register in its current form, it was on the basis that the register in its current form continued to satisfactorily balance the benefit of integrity and transparency against the risk of misunderstanding and improper use. The Commissioner's decision was also informed by acknowledgement from representatives of the tax profession that more needed to be done to ensure that taxpayers and professionals understood the proper purpose of the register and were aware of the risks of improper use of the register, and that the tax professional bodies had a key role to play in that educative function.

4.122 The ATO confirms the public commitment made to the National Tax Liaison Group in March 2009 to retain the register in its current form.

4.123 The ATO disagrees with the proposed 'enhancements' in these recommendations and is concerned that they significantly increase the risk of users misunderstanding the intent and purpose of the register (integrity and transparency of the private ruling system). The ATO provides access to its precedential database (the ATO legal database) for users to research as the authoritative source for information about the ATO's interpretation of the law.

4.124 As the Inspector-General has noted, the current backlog of unpublished edited versions arose in part as a result of the ATO's earlier investigation of an alternative format for edited versions contained in the register. More recently, the team that publishes the register has had to balance the register-related work with the migration

of private rulings to Siebel (as noted at paragraph 4.101 of the report) and a recent spike in publishing activity for ATO Interpretative Decisions. Given the precedential status of ATO Interpretative Decisions the team has given priority to that work over work relating to the register.

4.125 The ATO will continue to work towards ensuring that edited versions of private rulings are published on the register within our current internal management measure of 49 days. The 49 day internal measure recognises the balance between integrity and transparency and our statutory obligations under the secrecy and privacy provisions of the relevant laws, but we also acknowledge that we can not always meet this measure in every case. We will also consider opportunities for process and systems improvements that could help drive improved efficiency and timeliness in the longer term.

CHAPTER 5: IMPLEMENTATION OF RECOMMENDATIONS OF IGT'S 2008 REVIEW ON REVENUE BIAS IN PRIVATE RULINGS

5.1 On 7 February 2005, the then Minister for Revenue and Assistant Treasurer asked the Inspector-General of Taxation (Inspector-General or IGT) to review and report on whether there is a 'pro-revenue' bias evident in private binding rulings (PBRs) issued by the Commissioner of Taxation under Part IVAA of *Taxation Administration Act 1953*. As a result of this request and industry representations to do so, the Inspector-General then conducted a review of the potential revenue bias in private rulings involving large complex matters. This review focussed on private rulings involving large business taxpayers.

5.2 The review³³ found that because of the ATO's dual role as a rulings administrator and a revenue collector it was generally accepted that the ATO would have an inherent revenue bias in finely balanced matters. However, the review found that there was no evidence of undue revenue bias in large complex PBRs.

5.3 Based on a representative survey, however, around 70 per cent of large business PBR applicants perceived the Tax Office to have a revenue bias in its PBRs. A major cause of these perceptions was identified as being a lack of transparency – taxpayers observed unexplained Tax Office behaviours and in the absence of cogent explanations interpreted those behaviours as being motivated by a revenue bias. The Inspector-General made ten recommendations to address this. The Tax Office fully agreed with six of these recommendations and partly agreed with four.

5.4 The ten recommendations suggested improvements in the following areas:

- Tax Office transparency, communication and objectivity – Recommendations 1 to 6 (Recommendations 1 and 2 were partly agreed to by the Tax Office)
- The interactions between the Tax Office and Treasury – Recommendations 7 and 8 (Recommendation 7 was partly agreed to by the Tax Office)
- The time frames for private rulings – Recommendations 9 and 10 (Recommendation 10 was partly agreed to by the Tax Office).

5.5 The structure adopted in this chapter in addressing the implementation of each recommendation is to outline in sequence the following:

- the original IGT recommendation;
- the ATO position on the implementation of that recommendation; and
- the IGT's conclusion on the ATO's implementation of that recommendation.

³³ *Review of the potential revenue bias in private binding rulings involving large complex matters*, Inspector-General of Taxation, February 2008.

5.6 A recommendation is considered implemented where the Tax Office has demonstrated to the Inspector-General that the particular recommendation has been satisfactorily addressed. In some cases this status has been allocated by the IGT to a recommendation where some work remains to be done, but only where there are detailed plans, actions and commitment to complete implementation in a short timeframe.

5.7 The ATO's original response to the IGT's recommendations is included in Appendix 4 of this report.

RECOMMENDATION 1

Informing taxpayers when it sees a need for external input, including from the Treasury, on interpretive matters that relate to their PBR applications and the reasons why.

ATO position

Implemented.

Evidence supporting the ATO position

5.8 Recommendation 1 was agreed in part, because in situations where external input is required from Treasury, it would not be appropriate to disclose the reasons why the Tax Office is seeking Treasury input. The Tax Office considers such communications to be confidential.

5.9 The agreed aspect of the recommendation has been primarily addressed by the Tax Office through the development and delivery of an Interpretative Assistance (IA) training package which educates Tax Office staff on 'effective communication' and their 'roles and responsibilities' in providing rulings to taxpayers. The foundational level training, 'IA Processes and Case Management (foundation)' was developed and delivered prior to the Inspector-General's 2008 *Review of the potential revenue bias in private binding rulings involving large complex matters*. It was delivered as a workshop to staff in the latter half of 2007 on a first come first in basis and focussed on active case management and communication. As a pre-requisite to this workshop, attendees who registered were required to have at least twelve weeks experience in the Tax Office.

5.10 Subsequently the intermediate level training, 'IA Framework, Case Management and Procedures (Intermediate)' was developed as a two-day course which was piloted on the 26th and 27th of May 2009 and rolled out across the relevant Tax Office IA sites in late May/early June 2009. The course consists of three modules: (1) Roles and Responsibilities of an IA case officer/team leader, (2) Practices and Procedures in doing IA case work, and (3) Case studies. This intermediate level training was deemed mandatory to all IA staff engaged in rulings work by the Large Business and International (LBI) Executive. Small and Medium Enterprise (SME) staff also attended the intermediate training.

5.11 The following table sets out the numbers of staff who attended the IA training:

Table 5.1: Numbers of ATO staff who attended the IA training
IA Processes and Case Management (foundation)

Date	Sites	Participant numbers
3 & 4 July 2007	Hurstville	19
2 & 3 August 2007	Melbourne	19
6 & 7 August 2007	Perth	16

IA Framework, Case Management and Procedures (Intermediate)

Date	Sites	Participant numbers
27 May 2009	Parramatta	28
3 June 2009	Albury	15
11 June 2009	Brisbane	14
5 & 16 June 2009	Sydney	33
19 June 2009	Northbridge	18
23 June 2009	Moonee Ponds	23
24 & 25 June 2009	Box Hill	26
30 June 2009	Waymouth	26

5.12 The need to keep taxpayers informed of any external input sought on interpretative matters has also been presented to the IA network by the network leaders in late 2008. Those who comprise the IA network include the LBI IA Directors; thus the presentation to the IA network ensures that the key messages will be channelled down to those staff working on rulings. Since 1 July 2009, the IA network has become part of the LBI IA Business Management Committee.

5.13 The Practice Statement PS LA 2008/3 which was issued during 2008 reflects the need for communication with taxpayers where external input is sought. Paragraph 90 of PS LA 2008/3 now reads:

The Commissioner can take into account information provided by an entity other than the applicant, provided that the Commissioner tells the applicant what the information is and that the Commissioner intends to take the information into account. The applicant must be given a reasonable opportunity (ordinarily 28 days) to comment on the use of that information before the ruling is made.

5.14 The Tax Office decided that an update for Online Resource Centre for Law Administration (ORCLA)³⁴ was not required.

5.15 In terms of current ATO processes, when a business line case officer encounters an issue, that may or may not ultimately involve discussion with Treasury, the case officer will follow the established escalation procedure. The Tax Counsel Network (TCN) /Centre of Expertise (CoE) gatekeeper will allocate the issue to the TCN/CoE with the relevant expertise. Those officers have access to relevant materials

³⁴ ORCLA is a 'virtual' manual of policies, procedures and other instructions for staff who make technical decisions in respect of laws administered by the Commissioner of Taxation.

and registers. It would be TCN/CoE that would consult with Treasury on an issue arising in a case and they would inform the case officer that is happening. The case officer would, in turn, keep the taxpayer informed by advising them that it has been necessary to have discussions with Treasury. However, as the content of discussions with Treasury is confidential, the case officer would be unable to advise the nature of those discussions.

IGT conclusion — Implemented

5.16 The Tax Office partly agreed to this recommendation because it considers that it is not appropriate to disclose the reasons why the Tax Office is seeking external input from Treasury. The ATO-Treasury protocol states that:

Communications between the Tax Office and Treasury on tax and superannuation matters are confidential as they are, effectively, in the nature of communications between an agency and the government.

5.17 The Inspector-General considers that there are generally two categories of ATO-Treasury communications in this context. One category of communications discusses the implications of the ATO's views – for example, the identification of circumstances in which the law is not aligned with current Government policy or where there would be economic consequences if the ATO adopted a certain view of the law. The second category of communications is where the ATO considers that there are two or more interpretations open on a reasonable reading of the law, but the underlying purpose for the law is not clear.

5.18 The IGT agrees that there should not be a disclosure of the content of ATO-Treasury discussions where they fall within the first category of communications. There are strong public policy reasons to keep confidential the advice to Government on implications of policy.

5.19 However, where the communications fall within the second category, there are strong reasons why these communications should be disclosed as they will otherwise place taxpayers at a significant disadvantage. The IGT had also specifically identified the lack of transparency of ATO-Treasury dialogue on interpretative matters as one of the underlying causes of perceptions of revenue bias in PBRs. This concern was also raised by the JCPAA in its questioning of the Commissioner and Second Commissioner on the ATO's unwillingness to agree to the full implementation of this recommendation³⁵.

5.20 The IGT also notes that shortly before this review was finalised, the Government publicly released the Report on Australia's Future Tax System that was presented to the Treasurer on 23 December 2009. Recommendation 114 of this report is as follows:

35 Federal Parliament's Joint Committee of Public Accounts and Audit *Biannual hearing with Commissioner of Taxation*, 30 April 2008, Sydney, Proof Committee Hansard, pages 17 – 23.

Information or advice provided by Treasury to assist the ATO in determining the purpose or object of the law, or materials used by the ATO to determine policy intent (other than correspondence with or from government) should be made public.

5.21 The Government has not provided a response to this recommendation.

5.22 In relation to the implementation of what the ATO agreed to implement, the IGT undertook case work which showed that the ATO was advising taxpayers when it was discussing the technical issue with Treasury (although not the reasons why it was discussing the matter with Treasury). Also, as noted in the 'Evidence supporting the ATO position' section for this recommendation, the Tax Office has procedures in place for taxpayers to be kept informed by case officers, although not contemporaneously, where Treasury input has been sought regarding their PBR application.

5.23 On this basis, the IGT concludes that the Tax Office has completed what it has agreed to implement.

RECOMMENDATION 2

Informing taxpayers of the outcomes of external input, including from the Treasury, and internal deliberations on matters that affect them, especially where an unfavourable ruling is likely.

ATO position

Implemented.

Evidence supporting the ATO position

5.24 Recommendation 2 was agreed in part, because it would not be appropriate to disclose the nature or outcomes of discussions with Treasury, as the Tax Office considers such communications to be confidential. The Tax Office's evidence supporting this position is the same as that contained in paragraphs 5.8 to 5.15.

IGT conclusion — Implemented³⁶

5.25 As discussed in the IGT's analysis in recommendation 1 above, the Inspector-General notes that the Tax Office did not agree to implement this recommendation in full. The Inspector-General had specifically identified the lack of transparency of ATO-Treasury dialogue on interpretative matters as one of the underlying causes of perceptions of revenue bias in PBRs.

5.26 In respect of informing taxpayers of the outcomes of internal deliberations, a sample of the relevant ATO files demonstrates that the ATO informs applicants of the outcomes of internal deliberations (such as TCN and CoE deliberations) before the

³⁶ This recommendation was implemented only to the extent that the ATO agreed with the original recommendation.

ATO concludes the ruling. The ATO also provides similar messages to its staff to do so in PS LA 2008/3³⁷ and its IA Intermediate training package.

RECOMMENDATION 3

Where an understanding of purpose is a factor in the decision in large business unfavourable PBRs, including a statement of the underlying purpose of the legislative provisions on which the interpretation is based and the source for that purpose (for example, how the legally permissible extrinsic materials have been relied upon to ascertain that purpose and in concluding its view).

ATO position

Implemented.

Evidence supporting the ATO position

5.27 This recommendation has been primarily addressed through the IA Intermediate training package [referred to in paragraph 5.10]. This training covers the need for Tax Office staff to communicate to taxpayers the policy intent used to interpret the law, provide full explanation of why this is the better view and the extrinsic material used to make this decision.

5.28 To further enhance staff knowledge of statutory interpretation, the trainer conducting the intermediate level training requested attendees to complete the existing Ilearn package (self-paced) on statutory interpretation. Also, the Law and Practice business line is developing a more detailed statutory interpretation course that is planned to be rolled-out in 2010. The pre-requisite to the detailed statutory interpretation course will be the existing Ilearn package.

IGT conclusion — Implemented

5.29 The ATO confirmed that the new quality assurance process (the ATO's Integrated Quality Framework system) does not directly assure adherence by tax officers to the requirements of the recommendation. The Tax Office's ILearn package on statutory interpretation does not contain any instruction to tax officers in line with recommendation 3. A more detailed statutory interpretation course is currently being developed for IA staff.

5.30 However, the Inspector-General reviewed 6 LBI PBRs finalised during 2008/09 where the underlying purpose of the legislative provision was a material factor for deciding the ATO view in unfavourable decisions. The Inspector-General found that all included a statement and source in line with the recommendation.

37 See paragraphs 198 and 201.

RECOMMENDATION 4

More widely adopting the key principles of the Priority PBR process in relation to large business PBRs:

- Centralised point of reference (process owner) responsible for marshalling resources and taking remedial action to ensure cases are not delayed;
- Alignment of taxpayer and Tax Office priorities;
- Front end engagement of all expertise to avoid sequential processing; and
- Taxpayers and Tax Office working together to clarify the ruling.

ATO position

Implemented.

Evidence supporting the ATO position

5.31 In addressing the need for a centralised point of reference for rulings and front-end engagement of expertise, the priority rulings system has been expanded to allow certain class rulings into the priority process. As a result PS LA 2005/10 was withdrawn and a new practice statement PS LA 2009/2 has been published to redefine the way the priority process works. The changes to PSLA 2005/10 were substantial and involved extensive internal and external consultation.

5.32 To communicate the release of PS LA 2009/2, a multi-level communication strategy was developed. Internally, articles were placed in ATO Extra (an ATO staff newsletter) and Business Service Line newsletters. Externally the Commissioner mentioned the change in his speech to the Corporate Tax Association, which is a speech reported extensively in the media.

5.33 The IA training package covers this recommendation by providing directions for staff around 'roles and responsibilities' in providing rulings, in both the foundational and intermediate level training [referred to in paragraphs 5.9 and 5.10].

5.34 The advice guidance material in ORCLA has been updated with a link to the new practice statement PS LA 2009/2. This recommendation has also been enhanced by the creation of the new Interpretive Advice segment in LBI on 1 July 2009, which allows for holistic management of the IA function.

IGT conclusion — Implemented

5.35 The purpose of the recommendation is to increase transparency, improve communication and to clearly demonstrate objectivity in large business PBRs by improving the quality of the application process. The Tax Office response has been to expand the Priority PBR Process to certain class rulings. Although class rulings are not PBRs, this action is welcome. However, it does not help to implement the

recommendation. This is because the recommendation is directed at extending the principles of the priority process towards other large business PBRs.

5.36 However, the IGT notes that the Tax Office created a new IA Group in LBI on 1 July 2009. This change is part of a new model for IA work arrangements to deliver productivity improvements relating to the four key principles of the Priority PBR Process.

5.37 The IGT notes that an internal ATO review, conducted in 2009, has also recommended that the key principles of this priority process should be extended to other large business PBR applications. As at the end of 2009, the findings and recommendations from the internal review remain part of the ATO's continuing improvement work. The IGT observes that the ATO is implementing a differentiated service model for large business PBR applications and implementing an 'early engagement model' for those applications involving more complex issues and/or significant risk to the ATO and/or taxpayer – for example, where Part IVA sign-off is requested, or where a ruling involves a known problematic area of the law. The processes involved in this model require, amongst other things, early engagement of relevant ATO expertise, regular call overs (with senior executive interventions if time frames are not met) and discussions with the PBR applicants.

5.38 Although the Tax Office is still in the early stages of bringing about change to more widely adopt the Priority PBR process in relation to large business PBRs the work outlined above and the trend in improving timeframes for finalising large business PBRs³⁸ indicates that the Tax Office's approach is having the desired effect. The recommendation is therefore considered implemented.

38 The ATO has advised that the average timeframe to complete a large business PBR in 2003/04 to 2004/05 was 174 days, while the average timeframe to complete a large business PBR in the first 8 months of 2009/10 is around 130 days. It also states that the total average timeframe for the year is expected to decline due to the declining average timeframes for large business PBRs currently in progress – around 80 days as at end of February 2010.

RECOMMENDATION 5

Increasing transparency, improving communication and more clearly demonstrating objectivity in relation to PBR technical decision making by:

- before an adverse decision is made, communicating to the applicant the basis for the likely Tax Office view (including external opinions where relevant), an explanation of why the Tax Office's view is to be preferred over the applicant's, indicating the relevance of information provided by the applicant, and providing the applicant an adequate opportunity to comment;
- vetting requests for additional information and (if requested) providing reasons why the information is relevant and identifying the specific aspect of the technical issue that turns on the requested information;
- if requested by the applicant, providing applicants with written reasons for delay if the PBR has not issued after three months, including contact details for the relevant LBI segment leader, CoE Manager and Deputy Chief Tax Counsel;
- where necessary, engaging recognised independent external subject specialists to supplement Tax Office capability to respond to large, complex PBRs; and
- where requested by the PBR applicant, ensuring that the Case Manager provides the applicant with a free and quick flow of direct contact with those technical decision makers (whether in TCN, CoE or LBI) that determined, or are determining, the technical issues relating to the application.

ATO position

Implemented.

Evidence supporting the ATO position

5.39 Senior leaders in the Law and Practice business line have reinforced the key messages of 'access to decision makers' to the senior staff of the CoE, such as ensuring that CoE staff are available when requested by applicants of rulings to discuss the outcome or specific issues. In LBI the key messages have been presented to the IA network by the network leaders in late 2008. As the forum consists of LBI IA Directors, the messages are channelled down to IA staff.

5.40 The IA training package covers the five elements of this recommendation through the foundational and intermediate level training [referred to in paragraphs 5.9 and 5.10]. At the intermediate level training, the trainer provided attendees with copies of Recommendation 5 and 6.

5.41 Also the advice guidance material in ORCLA has been updated and practice statement PS LA 2008/3 has been issued. In regards to sub issue (2), paragraph 90 of PS LA 2008/3 now reads:

Generally, if additional information is necessary to make a private ruling it must be requested from the applicant. ... provided that the Commissioner tells the applicant what the information is and that the Commissioner intends to take the information into account. The applicant must be given a reasonable opportunity (ordinarily 28 days) to comment on the use of that information before the ruling is made.

IGT Conclusion

5.42 The original IGT recommendation has five separate parts, each of which is commented on separately below.

Part i) — Implemented

5.43 Case testing, which included the obtaining of feedback from taxpayers and their advisers, demonstrated that the ATO complied with this part of the recommendation. However, in withdrawn PBR applications, the IGT was unable to conclude whether aspects of this recommendation (such as, explaining why the ATO view was preferred over the taxpayer's, or providing an adequate opportunity to comment) were implemented. Feedback from applicants asserted dissatisfaction with the ATO's conduct in this regard. This indicates to the IGT that although finalised unfavourable PBRs exhibit these ATO behaviours (and on this basis the IGT concludes that this part of the recommendation is implemented) there is room for the ATO to improve its processes by focussing on exhibiting these behaviours closer to the point in time at which it communicates its likely unfavourable view.

5.44 A review of the IA Intermediate training package revealed a reference to the first part of recommendation 5 and to the need for ATO officers to communicate with taxpayers where the issuing of an unfavourable ruling is being considered. Participants are also referred to the ATO business segment in PS LA 2008/3 which deals with tax officers engaging in informal discussions with taxpayers. Paragraphs 201 and 202 of the practice statement encourage officers to inform applicants of concerns which may lead to an unfavourable response.

5.45 Neither the IA training package or PS LA 2008/3 mentions the need to provide an explanation of why the Tax Office's view is preferred over the applicant's, or to indicate the relevance of information provided by the applicant. A review of PS LA 2008/3 confirmed that no change has been made to the practice statement to implement this aspect of the recommendation.

Part ii) — Implemented

5.46 An ATO internal review has recommended that a process be implemented that monitors and approves requests for further information from taxpayers, where the ruling request is more than two months old or where there have already been more than one or two requests for information issued.

5.47 Specific reference to, and discussion of, the requirements of this part of the recommendation regarding information requests has been included in the IA Intermediate training package. The Inspector-General notes that paragraph 2 of PS LA 2003/9 requires ATO technical decision making staff (including those that handle PBR applications) to follow the policies and procedures set down in ORCLA. The Tax Office

has updated its ORCLA manual to reflect the requirements to explain why the information is relevant. The ATO has assured the IGT that inherent to this explanation is a communication of the technical issue which turns on the requested information. On this basis the IGT considers that the recommendation is implemented.

Part iii) — Implemented

5.48 In conducting the follow up review, the Inspector-General determined that a number of PBRs have taken more than three months to issue. However, the ATO advises that in none of these cases did the applicant ask for written reasons for the delay. This may be a result of applicants being unaware of this option.

5.49 The Inspector-General considers that although not essential to the implementation of this recommendation, that the Tax Office should alert applicants of this option – for example, by alerting applicants to this option in the acknowledgement letters that the Tax Office sends to PBR applicants.

Part iv) — Implemented

5.50 The requirement to engage independent external subject specialists has been highlighted in the IA Intermediate training package. Sample testing by the Inspector-General evidenced that independent external subject specialists had been appropriately engaged.

Part v) — Implemented

5.51 Direct reference to this part of the recommendation is made in the IA Intermediate training package to encourage effective communication with applicants. This commitment has also been referred to by the Commissioner in a number of speeches³⁹:

We will re-emphasise that the responsibilities of our case managers include ... arranging dialogue between the company and our decision makers on the case.

5.52 The IGT observed, in the unfavourable PBR cases that were reviewed, in almost all cases access was provided to PBR applicants where requested by the applicant or their representative. However, the IGT is aware of circumstances where applicants or their representatives feel this engagement could operate more effectively. On balance, the IGT concludes, based on the material reviewed, that this part of the recommendation is implemented where PBR applicants have made requests.

RECOMMENDATION 6

Ensuring that tax officials involved in interpretive matters are aware of the accepted principles of the purposive approach to statutory interpretation (including the accepted materials to ascertain that purpose) and that they should not rely on advice of what policy developers or legislative drafters intended.

39 D'Ascenzo M, *A New Dimension*, speech to the Corporate Tax Association Convention, Sydney, 12 May 2008

ATO position

Implemented.

Evidence supporting the ATO position

5.53 This recommendation has been primarily addressed through the IA Intermediate training package [referred to in paragraph 5.10]. This training covers the need for Tax Office staff to communicate to taxpayers the policy intent used to interpret the law, provide full explanation of why this is the better view and the extrinsic material used to make this decision. At the intermediate level training, the trainer provided attendees with copies of Recommendations 5 and 6.

5.54 To further enhance staff knowledge of statutory interpretation, the trainer conducting the intermediate level training requested attendees to complete the existing Ilearn package (self-paced) on statutory interpretation, which covers the purposive approach to interpretation. Also, the Law and Practice business line is developing a more detailed statutory interpretation course that is planned to be rolled-out in 2010. A pre-requisite to the detailed statutory interpretation course will be the existing Ilearn package.

IGT conclusion — Implemented

5.55 The Tax Office response primarily relies on the IA Intermediate training package which was developed to provide attendees with a more in-depth understanding of the statutory framework of interpretative assistance work, the practices and procedures supporting that work, as well as officer's roles and responsibilities. A review of the package reveals that attendees were made aware of the IGT recommendation and of a self-paced ILearn package *Statutory Interpretation: An Introduction*:

... which all IA officers should complete.⁴⁰

5.56 The Inspector-General considers that, one exception aside, the ILearn package should impart a well-rounded understanding of the accepted principles of statutory interpretation. This exception concerns the use of advice given by policy developers and legislative drafters in resolving interpretative matters.

5.57 The only reference in the ILearn package to ATO-Treasury interaction on interpretation matters appears on page 35 of that package:

Advice from Treasury to the Tax Office on the policy intent of a provision would not generally be considered extrinsic material for the purposes of the Acts Interpretation Act 1901. These policy advices should be used carefully when determining the legislative purpose of a provision. It will usually be best practice to use the same extrinsic materials as the Court would use.

⁴⁰ *Interpretative Assistance Framework, Case Management & Procedures* (Tax Office training package - version 01/2009 - p.5).

5.58 Although the above instruction recognises that such advice is impermissible according to the rules of statutory interpretation, it also indicates to staff that there may be circumstances where they are able to use Treasury advice on the 'policy intent' of a provision as a basis for making an interpretative decision. This clearly does not align with discussion in the Inspector-General's 2008 report at paragraphs 5.20 to 5.25 and 5.35 to 5.56 – as the IGT had specifically identified the treatment of policy advice in interpretative matters as one of the underlying causes of perceptions of revenue bias in PBRs.

5.59 In relation to whether the ATO has ensured that tax officials involved in interpretative matters are aware of these principles, the IA training package was designed primarily for case officers and authorising officers in the business lines, although:

... it should also be attended by staff from specialist areas, for example Centres of Expertise, Tax Counsel Network members, or Business Line specialists who will contribute to IA casework ...⁴¹

5.60 However, the Tax Office response to the recommendation indicates that only LBI staff and SM&E staff attended. Staff from CoE and TCN are also involved in interpretative matters in the resolution of large complex matters, being the ATO's senior technical officers. Given that TCN and CoE staff deal with statutory interpretation on a daily basis, the IGT would not expect that they be required to attend this level of training.

5.61 On this point the Tax Office assures the IGT that it has reinforced with its senior technical officers that the proper interpretation of the law is not determined by advice of what policy developers or legislative drafters intended in relation to interpretative matters. On this basis the IGT considers that the recommendation is implemented.

RECOMMENDATION 7

Clarifying, preferably in its interagency protocol, the Tax Office's and Treasury's expectations of the purpose and nature of their interactions on technical matters that relate to already enacted law. This clarification should include:

- that PBRs should not be delayed because the technical issues relating to those PBRs are the subject of discussions with Treasury; and
- that in relation to interpretive matters, the Tax Office may invite comments on the purpose or object of the legislative provisions in question, while recognising that any Treasury comments are not determinative.

⁴¹ *Interpretative Assistance Framework, Case Management & Procedures* (Tax Office training package – version 01/2009 – p.1).

ATO position

Implemented.

Evidence supporting the ATO position

5.62 The revised protocol was posted on the ATO's website on 25 March 2008. The relevant section under the heading 'For enacted law' states that the Tax Office routinely consults with Treasury, the professions, affected taxpayers and the public in forming its view of the interpretation of the enacted law.

IGT Conclusion

5.63 The original IGT recommendation has two separate parts, each of which is commented on separately below.

Part i) — Implemented

5.64 The ATO has completed two revisions of the ATO-Treasury protocol since the Inspector-General's report was released in February 2008. The ATO has not included a commitment that PBRs are not to be delayed because a technical issue relating to the particular PBR is the subject of discussions with Treasury. The ATO has indicated that the clarification was too detailed to incorporate into the ATO-Treasury protocol. This is because the ATO considers that protocol to be a high level document. However, the ATO has undertaken to incorporate the clarification into an internal corporate document within the immediate future.

5.65 The ATO also provided the IGT with examples of cases where the PBRs were issued before Treasury consultations had concluded on the technical issues. In line with the discussion in paragraph 5.46 to 5.50 of IGT's 2008 report, the ATO has acted without awaiting Treasury's final response in the cases viewed by the IGT.

Part ii) — Implemented

5.66 In relation to the second part of the recommendation, an appropriate revision has been made to the protocol.

RECOMMENDATION 8

Ensuring that the Tax Office follows the formal protocol processes in every case where it sees a need for dialogue with Treasury on potential implications of its view of the law. This would include providing a comprehensive administrative impact statement (including details on how it will administer the law if there is no law change).

ATO position

Implemented.

Evidence supporting the ATO position

5.67 This formal process has been in place since July 2007. All ATO minutes that suggest a law change must be cleared by the ATO's Chief Tax Counsel before they are sent to Treasury. The ATO's Governance and Government Relations (GGR) group ensures this happens because all minutes to Treasury must also be cleared by the First Assistant Commissioner GGR or the Assistant Commissioner Policy and Practice. Moreover, GGR controls the issue of minute numbers so that all minutes go through this central point.

IGT conclusion — Implemented

5.68 The Inspector-General sample-tested relevant ATO-Treasury formal communications, and in all cases ATO Minutes had been prepared in line with the recommendation.

RECOMMENDATION 9

Issuing PBRs irrespective of whether the matter involves consideration of a technical issue that is the subject of a developing or contemplated public ruling.

ATO position

Implemented.

Evidence supporting the ATO position

5.69 The message that private binding rulings should be issued, irrespective of whether a public ruling has been completed, has been reinforced by senior leaders in LBI and Law and Practice through the quarterly aged case call over processes. Also the network leaders of the LBI IA network discussed this recommendation with the IA Directors in meetings in late 2008. The presentation to the IA network ensures that this recommendation is channelled down to IA staff.

5.70 The IA foundation training package [referred to in paragraph 5.9] covers this recommendation through good case management. The subsequent IA Intermediate training package [referred to in paragraph 5.10] covers this recommendation in module (1) Roles and Responsibilities of an IA case officer/team leader.

IGT conclusion — Implemented

5.71 The Tax Office has verbally reinforced via the call over process and through presentations to senior IA staff that PBRs 'should' not be delayed because of a contemplated or developing public ruling. The IA Intermediate training package advises participants to 'note' the IGT recommendation. The Tax Office confirmed that the 2007 Foundation training package contained broad messages regarding good case management and officer responsibilities, but did not refer to the IGT recommendation. The IGT confirmed that there is no further communication or instruction to tax officers regarding the recommendation. Although, not essential to the implementation of this

recommendation, the IGT considers that these messages to ATO staff should be reinforced through a binding staff instruction. In any event, the IGT has confirmed with the Tax Office that even where a technical issue is the subject of a developing or contemplated public ruling, a PBR involving the same issue will not be delayed because of this. Once the ATO precedential view on the issue is decided, the PBR will continue to be processed, independently of the public ruling. The IGT considers that this approach would appropriately implement the recommendation.

5.72 The Inspector-General sought to sample test cases in line with the recommendation but the Tax Office confirmed that there were no such cases. It is noted that the ATO's own internal review conducted in 2009 indicates that, in 16 of 34 LBI PBRs not completed within the 90-day corporate timeframe, there were issues associated with unsettled or contentious areas of the law. However, the ATO assures the IGT that the analysis of those aged complex and difficult cases did not show those cases to have been delayed due to the development of a public ruling.

RECOMMENDATION 10

Reporting achievements against performance standards and elapsed timeframes of PBRs in Tax Office annual reports.

ATO position

Implemented.

Evidence supporting the ATO position

5.73 This recommendation was agreed to in part because while the Tax Office already reports achievements against performance standards, the question of elapsed time is not so clear. A private binding ruling requires a joint effort by the Tax Office and the taxpayer. Accordingly, the elapsed time from the date of application to the date of issue of the ruling is not a good measure of the Tax Office's performance as some delays can be due to the taxpayer.

5.74 Where the ATO adopts the principles of the Priority PBR process, it engages with the taxpayer when the arrangement is being developed. Much of the work in these cases is done before the ruling is lodged and the time elapsed from the date of lodgement is largely an irrelevant measure.

5.75 Therefore, to the extent agreed, this recommendation has been implemented and no further action is required.

IGT conclusion — Implemented

5.76 The Tax Office agreed in part to the Inspector-General's recommendation by stating that reporting on elapsed time can be skewed because of delays due to taxpayers. Just a few months following the Inspector-General's 2008 report, the Joint

Committee of Public Accounts and Audit (JCPAA) tabled⁴² a report that included two recommendations relating to the subject matter of the Inspector-General's Recommendation 10. One of the JCPAA's recommendations was that the ATO publish the elapsed timeframes for large business PBRs in the Commissioner's annual reports. Both JCPAA recommendations were implemented by the Tax Office in its 2007-08 Annual Report.

5.77 Therefore, although the Tax Office stated that it would only partially implement the Inspector-General's recommendation, it did fully implement it following the JCPAA's reiteration of this recommended action.

⁴² Report 410 - Tax Administration - tabled by the JCPAA on 26 June 2008.

APPENDIX 1: TERMS OF REFERENCE AND CONDUCT OF THE REVIEW

TERMS OF REFERENCE

A1.1 On 6 April 2009 the IGT announced the terms of reference for his review of the ATO's administration of private rulings. The terms of reference for this review were to:

- examine the purpose, use and ongoing relevance of the register of edited private rulings and the relationship of this register to the ATO's more authoritative forms of guidance, such as ATO Interpretative Decisions (ATO IDs);
- investigate timeliness, accessibility and productivity issues for private rulings, and issues concerning their binding nature;
- examine the extent to which the ATO has implemented the administrative recommendations on private rulings made in Treasury's 2004 *Report on Aspects of Income Tax Self Assessment* (the RoSA review) and the Inspector-General's 2008 review on the potential revenue bias in private rulings; and
- examine, in the context of contemporary risks, the extent to which the design of the ATO Change Program's new system will maintain the integrity and quality of private rulings and deliver benefits to taxpayers.

CONDUCT OF THE REVIEW

A1.2 The IGT advertised the review on his website, www.igt.gov.au, from 6 April 2009. The review was also reported in the press and in specialist accounting and legal publications.

A1.3 Written submissions to the review were taken from members of the public and a number of organisations.

A1.4 Members of the review team also met with members of the accounting and legal profession and with representatives of various professional bodies representing lawyers and accountants.

A1.5 The Commissioner of Taxation was asked to provide information and documents relevant to the review. Visits were made to the various ATO locations, including the National Office in Canberra and offices located in Melbourne, Box Hill, Parramatta, Sydney, Newcastle, Brisbane, Upper Mount Gravatt, Townsville and Hobart to interview relevant ATO staff.

A1.6 The review also took into account a number of other inquiries relevant to this review.

APPENDIX 2: ATO'S RESPONSE TO THE REVIEW

A2.1 The ATO's response to the review is set out on the following page.



Mr Ali Noroozi
Inspector-General of Taxation
Level 19, 50 Bridge Street
Sydney NSW 2001

Dear Ali

Thank you for your report on the *Review of aspects of the Australian Taxation Office's administration of private binding rulings*. The ATO's responses to your specific recommendations are at Attachment 1. I understand that you will include our responses under the relevant recommendation in your final report.

I note your favourable comments on our strong performance on the quality of the private rulings that were the main subject of your review, and the supportive comments in a number of submissions made to you. I also note that you consider that we need to improve the timeliness of our responses to requests for private rulings, especially those that may need to involve a number of our experts to resolve issues that are usually complex or novel. We agree and, as you are aware, are pursuing initiatives that aim to get the key people involved early to resolve the issues and work closely with the applicants as appropriate.

It is pleasing to see that you have concluded that we have implemented all of the agreed recommendations of the *2008 Review of the potential revenue bias in private binding rulings involving large complex matters*.

I observe your concerns about the impact of our migration to a new IT system on the timeliness of our private rulings. We agree with you that with the introduction of any new system, especially one of this magnitude, it can be expected that it will take some time for staff to get accustomed to the new functionality and ways to use the system most effectively and efficiently. We are working to address these impacts.

In summary, of your six recommendations we agree with three in full or in principle, with two in part and on one of the recommendations we make no comment as it is directed to government. Our reasons are set out at Attachment 1.

Our major difference, as far as your findings and recommendations are concerned, relates to our Register of Private Binding Rulings (the register). We remain of the view that the key purpose of the register is integrity – that the person receiving the

private ruling can verify its authenticity by reference to this register on our website. It is also a means of transparency for the private rulings we issue. We believe that it is performing this role adequately in its current form. Our concern with the 'enhancements' proposed is that they could be interpreted as moving the register beyond its intended purpose (a register for integrity and transparency of the private ruling system) to an authoritative database - a risk acknowledged when we established the register. The ATO's precedential database (the ATO legal database) is the authoritative source for information about the ATO's interpretation of the law.

Finally I would like to acknowledge the efforts of all involved in the undertaking of the review.

Yours Sincerely

A handwritten signature in cursive script that reads "Jennie Granger".

Jennie Granger
Second Commissioner Law

APPENDIX 3: ATO'S MANAGEMENT ARRANGEMENTS FOR PRIVATE RULINGS

A3.1 Private rulings on income tax issues can be worked on by ATO staff in one or more of four major business lines, together with (in some cases) staff in one or more of six separate Centres of Expertise as well as (again, in some cases) staff from the Tax Counsel Network. For 2009/10, the ATO has budgeted for 373 full time equivalent staff (out of a total of 21,530 full time equivalent staff) to work on private rulings, oral rulings and administratively binding advice.

A3.2 Business lines have the primary responsibility for managing private ruling cases. Case officers within business lines who are allocated private rulings are expected to be the primary contact point between the ATO and the applicant for any ruling.

A3.3 A business line can prepare and issue a private ruling without referring the matter to any other area of the ATO where the ruling involves the application of a precedential ATO view, the straightforward application of the law, the exercise of a discretion, making an ultimate conclusion of fact or valuing something. Precedential ATO views are those contained in publicly issued rulings, publicly issued draft rulings, ATO Interpretative decisions (ATO IDs), decision impact statements and other specific documents listed in a schedule of precedential ATO views.

A3.4 Where there is no precedential ATO view for the matter to be addressed in a private ruling, or the application of an existing precedential view is considered to give rise to the wrong outcome, the business line must escalate the issue to a relevant Centre of Expertise whose role is then to either create the relevant precedential ATO view or to reconsider the existing view. A business line may also escalate an issue to a centre in other circumstances. One example is where the issue involves the application of a discretion, the legislation provides for specific factors to be considered in exercising that discretion and there is doubt about the meaning of one or more of those factors.⁴³

A3.5 A business line must refer a private ruling to the ATO's Tax Counsel Network where the ruling involves the application of Part IVA (the general anti-avoidance provision) or section 45B (which involves demergers of corporate groups) of the *Income Tax Assessment Act 1936* or a significant technical issue (known as a Priority Technical Issue). From time to time the ATO will also issue a direction that other matters must be referred to this network. For example, from August 2006 to December 2008, there was a direction that all private rulings involving the application of section 40-880 of the *Income Tax Assessment Act 1997* were to be referred to a particular member of the Tax Counsel Network.

A3.6 For income tax rulings other than those which involve aggressive tax planning matters there are four major business lines which prepare private rulings. These business lines are for Microenterprises and Individuals (MEI), Small and Medium

⁴³ PSLA 2004/4 at paragraph 4.

Enterprises (SME), Large Businesses and International (LBI) and Superannuation (Super).

A3.7 During the course of the review the ATO switched to a new computer system for managing private rulings – the Siebel system. This switch has led to certain changes in the manner in which each business line handles private rulings, particularly as regards the manner in which private rulings are initially streamed to business lines.

A3.8 The cases examined by staff of the IGT for the first and major fieldwork part of this review were prepared or on hand during the 2008/09 year. During this time the ATO employed a computer system known as the Technical Decision-Making System (TDMS) for private rulings work. In this period, each business line adopted the processes for managing private rulings discussed below.

BUSINESS LINE PROCESSES

Microenterprises and individuals

A3.9 During 2008/09 this business line, which is responsible for tax matters involving individuals and microenterprises with a turnover of up to \$2 million, had approximately 100 staff (94 on a full time equivalent basis) working on private rulings. These personnel were located in various offices around Australia, including a number of regional offices. They worked in a provision of advice area which was separate from compliance/audit areas. Staff in this area also worked on objections, general interpretative guidance, internal advice and class rulings as well as private rulings.

A3.10 For private rulings, staff in a Business Operations Unit actually prepared the ruling. Senior technical officers who were in a separate technical business unit would authorise the private rulings. A single officer in this technical business unit acted as a “gatekeeper” for work that the line referred to one or more of the Centres of Expertise.

A3.11 Rulings that came to the business line were classified by a front-end process into four types of rulings. These classifications were: basic, routine, complex and highly complex. Rulings on South Australian workers compensation issues were classified as basic and were streamed to the ATO’s Hobart office for processing. The Hobart office was also responsible for carrying out the front-end processing of all private rulings that came to the business line.

A3.12 Under the new Siebel system the business line no longer manually classifies rulings, as the Siebel system automatically classifies incoming rulings.

A3.13 Private rulings can come to the line from taxpayers or their representatives either directly from taxpayers or after the matter has first been raised with an MEI call centre.

A3.14 For the 2008/09 year, around 3 per cent of the 6,766 private rulings on income tax handled by the business line needed to be referred to a Centre of Expertise for an ATO precedent to be created.

A3.15 Around 80 per cent of private ruling requests handled by the line were from tax agents.

A3.16 This line also handles oral rulings for taxpayers. During the 2007/08 year, 82 oral rulings were issued, while in 2008/09 only 13 oral rulings were issued.

Small and medium enterprises

A3.17 During 2008/09 this business line, which is responsible for handling the tax affairs of enterprises with a turnover of between \$2 million and \$250 million, had approximately 210 staff (38 on a full-time equivalent basis) working on private rulings. These staff also worked on objections, general interpretative guidance, internal advice, litigation, class rulings and advice to Treasury.

A3.18 Most of the private rulings prepared by the SME line (313 of the 753 handled in 2008/09) involved fringe benefit matters. Its next largest number of private rulings were for not for profit entities. For both these types of rulings, this business line handled all private rulings on the issue, regardless of the size of the taxpayer.

A3.19 The line had certain specialist teams which handled particular types of rulings. An example of this was the demerger team which was based in Geelong.

A3.20 A classification team would stream rulings to the appropriate area.

A3.21 The line had five contact officers who interacted with the Centres of Expertise whenever a centre needed to be involved in a private ruling.

Large businesses and international

A3.22 This business line, which is responsible for business taxpayers with a turnover of more than \$250 million, had no separate area for handling private rulings work during 2008/09. This work was done by 57 ATO staff (on a full time equivalent basis) who also worked on product and class rulings, interpretative guidance and, in some cases, compliance and audit matters. From 2008/09 this has changed, and the LBI business line now has a separate provision of advice area which consists of 120 staff.

A3.23 During 2008/09, private ruling applications were generally received directly by a particular tax officer who had had previous contact with the relevant applicant. These officers were located in one of four different groups within the business line. These groups consisted of the Energy and Natural resources area, the National Client Group area, the Innovation area and the Financial Services group. There was a classification process to send rulings on particular topics to particular personnel.

A3.24 Case officers in the LBI line, if they needed to contact a Centre of Expertise would do so directly without going through another person in the line. The separate areas within LBI each had their own written procedures for escalating a ruling to either a centre or to TCN.

A3.25 The LBI area has an internal benchmark of finalising all private rulings within 90 days.

Superannuation

A3.26 This business line is responsible for handling superannuation tax issues, other than those involving large superannuation funds who have a turnover exceeding \$250 million. Large superannuation funds are handled by the ATO's LBI business line.

A3.27 During 2008/09, private rulings on income tax handled by the Superannuation line were only a small part of the private advice work performed by this line, as most forms of advice provided by the line involve non-tax superannuation issues. There were 20 full-time equivalent staff working on superannuation income tax issues.

A3.28 The income tax private rulings handled by the line during the year fell into two broad categories: undeducted purchase price issues and other matters. Undeducted purchase price issues were handled by a small advice team located in the ATO's Upper Mount Gravatt office, while other income tax private rulings were handled by a team in the ATO's Sydney office. The team in Sydney office also handled class rulings, objections, internal advice, interpretative guidance and administratively binding advice on superannuation matters.

A3.29 For complex matters, this business line had a process under which any application for a private income tax ruling would be first looked at by a senior technical approval officer who would then provide guidance to the case officer who would actually prepare the ruling.

A3.30 The rulings area based in Sydney was responsible for making any escalations of private rulings that needed a precedential ATO view to the relevant Centre of Expertise. These escalations were usually made to the Superannuation Centre of Expertise.

CENTRES OF EXPERTISE

A3.31 In 2008/09 there were six Centres of Expertise to whom issues in a private ruling on income tax could be referred. These centres were located in the ATO's Law and Practice area and had a total of 281 staff located in various ATO offices around the country. The centres, and the numbers of staff in each (some of whom are not technicians but provide administrative support), were as follows:

- Administration, Business and Personal Taxes: 62.7 full-time equivalent (FTE) staff;
- Finance and Investment: 61.8 FTE staff;
- International: 31 FTE staff;
- Losses and capital gains tax: 37.5 FTE staff;
- Consolidations: 30.44 FTE staff; and
- Superannuation: 33.8 FTE staff.

A3.32 Each centre had one or more 'gatekeepers' who determined what escalations their centre would accept. Each centre also had its own escalation template which business lines had to complete when sending a private ruling to that centre. This escalation template has now been standardised into a single template.

A3.33 Centres worked, and continue to work, on matters other than private ruling escalations which require the creation of a precedential ATO view. Their work priorities are (in the following order): advice to Treasury on new and existing laws, priority technical issues (which generally also include priority private rulings), creating precedential ATO views, maintaining the ATO's precedential database and providing general technical advice. Only a very small percentage of the work of the centres involves private rulings escalations.

A3.34 In 2008/09 staff of each centre used the TDMS system to record their work on private rulings issues.

TAX COUNSEL NETWORK

A3.35 The ATO's Tax Counsel Network (TCN) consists of around 91 technical and administrative staff (on a full time equivalent basis) located in various offices around the country. The technical staff of TCN are the ATO's most senior tax technical specialists.

A3.36 In 2008/09 the process for escalating a private ruling issue to this network was as follows. The issue would be escalated to one of three business managers in the TCN area who would then allocate the ruling to a particular TCN member. If the issue involved a priority technical issue (PTI) the relevant business manager would discuss the issue with a Deputy Chief Tax Counsel who would then allocate the ruling to a particular TCN member, together with a nominated priority of between 1 and 3.

A3.37 Business lines had to complete an escalation form to refer a ruling to the Tax Counsel Network. There were separate escalation forms for Priority Technical Issues, Part IVA issues and section 45B issues.

A3.38 Members of the TCN provided monthly reports to the area's business managers on the work (including private rulings issues) which they were performing. They did not use the TDMS system to record their work.

APPENDIX 4: TAX OFFICE'S ORIGINAL RESPONSE TO RECOMMENDATIONS FROM THE 2008 REVIEW ON THE POTENTIAL REVENUE BIAS IN PRIVATE RULINGS

A4.1 Set out below are the Tax Office responses to the recommendations from the Inspector-General's 2008 *Review of the Potential Revenue Bias in Private Binding Rulings Involving Large Complex Matters*.

RECOMMENDATION 1

Informing taxpayers when it sees a need for external input, including from the Treasury, on interpretive matters that relate to their PBR applications and the reasons why.

ATO response

Agree in part.

The Tax Office agrees to inform taxpayers when it sees a need for external input including from Treasury. In general, this is already happening as a consequence of the improvements to communication that we have put in place since the focus years of the Report. However, where the external input is from Treasury, it would not be appropriate to disclose the reasons why as we consider such communications to be confidential.

RECOMMENDATION 2

Informing taxpayers of the outcomes of external input, including from the Treasury, and internal deliberations on matters that affect them, especially where an unfavourable ruling is likely.

ATO response

Agree in part.

We will keep applicants informed about the progress of rulings, including when it becomes necessary to obtain advice from external or other internal sources, however it would not be appropriate to disclose the nature or outcomes of discussions with Treasury as we consider such communications to be confidential.

RECOMMENDATION 3

Where an understanding of purpose is a factor in the decision in large business unfavourable PBRs, including a statement of the underlying purpose of the legislative provisions on which the interpretation is based and the source for that purpose (for example, how the legally permissible extrinsic materials have been relied upon to ascertain that purpose and in concluding its view).

ATO response

Agree.

RECOMMENDATION 4

More widely adopting the key principles of the Priority PBR process in relation to large business PBRs:

- Centralised point of reference (process owner) responsible for marshalling resources and taking remedial action to ensure cases are not delayed;
- Alignment of taxpayer and Tax Office priorities;
- Front end engagement of all expertise to avoid sequential processing; and
- Taxpayers and Tax Office working together to clarify the ruling.

ATO response

Agree.

RECOMMENDATION 5

Increasing transparency, improving communication and more clearly demonstrating objectivity in relation to PBR technical decision making by:

- before an adverse decision is made, communicating to the applicant the basis for the likely Tax Office view (including external opinions where relevant), an explanation of why the Tax Office's view is to be preferred over the applicant's, indicating the relevance of information provided by the applicant, and providing the applicant an adequate opportunity to comment;
- vetting requests for additional information and (if requested) providing reasons why the information is relevant and identifying the specific aspect of the technical issue that turns on the requested information;
- if requested by the applicant, providing applicants with written reasons for delay if the PBR has not issued after 3 months, including contact details for the relevant LBI segment leader, CoE Manager and Deputy Chief Tax Counsel;
- where necessary, engaging recognised independent external subject specialists to supplement Tax Office capability to respond to large, complex PBRs; and
- where requested by the PBR applicant, ensuring that the Case Manager provides the applicant with a free and quick flow of direct contact with those technical decision makers (whether in TCN, CoE or LBI) that determined, or are determining, the technical issues relating to the application.

ATO response

Agree. However there may be circumstances where it may not be appropriate to provide applicants with copies of external opinions (for example, where the Tax Office is claiming Legal Professional Privilege).

RECOMMENDATION 6

Ensuring that tax officials involved in interpretive matters are aware of the accepted principles of the purposive approach to statutory interpretation (including the accepted materials to ascertain that purpose) and that they should not rely on advice of what policy developers or legislative drafters intended.

ATO response

Agree.

RECOMMENDATION 7

Clarifying, preferably in its interagency protocol, the Tax Office's and Treasury's expectations of the purpose and nature of their interactions on technical matters that relate to already enacted law. This clarification should include:

- that PBRs should not be delayed because the technical issues relating to those PBRs are the subject of discussions with Treasury; and
- that in relation to interpretive matters, the Tax Office may invite comments on the purpose or object of the legislative provisions in question, while recognising that any Treasury comments are not determinative.

ATO response

Agree in part.

The Tax Office and Treasury are working together to clarify our interactions in respect of interpretation of the enacted law. A revised protocol will be published when it is complete.

We agree that no PBRs should be delayed because of discussions with Treasury on technical issues; however there may be rare cases where the implications of an interpretation are of such significance that they require consideration of a policy response.

RECOMMENDATION 8

Ensuring that the Tax Office follows the formal protocol processes in every case where it sees a need for dialogue with Treasury on potential implications of its view of the law. This would include providing a comprehensive administrative impact statement (including details on how it will administer the law if there is no law change).

ATO response

Agree.

We already have a formal process for providing advice of this type to Treasury, which includes a standard minute that requires a statement of the impacts on taxpayers as well as our administration, revenue effects, if any, and how we will administer the law if there is no law change. This formal process is mandated in the Tax Office by a practice statement, PS CM 2003/14, that was reviewed and reissued in 2007. We will ensure conformance with this process.

RECOMMENDATION 9

Issuing PBRs irrespective of whether the matter involves consideration of a technical issue that is the subject of a developing or contemplated public ruling.

ATO response

Agree.

RECOMMENDATION 10

Reporting achievements against performance standards and elapsed timeframes of PBRs in Tax Office annual reports.

ATO response

Agree in part.

While we do report achievements against performance standards, the question of elapsed time is not so clear. A private binding ruling requires a joint effort by the Tax Office and the taxpayer. Accordingly, the elapsed time from the date of application to the date of issue of the ruling is not a good measure of the Tax Office's performance as some delays can be caused by the taxpayer.

Where we adopt the principles of the Priority PBR process we engage with the taxpayer when the arrangement is being developed. Much of the work in these cases is done before the ruling is lodged and the time elapsed from the date of lodgement is largely an irrelevant measure.

APPENDIX 5: ABBREVIATIONS

AAT	Administrative Appeals Tribunal
AR	Annual Report
ATO	Australian Taxation Office
ATO ID	ATO Interpretative decision
ATP	Aggressive Tax Planning
ATR	Australian Tax Reports
BSL	Business Service Line
Commissioner	Commissioner of Taxation
EM	Explanatory Memorandum
EXC	Excise
FCT	Federal Commissioner of Taxation
FTE	Full time equivalent
GST	Goods and Services Tax
IGT	Inspector-General of Taxation
IGT Act	<i>Inspector-General of Taxation Act 2003</i>
Inspector-General	Inspector-General of Taxation
IT	Income Tax Ruling
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
LB & I	Large Business and International
L & P	Law and Practice
MEI	Microenterprises and individuals
NTLG	National Tax Liaison Group
Ops	Operations
PBR	Private binding ruling
PS	Practice Statement
PS LA	Practice Statement Law Administration
PS LA (GA)	Practice Statement Law Administration (General Administration)

Appendix 5: Abbreviations (continued)

RoSA	Review of Aspects of Self Assessment
S&ME	Small and medium enterprises
SPR	Superannuation
TAA 1953	<i>Taxation Administration Act 1953</i>
Tax Office	Australian Taxation Office
TCN	Tax Counsel Network
TD	Taxation Determination
Tax Office	Australian Taxation Office
TR	Taxation Ruling