



Australian Government
Inspector-General of Taxation

Review of the Tax Office's administration of public binding advice

A report to the Assistant Treasurer

Inspector-General of Taxation

7 April 2009

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7 April 2009

The Hon. Chris Bowen
Assistant Treasurer
Minister for Competition Policy and Consumer Affairs
Parliament House
CANBERRA ACT 2600

Dear Minister

I am pleased to present to you my report on findings and recommendations in respect of the review of the Tax Office's administration of public binding advice. 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 Tax Office's response, including the relevant covering letter, is in Appendix 2 to the report. In finalising the report, I have fully considered the Tax Office's response.

Of the four key recommendations I have made, the Tax Office has fully agreed with two, partly agreed with one and disagreed with one.

The Tax Office has agreed to issue further guidance on its ability to issue public rulings on matters such as risk management material, safe harbours, and matters involving the *A New Tax System (Australian Business Number) Act 1999* (the ABN Act). It has also agreed to enhance its systems to promptly inform the community of changes it makes to Tax Office practice statements.

The key recommendation with which the Tax Office has partly agreed concerns the concept of a Tax Office 'general administrative practice'. In this review, I have recommended that the Tax Office should acknowledge that key examples of its non-binding published advice (such as the supplement to TaxPack and the annual guidebook on rental properties) represent its 'general administrative practice' under the law. This acknowledgement would mean that any changes to this advice would only have a retrospective impact on taxpayers in cases where the advice has been exploited or has been the subject of tax avoidance. I consider that such an acknowledgement would increase certainty, efficiency and community confidence in the tax system.

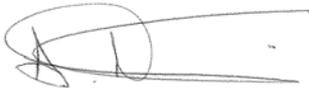
The Tax Office has not agreed to make this acknowledgement, but has agreed to seek independent legal advice on the meaning of the term 'general administrative practice'. This may lead to closer alignment of our respective views. The Tax Office has also agreed to issue further guidance to its staff on the meaning of this term after receiving this advice.

The Tax Office has also disagreed with my recommendation that a number of documents which are currently referred to by the Tax Office as 'rulings', but which are not in fact legally binding, should be identified or re-named in a way which ensures that taxpayers are not misled as to their legal status. During my review I identified 22 documents of this kind that would need to be re-named. However, the Commissioner considers that the preamble to each of these rulings adequately identifies their status and that re-naming them would cause confusion.

During the review I also made three subsidiary recommendations, all of which have been partly agreed to by the Tax Office.

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.

Yours sincerely

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

Ali Noroozi
Inspector-General of Taxation

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CHAPTER 1: INTRODUCTION

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

1.2 The review was announced on 12 October 2007. 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 Inspector-General by industry and tax practitioners.

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

1.5 Chapter 3 deals with the Tax Office's view on what matters it can make the subject of legally binding advice. Chapter 4 deals with the nature of Tax Office advice that has been issued since major changes to the rulings law were introduced in 2006. Chapter 5 deals with the issue of a Tax Office 'general administrative practice'. A brief history of Australia's rulings system is in Appendix 3.

1.6 During the course of the Inspector-General's review, the Tax Office made or proposed a number of changes to its processes for public advice. Some of those changes directly addressed concerns raised with the Inspector-General. All changes made or proposed by the Tax Office are noted in this report wherever relevant.

1.7 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 each recommendation.

CHAPTER 2: OVERVIEW AND SUMMARY

2.1 Australia is unique in having both a binding public rulings system and a system of publishing, in an edited and non-binding form, the content of binding private rulings.

2.2 In Australia, the Tax Office has the power to make its published advice on income tax matters 'legally binding' on the way in which particular provisions in the tax law will apply, or on any matter involved in the application of the provisions. Advice which is legally binding means that the Tax Office cannot assess and collect additional primary tax, penalties and interest if the advice is wrong and a taxpayer has followed that advice. Non-binding Tax Office advice may protect taxpayers from penalty and interest; but only legally binding advice gives taxpayers the certainty of knowing that they are fully protected from any further liability.

2.3 In many other countries, advice published by the relevant revenue authority, where it exists, is only generally administratively binding on the relevant revenue authority. However, in a number of other countries which do not have a legally binding public rulings system (such as the United States of America and Canada) there is a very well established system under which the contents of private binding rulings issued by the relevant revenue authority are published in an edited form by commercial publishers.

2.4 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.

2.5 In Australia edited private rulings have been published by the Tax Office in a register of binding private rulings that is available on its website, free of charge to all taxpayers. This register does not form part of the Tax Office's advice and guidance framework and is labelled accordingly. It therefore cannot be relied on.

2.6 During the time this report was being finalised, the Tax Office flagged that it was considering discontinuing its practice of publishing edited private rulings in a register. Instead the existing register was to be converted to one which records the number and subject title of the relevant ruling, without displaying any content. However, in response to concerns raised about this proposal by the Inspector-General and others, the Tax Office has announced that it will not be proceeding with this proposal. Instead, the Tax Office will work with representative bodies to ensure there is a proper understanding across the tax profession of the nature of the register, its risks and limitations, and the role played by more authoritative Tax Office advice and guidance material.

2.7 As a result of the Government's acceptance of recommendations from Treasury's 2004 Review of Aspects of Income Tax Self Assessment (RoSA), there were expectations that the Tax Office would make *more* advice for income tax publicly available and would also make more of that publicly available advice legally binding. The Government said that the most important recommendations in the RoSA report:

... improve certainty through providing for a better framework for the provision of Tax Office advice and introducing ways to make that advice more accessible and timely, and binding in a wider range of cases.¹

2.8 The Tax Office also said that

The RoSA provision of advice recommendations aim to improve certainty for taxpayers by making Tax Office advice more reliable, accessible, timely, and legally binding on the Commissioner for a wider range of topics.²

2.9 These statements suggested that, over time, the proportion of binding advice issued by the Tax Office would increase, assuming that other factors such as the rate of legislative change and the resources devoted to producing such advice remained constant.

2.10 The RoSA review's recommendations on public advice were made against a background of concerns raised by the community as to how the Tax Office had handled a number of particular high-profile disputes with taxpayers. These disputes were ones where taxpayers asserted that they had followed some form of Tax Office advice (in a public ruling, another publicly available Tax Office document, or in Tax Office advice to specific taxpayers that was widely circulated by parties other than the Tax Office). These taxpayers asserted that as a result of following this advice they should not be in any dispute with the Tax Office.

2.11 The Tax Office's overall approaches to some of these disputes have been referred to in previous reports by the Inspector-General. The disputes previously referred to by the IGT include disputes on :

- employee benefit arrangements;
- service entity arrangements;
- retirement village arrangements;
- research and development syndicate arrangements.

2.12 In all of these disputes, taxpayers asserted that it was unfair for the Tax Office to 'walk away' from its previous advice, and that the Tax Office should adopt any revised approaches to the relevant issue on only a prospective rather than retrospective basis.

1 The Commonwealth Treasurer, *Outcome of the Review of Aspects of Income Tax Self Assessment*, Media Release No. 106 of 2004, 16 December 2004.

2 Australian Taxation Office, *Review of self assessment – provision of advice*, downloaded from the Tax Office's website at: www.ato.gov.au/taxprofessionals/content.asp?doc=/content/59678.htm on 12 October 2007.

2.13 In all of these disputes the Tax Office was largely able to counter these assertions. It did so by successfully contending that it was not bound to follow the relevant advice. The reasons for this included:

- that the particular arrangement in the dispute was not dealt with in the advice;
- that the advice had been rescinded by the Tax Office at the time the taxpayer sought to rely on it;
- (in the case of private rulings issued to other taxpayers) that the advice was not obtained by the particular taxpayer who sought to rely on it;
- that the advice did not represent its general administrative practice;
- that the advice, although it represented Tax Office general administrative practice, should not be applied because the taxpayers in the relevant dispute were using that advice in an egregious manner to avoid tax.

2.14 The issue of the extent to which Tax Office advice – particularly that which is set out in a public ruling – will apply to particular transactions is problematic, particularly for complex issues or transactions. This issue led one of the tax professional bodies³ which made a submission to this review to state that, for complex issues, it was reluctant to advocate that more Tax Office advice be issued in a binding form, unless the Tax Office also changed its approach of rigidly applying such advice as if it was the law.

2.15 However, this professional body still agreed with the general principle, which was also supported by all other submissions to this review, that, where the Tax Office had formed a non-contentious view on an area of taxation law of sufficiently general application, it should issue that view in a binding form.

2.16 At the time of most of the disputes referred to above the operation of the law was that if the Tax Office changed its expressed view on a particular issue, and that particular issue was not originally addressed in a binding public ruling or a binding private ruling obtained by the relevant taxpayer, the Tax Office was legally entitled to apply its changed view retrospectively and levy tax, penalties and interest on affected taxpayers.

2.17 However, penalties were not payable if the taxpayer could demonstrate that the relevant prior Tax Office view amounted to a 'general administrative practice' of the Commissioner.

2.18 The Tax Office did however have an administrative practice that where the Tax Office view was a long standing Tax Office practice, and it was changed by a public ruling, the new ruling would usually only have a future application.⁴

3 Taxation Institute of Australia, *Submission to the Inspector-General of Taxation's review into the Tax Office's administration of public binding advice*, 10 January 2008.

4 This administrative practice is contained in paragraph 16 of TR 92/20.

2.19 As a result of legislative changes which arose from the RoSA review, the current legal position is that if the Tax Office changes its view on a particular issue, and the relevant practice amounts to a 'general administrative practice'⁵, not only will any penalty be removed, but so will interest. Also, if the previous practice amounts to a general administrative practice, and that practice is changed by the issue of a public ruling, taxpayers will be effectively protected from the payment of tax that they should have paid in prior periods based on the Commissioner's new view of the relevant law.

2.20 In addition, during the course of this review the Tax Office introduced the following administrative practice which is contained in paragraph 32 of PS LA 2008/3:

... where there is a change to a general administrative practice that is less favourable for taxpayers and that change is not communicated by way of a public ruling, the Tax Office will not necessarily amend assessments that were raised consistently with a practice in place at the time of the assessments. As a general rule the Tax Office will amend assessments only where tax avoidance is involved or the practice has been exploited in an unintended way.

2.21 The effect of this practice is that, if a general administrative practice is changed, but by some means other than by a public ruling (for example, by the issue of an ATO Interpretative Decision (ATO ID) or any other type of document which does not have public ruling status), taxpayers will still be protected against the payment of prior tax, except in cases where the relevant practice has been exploited or been the subject of tax avoidance.

2.22 These legislative and administrative changes mean that a Tax Office 'general administrative practice' can now be essentially equivalent to other forms of advice (such as public rulings and taxpayer-specific private rulings) which legally bind the Tax Office to a particular tax position. This is because, if a particular practice amounts to a general administrative practice, and the Tax Office later changes that practice, taxpayers will be protected against the levy of penalties, interest and (except in circumstances where the relevant practice was being exploited or was the subject of tax avoidance) prior period tax.

INSPECTOR-GENERAL'S FINDINGS

2.23 In this review the Inspector-General has found that some Tax Office practices in relation to its public advice are not giving full effect to the 2006 RoSA legislative changes to the rulings regime. The Tax Office has recently changed some, but not all, of these practices to reflect the concerns raised in this report.

2.24 These practices of the Tax Office stand in contrast to the various positive steps that the Tax Office has taken to give effect to these RoSA changes.

2.25 The positive steps which the Tax Office has taken to implement the 2006 changes to the rulings law to make more of its advice binding include the issue, early

5 As discussed in Chapter 5 of this report, a definition of this term is in the *Explanatory Memorandum to Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005* at paragraphs 3.130 to 3.132.

in 2008, of detailed guidance (in PS LA 2008/3) on the level of protection against the payment of tax, penalties and interest which various different types of Tax Office documents provide to taxpayers.

2.26 The guidance on such protection in this practice statement is unprecedented in its level of detail when compared with previous Tax Office guidance on the same topic. It is also unprecedented when compared to the level of detail on this topic provided by revenue authorities of other countries. This practice statement also, for the first time since the new rulings laws came into effect, sets out publicly the administrative practices the Tax Office will apply in cases where it changes a previous general administrative practice by either a public ruling or by other means.

2.27 Other positive steps the Tax Office has taken to implement the 2006 rulings law changes include the issue of detailed binding public rulings about both the public and private rulings system.⁶

2.28 The practices that are (or were) running counter to the Tax Office's otherwise good record in administering the changes to the rulings laws brought about by the RoSA review arise in each of the following areas:

- the view that officers of the Tax Office initially adopted of the effect of the rulings law on its ability to issue rulings on certain matters;
- the non-binding nature of some of the advice it has issued since the 2006 rulings law changes; and
- the Tax Office's views and approach to what is a 'general administrative practice'.

2.29 Each of these areas is discussed below.

Tax Office's position on the extent to which the 2006 changes to the rulings laws now allow it to rule on certain matters

2.30 As a result of this review, the Tax Office has now formally confirmed that, under the new rulings regime, in addition to being able to rule on matters of administration, collection and ultimate conclusions of fact, the Tax Office can also make binding public rulings, in the context of the application of a specific tax provision, on:

- risk management material;
- safe harbours;
- matters involving the *A New Tax System (Australian Business Number) Act 1999* (the ABN Act); and
- matters which are specific to a single entity.

6 See TR 2006/10 and TR 2006/11.

2.31 The Tax Office's acceptance of its ability to issue binding rulings on the above topics has not been set out in any publicly issued document.

2.32 During the review, the Inspector-General also found that a number of senior Tax Office staff involved in the drafting of public rulings held the view that the rulings laws which came into effect on 1 January 2006 meant that rulings could no longer be made on matters involving the exercise of the Commissioner's discretion. This view was based on the absence in the new rulings law of a specific provision, similar to that which existed in the old rulings law, which allowed such rulings to be made.

2.33 The Tax Office has confirmed in paragraph 13 of the public ruling TR 2006/10 that the new rulings laws are to be interpreted as enabling the Commissioner to issue rulings on the way in which a discretion is exercised.⁷ However, there is clearly a lack of knowledge of this guideline within the Tax Office. The Inspector-General has therefore recommended that the Tax Office take steps to issue further guidance on this matter to Tax Office staff.

2.34 These comments have led the Inspector-General to make the following key recommendation.

KEY RECOMMENDATION 1

The Inspector-General recommends that the Tax Office should:

- issue further guidance to its staff, which is made publicly available, on its ability to issue public rulings on the following issues:
 - risk management material;
 - safe harbours;
 - matters involving the *A New Tax System (Australian Business Number) Act 1999* (the ABN Act); and
 - matters which are specific to a single entity; and
- issue further guidance to its staff to explain that the rulings laws which came into effect on 1 January 2006 enable the Commissioner to make a ruling on the way in which a discretion will be exercised.

Tax Office response

2.35 The Tax Office agrees with this recommendation.

2.36 The Tax Office has provided publicly available guidance for Tax Office staff and the community on these matters in Taxation Ruling TR 2006/10 and in various law

⁷ The ATO's Practice Statement PS LA 2003/3 also confirms, at paragraph 22, that guidelines for the exercise of a Commissioner's discretion may be contained in a publicly issued ruling.

administration practice statements. Nevertheless, from the Inspector-General's comments, it is apparent that our position may not be sufficiently clear.

2.37 Therefore, the Tax Office agrees to add additional material to TR 2006/10 (public rulings), TR 2006/11 (private rulings) and internal guidance material, as appropriate, to provide further clarification of the Tax Office's view on:

- the broad scope of 'any matter involved in the application' of the provision of the law being ruled on (so as to potentially cover matters such as risk management material, 'safe harbours' or ABN issues, where it is necessary to do so for the application of the relevant provision),
- the ability to provide public rulings on discretion provisions,
- the inability to provide public rulings on provisions of the law not covered by the list in section 357-55 of Schedule 1 of the TAA, and
- the extent to which a public ruling can deal with matters specific to a single entity.

Nature of advice issued by the Tax Office since the 2006 changes to the rulings laws

2.38 This review has also gathered evidence which indicates that, since the enactment of the 2006 rulings laws, some Tax Office advice has become, as Treasury originally noted may occur, 'more limited, cautious and conditional'. This possible development in Tax Office advice was flagged in a Treasury discussion paper which preceded the final RoSA report.⁸ This development also does not give full effect to the apparent intent of the post 2006 rulings laws to allow more Tax Office advice to be legally binding.

2.39 The evidence which supports this assertion is as follows.

2.40 Firstly, since the date of effect of the new, post RoSA rulings regime, the number of (non-binding) practice statements issued by the Tax Office each year has generally been on the increase.

2.41 Secondly, the Tax Office has not made significant parts of its paper and electronic versions of TaxPack legally binding. This has occurred even though the post 1 January 2006 rulings regime gave the Commissioner power to declare TaxPack and similar material to be a legally binding ruling. It has also occurred even though Treasury's RoSA review specifically contemplated that the Tax Office would progressively make its premier advice products binding, as those products were updated.⁹

2.42 Thirdly, since 1 January 2006, the Tax Office has issued at least 30 public rulings, determinations, practice statements or ATO Interpretative Decisions (ATO

8 Commonwealth Treasury, *Review of Aspects of Income Tax Self Assessment*, Discussion Paper, March 2004 at page 26.

9 The Commonwealth Treasury, *Report on Aspects of Income Tax Self Assessment*, August 2004, at paragraph 2.3.1.

IDs) which involve replacing in whole or in part a pre RoSA ruling or determination. Of these:

- seven involve an increase in the amount of binding material in the post RoSA material;
- eight involve a decrease in the amount of binding material;
- eleven involve no change in the amount of binding material; and
- in four cases it is unclear whether the amount of binding material has changed.

2.43 One notable example of where the Tax Office has withdrawn a pre RoSA ruling and replaced at least parts of it with less binding material is Taxation Ruling TR 1999/5 (which deals with employee benefit arrangements.) This previously binding ruling has been withdrawn in full but has to date only been replaced with two ATO IDs.¹⁰

2.44 Other examples where the replacement material is less binding than the former material are in:

- a ruling on sale and lease backs¹¹;
- the practice statement which replaced the formerly administratively binding ruling on PAYG withholding penalties¹²; and
- material contained in a non-binding guidebook on the research and development concession which replaced material contained in three withdrawn, formerly administratively binding, rulings.¹³

2.45 The Inspector-General considers that, in line with the apparent intent of the 2006 changes to the rulings law, there should generally be no cases where the Tax Office issues material post RoSA which is *less* binding than what existed pre RoSA.

2.46 Fourthly, the Tax Office has not introduced a systematic process for going back over TR, TD or MT series rulings it issued in a non-binding form pre 1 January 2006 and reissuing them in a binding form. Such a process could, for example, be introduced whenever the Tax Office is confirming the application of those rulings to a number of taxpayers.

2.47 Fifthly, in 2007 the Tax Office withdrew statements it made in a 2003 practice statement (PS LA 2003/3) which clearly indicated that it considered that ATO IDs and material contained in its Schedule of ATO precedential views represented its general administrative practice in the context of protection against penalties. It now considers that these documents either do not represent its general administrative practice or only

10 ATO ID 2007/194 and ATO ID 2007/204.

11 TR 2006/13.

12 PS LA 2007/22.

13 The relevant rulings are IT 2442, 2451 and 2552, all of which were withdrawn on 6 August 2008. Any material in these former rulings which was current is now included in Part C of the ATO's *Guide to the R&D Tax Concession*, accessible at law.ato.gov.au.

do so when certain conditions are met. This change clearly represents a post RoSA shift in the direction of making its public advice more 'limited, cautious and conditional'.

2.48 The review has also found that there are difficulties with the way the Tax Office has communicated to the public the binding or non-binding status of its 'rulings' products, both prior to and after the RoSA rulings amendments. For example, there are at least 22 rulings in the TR, TD or MT series which are still current which, despite being labelled as 'rulings', contain preambles which indicate they are not rulings.

2.49 The Inspector-General's findings on this topic have led him to make the following key recommendation.

KEY RECOMMENDATION 2

The Inspector-General recommends that the Tax Office take steps to ensure that any rulings in its TR, TD or MT series which are currently called 'rulings', but which are not in fact legally binding rulings, are separately identified or are re-named in a way which ensures that taxpayers are not misled as to the legal status of such 'rulings'.

Tax Office response

2.50 The Tax Office disagrees with this recommendation.

2.51 The Tax Office considers the preamble to each of these rulings is clear and unambiguous in identifying their status and stating the protection afforded to taxpayers. The preamble is considered to be located in a logical and transparent place in the document, being immediately below the header. In addition, post-ROSA, each page of a formal series ruling which contains legally binding material carries a label in the header identifying that page of the document as being legally binding.

2.52 Moreover, the Tax Office considers that these documents have been known and viewed as rulings for considerable time, even though they may not be capable of being legally binding. These include the Income Tax (IT) series and the Superannuation Guarantee (SG) series of rulings and determinations. The Tax Office is not aware of any evidence that there is confusion about the status of such documents. Indeed, the Tax Office considers that the implementation of this recommendation, particularly in relation to pre-ROSA rulings referred to in the report, would cause rather than remove confusion, and would not alter the way in which these rulings might be used or viewed by the community.

2.53 Nevertheless, going forward, the Tax Office will make appropriate further enhancements to the existing page status label in its formal series rulings to address any perceived confusion about the binding nature of the material on any particular page.

Inspector-General's comments on Tax Office response

2.54 This recommendation could have been addressed by the Tax Office agreeing to change the citation name of all rulings which are called 'rulings' but which are not in

fact legally binding to something like 'TR (not legally binding)' or 'TR (NLB)'. There were 22 rulings of this type identified in the Inspector-General's report. This would have meant that when such rulings are cited by the Tax Office or by tax practitioners in any advice or in any other document it will be clear to the reader of the relevant advice or document that the ruling which is being referred to is not legally binding. The Inspector-General notes that the Tax Office has adopted this kind of process to differentiate 'general administration' practice statements from other practice statements.

Tax Office communication strategies for practice statements

2.55 Furthermore, the review also found that although the Tax Office has been issuing an increasing number of non-binding detailed practice statements, sometimes in substitution for what was previously documented in public rulings that were at least administratively binding, some of its communication strategies around these statements require improvements.

2.56 For example, it has no formal processes in place to notify the community of when practice statements have been withdrawn. In contrast, the Tax Office issues a formal notification when a public ruling is withdrawn or amended.

2.57 Similarly, when a practice statement is amended, the precise nature of any amendments is not detailed. Again this contrasts with the Tax Office's practices in relation to binding public rulings.

2.58 Furthermore, in some cases, the Tax Office does not make available on its website the content of previous versions of amended or withdrawn practice statements. These previous versions can only be obtained by contacting the Tax Office directly. Again, this practice stands in contrast to what the Tax Office does for public binding rulings.

2.59 As the Tax Office appears to be increasingly relying on practice statements as a vehicle for explaining and documenting its approaches, these documents should be subject to the same disciplines regarding any changes made to them that are currently applied to binding public rulings.

2.60 The Inspector-General's findings on this topic have led him to make the following key recommendation.

KEY RECOMMENDATION 3

The Tax Office should enhance its systems to promptly inform the community of any material changes it makes to its practice statements, the nature of those changes and their date of effect. It should also consider making available to the community via its website the full text of the new and old versions of the relevant practice statements so that a full history is available.

Tax Office response

2.61 The Tax Office agrees with this recommendation.

2.62 The Tax Office does aim to inform the community when changes to law administration practice statements (LAPS) have occurred and currently does so via 'alerts' to subscribers, in the Tax Agent Newsletter, and other means. The Tax Office agrees that it could be useful and more transparent to highlight material changes to any LAPS via our Tax Office website and will explore how this might be best achieved prospectively.

2.63 The report contrasts a number of the Tax Office processes for public rulings with those for practice statements. In this respect, it should be noted that the Tax Office makes its LAPS available to the community in the interests of openness and transparency, whereas publication of public rulings is required under the law. The Tax Office agrees that this transparency would be improved if old versions of LAPS were to be more readily available and will explore how this might be achieved where material changes to LAPS occur in the future.

General administrative practice

2.64 The Inspector-General considers that that Tax Office could more fully implement the intent of the post 2006 rulings law changes to make more Tax Office advice legally binding, with little downside revenue risk, by being prepared to acknowledge that a considerable quantity of its non-binding published advice represents its 'general administrative practice'.

2.65 The Inspector-General considers that the post 2006 rulings law changes which refer to the concept of a 'general administrative practice' offer considerable opportunity for increasing certainty, efficiency and community confidence in the tax system.

2.66 Acknowledgement by the Tax Office that a particular document embodies its general administrative practice (GAP) will have the following effects:

- any change to that practice will protect taxpayers who have followed the Tax Office's previous practice against the levy of any penalty for prior tax periods;
- any change to that practice will protect taxpayers who have reasonably relied in good faith on the Tax Office's previous practice against the levy of interest on tax that was not paid for prior periods; and
- any change to that practice that is made by a public ruling, will practically operate on a prospective basis only.¹⁴

¹⁴ The practical prospective operation of a change in a general administrative practice is explained in: Commonwealth of Australia, *Explanatory Memorandum to Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005* at paragraph 3.132.

2.67 In addition, under the Tax Office's current administrative practice that was introduced during the course of this review¹⁵, any change to such a practice that is made otherwise than by a public ruling will generally operate on a prospective basis, unless the practice has been exploited or been the subject of tax avoidance.

2.68 These consequences are largely equivalent to giving the relevant document legally binding status. The only difference is that where a document is a general administrative practice the Tax Office will have the ability to protect the revenue by changing the practice with retrospective effect where it has been exploited or has been the subject of tax avoidance.

2.69 The Tax Office has not, during this review, embraced the concept of 'general administrative practice' in the manner suggested by the Inspector-General.

2.70 Initially, during the review the Tax Office said that particular key Tax Office documents (such as its annual guidebook for rental properties) do not represent its general administrative practice. It also asserted that certain other documents which have been subject to a very high level of quality control both inside and outside the Tax Office (such as the miscellaneous tax ruling on the meaning of 'entity carrying on an enterprise' for ABN purposes, and the guidebook it has issued on service entity arrangements) did not represent its 'general administrative practice'.

2.71 Most of these documents qualify as 'precedential ATO views' which Tax Office staff must generally apply in dealing with the relevant issue, in accordance with a publicly available practice statement.¹⁶

2.72 In its final response to the review the Tax Office asserted that its initial responses to whether the above documents represented its general administrative practice should be replaced. In its new set of responses it asserted that a general administrative practice *may* be evidenced in these documents but that this could only be determined after considering the actions of the Commissioner in an appropriate number of instances at the relevant time.

2.73 In the same final response the Tax Office asserted that, despite the information previously provided, it did not consider that the various practice statements nominated as case studies by the Inspector-General categorically evidenced its general administrative practice. Instead, for each practice statement nominated as a case study by the Inspector-General, it asserted that:

While each situation needs to be considered at the appropriate time to determine the existence of a general administrative practice, it would be expected that this LAPS evidences a GAP.

2.74 This response provides less certainty than the Tax Office's original set of responses. This original set of responses stated definitely that some ATO documents represented its general administrative practice while some documents did not.

¹⁵ This practice is set out in Practice Statement PS LA 2008/3 at paragraph 32.

¹⁶ See PS LA 2003/3.

2.75 The issue of whether a document describes a Tax Office 'general administrative practice' on a particular tax matter is of considerable current significance to taxpayers because it will affect their overall approach to that matter in a self assessment environment. For example, the existence of such a practice will influence a taxpayer's decision on whether or not they need to seek specific advice on the relevant matter from the Tax Office in the form of a private binding ruling.

2.76 Furthermore, the issue of whether a document represents a Tax Office general administrative practice is also of considerable current importance to the Tax Office. For example, the existence of a 'general administrative practice' and whether a taxpayer has followed that practice, will affect the legal ability of the Tax Office to levy penalties and interest and its practical ability to levy (in certain circumstances) prior period tax in tax audits.

2.77 It is reasonable to assume that the Tax Office is in the best position to determine what its practices are. It is also in the best position to know whether or not they are 'general'. This is certainly true for Tax Office practices that do not exist in any publicly available documented form.

2.78 During this review the Tax Office initially stated that certain documents did not represent its 'general administrative practice' even where the relevant documents had been subject to the highest levels of technical scrutiny inside and outside the Tax Office. In its final response, it has not indicated, for the benefit of the Inspector-General, taxpayers generally or its own staff whether any of its approaches that are embodied in key, public Tax Office documents represent its general administrative practice.

2.79 The Tax Office considers that the existence or otherwise of a pre-existing general administrative practice can generally only be assessed at the time when it might be considering a change in that practice. This view does not take into account a fundamental principle of Australia's self assessment system. This principle is that it is taxpayers – not the Tax Office – who must, year by year, determine the extent of their income tax liability. As part of this self assessment process taxpayers need to know, on an ongoing basis, if a particular tax matter is covered by a Tax Office general administrative practice, as this will significantly affect the approach they adopt to the relevant issue.

2.80 The GAP provisions offer the Tax Office a clear opportunity to provide more certainty to taxpayers and to increase community confidence in their administration. If the Tax Office were to use the GAP concept, the issue and complexity of how much of its advice is legally binding might largely disappear.

2.81 Use of the GAP provisions would also avoid the Tax Office's major concern that it must apply its legally binding advice even where it is exploited.

2.82 The Inspector-General considers that a change in Tax Office approach to what material will represent its general administrative practice is required.

2.83 Firstly, the Tax Office should seek independent legal advice on the meaning of the term 'general administrative practice'. The Tax Office should ensure that this advice deals directly with the types of documents the Inspector-General has raised

with the Tax Office during the course of this review as potential candidates for 'general administrative practice' .

2.84 The uncertainty on the issue of what constitutes a 'general administrative practice' that arises from the Tax Office's second set of comments on the case studies examined during this review appears to reinforce the need for such advice.

2.85 Once this legal advice is obtained the Tax Office should issue further guidance to its staff and publish its views on how it will interpret and apply the term 'general administrative practice'.

2.86 In this guidance the Tax Office should publicly confirm (subject to the independent legal advice) that at least all documents which the Tax Office refers to as 'precedential ATO views' in PS LA 2003/3, together with all its publicly available practice statements, represent its 'general administrative practice' for the purposes of the income tax laws.

2.87 This will mean that at least all the following types of documents will represent the Tax Office's 'general administrative practice':

- publicly issued practice statements;
- publicly issued binding rulings;
- draft public rulings and other publicly issued rulings;
- ATO Interpretative Decisions (ATO IDs);
- decision impact statements; and
- documents listed in the Tax Office's Schedule of documents containing precedential ATO views (these documents include the Tax Office's guidebook on the research and development concession, the Tax Office's annual rental guidance booklet, and other major annual publications).

2.88 The Inspector-General has therefore made the following key recommendation.

KEY RECOMMENDATION 4

The Inspector-General recommends that the Tax Office:

- seeks independent legal advice on the meaning of the term 'general administrative practice'
- ensures that this advice also deals directly with the types of documents the Inspector-General has raised with the Tax Office during the course of this review as being potential candidates for 'general administrative practice', as well as situations where no formal ATO document refers to the alleged practice
- issues further guidance to its staff on the meaning of the term 'general administrative practice' following the receipt of the independent legal advice
- publicly confirms in this guidance that, subject to the independent legal advice, all documents which the Tax Office refers to as 'precedential ATO views' in PS LA 2003/3, together with all its publicly available practice statements, represent its 'general administrative practice' for the purposes of the income tax laws.

Tax Office response

2.89 The Tax Office agrees with the first three dot points and disagrees with the fourth dot point of this recommendation.

2.90 Our position is that the existence of a general administrative practice (GAP) is a question of fact to be determined having regard to all the facts and circumstances at the relevant time. While a Tax Office publication may evidence a GAP, and be one of the circumstances taken into account in determining whether a GAP exists, it is the consistent actions of the Commissioner in an appropriate number of instances that determine the existence or otherwise of a GAP, not the existence of a particular document. This view is supported by the explanation of GAP in the Explanatory Memorandum (EM) to the ROSA legislation and is reflected in our discussion of this issue in TR 2006/10, our public ruling on the post-ROSA public rulings system.

2.91 Consequently, simply declaring a publication as representing a GAP cannot of itself confer GAP status on a particular practice or course of action; nor can the absence of such a declaration effectively deny GAP status to a practice described therein. Rather, the existence of a GAP is an objective matter of fact in each specific instance, to be considered on a case by case basis as and when the question might arise.

2.92 In addition, we consider that to declare publications as GAP runs counter to the intent of ROSA. We consider that the thrust of ROSA is that we be clear about the level of protection that applies to taxpayers who reasonably rely in good faith on information contained in our publications. We consider that this has been achieved by specifying the level of protection on each publication. We also consider that the

framework established by ROSA identified a public ruling as the vehicle for the Commissioner to provide legally binding public advice.

2.93 The Tax Office has publicly expressed its view of how the ROSA law applies, including an explanation on GAP, in Taxation Ruling TR 2006/10. A further explanation of the post-ROSA framework, for the provision of Tax Office advice and guidance, including public rulings, is provided for Tax Office staff in Law Administration Practice Statement PS LA 2008/3, Provision of advice and guidance by the Tax Office, which is publicly available. We note the very positive comments in the Inspector-General's report at paragraphs 2.25 to 2.27 in reference to these publications.

2.94 Notwithstanding our position, we agree to seek independent legal advice on the meaning of GAP.

2.95 In the course of the review, your officers asked Tax Office staff a series of questions about particular documents, including whether the document evidenced a GAP in relation to the matters dealt with in that document. Your report sets out a summary based on the responses to this question. In some instances, we considered that the summarised responses needed clarification. Consequently, we provided supplementary material to ensure that our position is clear.

2.96 Given this, we accept that there is room to further clarify the nature of GAP for our staff and accordingly will supplement our existing guidance on this matter, as you have recommended, subject to the legal advice received.

Inspector-General's comments on Tax Office response

2.97 The Tax Office has partly agreed with this key recommendation. If the Tax Office were to acknowledge that key examples of its non-binding published advice (such as the supplement to TaxPack and the annual guidebook on rental properties) represent its 'general administrative practice' under the law, any changes to this advice would only have a retrospective impact on taxpayers in cases where the advice has been exploited or has been the subject of tax avoidance. The Inspector-General considers that such an acknowledgement would increase certainty, efficiency and community confidence in the tax system.

2.98 Whilst the Tax Office has not made this acknowledgement, it has agreed to seek independent legal advice on the meaning of the term 'general administrative practice'. This may lead to closer alignment between the respective views of the Tax Office and the Inspector-General. The Tax Office has also agreed to issue further guidance to its staff on the meaning of this term after receiving this advice.

CHAPTER 3: TAX OFFICE'S VIEWS ON THE TYPES OF DOCUMENTS IT CANNOT, POST ROSA, MAKE THE SUBJECT OF BINDING RULINGS

3.1 In a discussion paper issued prior to the enactment of the post RoSA tax rulings laws, the Commonwealth Treasury said:

Providing more legally binding advice would reduce the capacity of the Tax Office to amend assessments where taxpayers have paid too little tax on the basis of incorrect Tax Office advice. This may have significant revenue consequences, or the tax foregone might effectively be borne by taxpayers as a whole. However, these concerns do not apply if the advice is correct.¹⁷

3.2 These comments refer to the fact that, in a legally binding ruling regime, the Tax Office does not have the same capacity to collect prior year tax that has not been collected because of incorrect Tax Office advice.

3.3 A concern that incorrect Tax Office advice could have significant revenue consequences appears to be one reason why Australia did not adopt a binding rulings regime until 1992. This may also be why other countries have been reluctant to introduce a binding public rulings regime which is as comprehensive as Australia's. Summaries of the rulings regimes of five other countries with comparable jurisdictions are set out in Appendix 4.

3.4 However, the 1992 rulings laws allowed Tax Office advice to be legally binding. Furthermore, in 2006 these laws were changed to allow *more* such advice to be legally binding than was the case under the 1992 laws. It seems therefore that, in setting up the post 2006 legal framework for rulings, Australia's policy-makers intended that Australian taxpayers should have, and be able to rely on, *more* legally binding Tax Office advice, even though this development could have possible adverse revenue consequences.

3.5 It also seems that the policy-makers' decision on this point may have been based on the premise that the Tax Office should be able to minimise the revenue risks associated with its provision of incorrect legally binding advice by introducing internal systems which ensure that any such advice it gives is in fact correct.

3.6 However, given the Commissioner's broad powers of administration, it is theoretically possible for the Tax Office to not give full effect to any apparent intent of the post 2006 rulings laws for more Tax Office advice to be legally binding.

3.7 One way the Tax Office can do so is by stating that certain types of advice it provides are not legally capable of being binding under these laws.

¹⁷ Commonwealth Treasury, *Review of Aspects of Income Tax Self Assessment* Discussion Paper, March 2004 at page 26.

3.8 Under the old rulings laws these matters were limited to those in which the Commissioner gave his opinion on the way in which the law applies to any person (that is, on the interpretation of that law). Under the new rulings laws the Commissioner can now rule on '*any matter involved in the application of*' (IGT's italics) the law (see section 358-5(2) of the *Taxation Administration Act 1953* (TAA 1953)).

3.9 As a result of this review, the Tax Office has now formally confirmed that under the new rulings regime, in addition to being able to rule on matters of administration, collection and ultimate conclusions of fact, the Tax Office can also make binding public rulings, in the context of the application of a specific tax provision, on:

- risk management material;
- safe harbours;
- matters involving the ABN Act; and
- a matter which is specific to a single entity.

3.10 The Tax Office's acknowledgement of its ability to issue binding rulings on the above topics is subject to conditions, as its comments below on each of these matters illustrate. This acknowledgement has also not been set out in any publicly issued document.

Risk management material

3.11 An example of risk management material is a document which sets out which taxpayers may be the subject of a Tax Office audit on a particular issue.

Tax Office approach

3.12 The Tax Office has advised the Inspector-General that certain types of risk management material could be the subject of a binding public ruling where it is a matter necessary to determine the Commissioner's opinion on how a particular relevant provision applies or would apply to entities and if the Commissioner chose to deal with the risk management material in the public ruling.

3.13 The Tax Office considers that there would be very few, if any, circumstances where it was necessary to deal with risk management material in the course of providing an opinion on the application of a provision of the law. Further, even where discussed, if the risk management material did not relate to the relevant provision being ruled upon, it considers it would not form part of the binding public ruling. It states that this latter point is covered in an example at paragraph 28 of TR 2006/10, where the public ruling in question is dealing with Division 974 and the audit plans are not related to the view expressed about Division 974.

3.14 The Tax Office also states that, more significantly, with audit plan and other enforcement scenarios, the Commissioner would not choose to issue any binding public ruling on such general administration issues where this would amount to a

direct fetter on his ability to fulfil his responsibilities to properly administer the law. Any possible discussion of risk management material in a proposed public ruling would be considered on a case by case basis in the course of developing the public ruling.

'Safe harbour' issues

3.15 The term 'safe harbours' in this context means practices (which may include maximum or minimum amounts) which the Tax Office says it will accept as meeting the requirements of the tax law in specific circumstances.

Tax Office approach

3.16 The Tax Office states that it is a matter for the Commissioner to consider, on a case-by-case basis, when and the extent to which any 'safe harbour' of the nature mentioned (for example, permitted deductible amounts) might be necessary to provide an opinion on the application of a provision of the law in the form of a binding public ruling. In considering this, he must have regard to the extent the provision of any such safe harbour might prejudice or unduly restrict his ability to fulfil his responsibility to properly administer the tax laws and his responsibilities under the *Financial Management and Accountability Act 1997*. Therefore, as with risk management material above, it would be extremely rare for this to be dealt with in a public ruling.

Matters involving the ABN Act

3.17 After the enactment of the new ruling regime the Tax Office reissued its ruling on the meaning of the term 'entity carrying on an enterprise' for the purposes of the ABN Act. The new ruling is MT 2006/1. However this new ruling, like its predecessor, is expressly not a binding ruling (although both it and its predecessor are parts of what is known as the miscellaneous tax 'ruling' series).

3.18 Although the ABN Act is not an Act covered by the new rulings regime, the operation of the ABN Act is an integral part of the administration of the income tax laws. This is because a failure to quote an ABN will result in income tax being withheld on business to business payments. The new rulings laws now expressly allow the Tax Office to make binding rulings about the administration or collection of income tax. This means that the Tax Office could have issued this ruling on the basis that it was, at least partly if not wholly, a binding ruling. However, it did not do so.

Tax Office approach

3.19 The Tax Office states that section 357-55 of the TAA 1953 lists the various topics that are relevant for binding public rulings (these are set out at paragraph 11 of TR 2006/10). The ABN Act is not included, and therefore the Commissioner is not authorised to make binding public rulings about provisions in the ABN Act. The Tax Office considers the law to be clear on this point.

3.20 It also states that, in dealing in a binding public ruling with the PAYG provisions in the *Taxation Administration Act 1953* (which are about the collection and

administration of income tax), it may be useful to consider some applicable concepts or terms from the ABN Act. This falls under the scope of 'any matter', but is for the purpose of ruling on the PAYG provision and is only binding in respect of that provision (as discussed above).

3.21 The Tax Office has also advised the Inspector-General that it did not take an approach of issuing MT 2006/1 in a form which linked to a relevant provision, as listed in section 357-55, so as to render the contents legally binding because:

MT 2006/1 deals even more comprehensively (87 pages) with the meaning of 'entity' and 'enterprise' for the purposes of the ABN Act (*than its predecessor*). The ruling (at paragraphs 8 to 9) discusses the policy intent underlying the introduction of the ABN system, being principally as a unique business identifier to be used by entitled entities for all dealings with commonwealth, state and local government. While a significant part of the policy intent is to allow businesses to identify themselves reliably for the purposes of a range of taxation laws (that is, not just income tax), it also serves a variety of other purposes.

Due to the multi-purpose nature of the ABN system, the views in MT 2006/1 on the meaning of terms in the ABN Act apply much more generally than for any specific income tax provision (such as no-ABN withholding). This is why these issues were dealt with in the MT series, both in 2000 and again in 2006.

As the primary reason for having MT 2006/1 is for more general application, to issue a ruling with more restricted application would not have fulfilled the original purpose and a further ruling in the same terms as MT 2006/1 would still have been necessary.

Inspector-General's comments

3.22 The Inspector-General notes that the Tax Office's register of binding private rulings appears to indicate that taxpayers have sought and obtained from the Tax Office *private* binding rulings solely in relation to ABN Act matters.¹⁸ The Inspector-General will further explore the subject of Tax Office practices in this area in the context of a proposed review on binding private rulings which he has recently announced will form part of his forward work program.

Matters likely to be specific to a particular entity

Tax Office approach

3.23 The Tax Office asserts that subsection 358-5(1) of the TAA 1953 clearly states that a public ruling is about how the Commissioner considers a relevant provision applies to entities generally or to a class of entities (also see paragraph 4 of TR 2006/10). It is possible that a public ruling applying to entities generally could deal with matters specific to a single entity (for example, in the context of a class ruling for employees on a specific company's employee share arrangements). However, it is the

¹⁸ See for example the edited private ruling with the authorisation number 71486 on the Tax Office's register of private binding rulings.

private rulings system which has been established to deal with how the law applies to a single entity. The Tax Office considers that the law is clear on this point.

Inspector-General's recommendation

3.24 The Inspector-General notes that the Tax Office's views on all the above matters are yet to be fully communicated to either its staff or to the public at large.

3.25 The Inspector-General further notes that during the course of this review senior staff from various business lines within the Tax Office were found to be of the view that under the 2006 rulings regime they were *legally* unable to issue public binding rulings on risk management material, safe harbours, matters involving the ABN Act and matters specific to a particular entity. These views do not accord with the position the Tax Office has now expressed to the Inspector-General.

Matters involving the application of the Commissioner's discretion

3.26 During the review the Inspector-General also found that a number of senior Tax Office staff involved in the drafting of public rulings held the view that the rulings laws which came into effect on 1 January 2006 meant that rulings could no longer be made on matters involving the exercise of the Commissioner's discretion. This view was based on the absence in the new rulings law of a specific provision, similar to that which existed in the old rulings law which allowed such rulings to be made.¹⁹

3.27 The Tax Office has confirmed in a statement in paragraph 13 of the public ruling TR 2006/10 that the new rulings laws are to be interpreted as enabling the Commissioner to issue rulings on the way in which a discretion is exercised. However, there is clearly a lack of knowledge of this guideline within the Tax Office. The Inspector-General has therefore recommended that the Tax Office take steps to issue further guidance on this matter to Tax Office staff.

3.28 The above comments have led the Inspector-General to making the following recommendation.

¹⁹ The relevant former provision was section 14ZAAD of the TAA 1953.

KEY RECOMMENDATION 1

The Inspector-General recommends that the Tax Office should:

- issue further guidance to its staff, which is made publicly available, on its ability to issue public rulings on the following issues:
 - risk management material;
 - safe harbours;
 - matters involving the *A New Tax System (Australian Business Number) Act 1999* (the ABN Act); and
 - matters which are specific to a single entity; and
- issue further guidance to its staff to explain that the rulings laws which came into effect on 1 January 2006 enable the Commissioner to make a ruling on the way in which a discretion will be exercised.

Tax Office response

3.29 The Tax Office agrees with this recommendation.

3.30 The Tax Office has provided publicly available guidance for Tax Office staff and the community on these matters in Taxation Ruling TR 2006/10 and in various law administration practice statements. Nevertheless, from the Inspector-General's comments, it is apparent that our position may not be sufficiently clear.

3.31 Therefore, the Tax Office agrees to add additional material to TR 2006/10 (public rulings), TR 2006/11 (private rulings) and internal guidance material, as appropriate, to provide further clarification of the Tax Office's view on:

- the broad scope of 'any matter involved in the application' of the provision of the law being ruled on (so as to potentially cover matters such as risk management material, 'safe harbours' or ABN issues, where it is necessary to do so for the application of the relevant provision),
- the ability to provide public rulings on discretion provisions,
- the inability to provide public rulings on provisions of the law not covered by the list in section 357-55 of Schedule 1 of the TAA, and
- the extent to which a public ruling can deal with matters specific to a single entity.

CHAPTER 4: TAX OFFICE'S CURRENT PRACTICES AS REGARDS BINDING AND NON-BINDING RULINGS

4.1 In the discussion paper which preceded the RoSA report, the Commonwealth Treasury stated that there was a risk that if the tax ruling laws were amended to make more Tax Office advice binding the Tax Office's advice might become 'more limited, cautious and conditional'. This possible development in Tax Office advice was flagged in a Treasury discussion paper which preceded the final RoSA report.²⁰

4.2 This review has gathered evidence which indicates that since the enactment of the 2006 rulings laws, some Tax Office advice has in fact become 'more limited, cautious and conditional'.

4.3 The evidence which supports this assertion consists of:

- the volume of non-binding practice statements issued since 1 January 2006;
- the nature of the declarations which the Tax Office includes in the paper and electronic forms of its annual TaxPack publication as to the extent to which the material in those publications is binding on the Tax Office;
- the extent to which the Tax Office has reissued in a non-binding form material that was issued in a binding form pre 1 January 2006;
- the absence of any systematic Tax Office process for going back over TR, TD or MT series rulings it issued in a non-binding form pre 1 January 2006 and reissuing them in a binding form; and
- the withdrawal by the Tax Office in 2007 of certain assertions it made in a previous 2003 practice statement. The 2003 assertions made it clear that the Tax Office considered that ATO IDs and other material set out its general administrative practice. The Tax Office no longer holds this view. Its revised view on this topic is discussed more fully in the next chapter of this report.

4.4 The review has also found that there are difficulties with the manner in which the Tax Office has communicated to the public certain aspects of both its 'rulings' products and its practice statements products.

²⁰ Commonwealth Treasury, *Review of Aspects of Income Tax Self Assessment* Discussion Paper, March 2004 at page 26.

Volume of practice statements issued before and after 1 January 2006

4.5 Since the date of effect of the new post RoSA rulings regime, the number of non-binding practice statements issued each year has (with the exception of the year ended 30 June 2008) been on the increase.

4.6 This trend is evident from the following table:

Summary of Law Administration Practice Statements issued per Business Service Line from 2003-04 to 2007-08

	Ops	ATP	CS&C	Debt	EXC	GST	L&P	LB&I	MEI	S&ME	SPR	Totals
2003-04	1					2	5	3	3			14
2004-05	2	1				2	7	4	2	2		20
2005-06	1	2				3	8	5		1	1	21
2006-07	4	2				5	8	5		2	9	35
2007-08	0	2	2	1	1	5	12	3	1	1	1	29
Totals	8	7	2	1	1	17	40	20	6	6	11	119

Tax Office declarations involving the binding status of advice in TaxPack

4.7 The RoSA review recommended that the Commissioner be empowered to declare that advice for the general information of non-business individual preparers (for example, TaxPack) is legally binding upon the Tax Office. The RoSA review also specifically contemplated that the Tax Office would progressively make its premier advice products binding, as those products were updated.²¹

4.8 While the post 1 January 2006 rulings regime now gives the Commissioner power to declare TaxPack and similar material to be a legally binding ruling, the Tax Office has not made significant parts of its paper and electronic versions of TaxPack legally binding.

4.9 Furthermore, the paper and electronic versions of TaxPack are unclear on whether legally binding status extends to business individuals or to individuals who have their return prepared by a tax agent.

4.10 In addition, the paper and electronic versions of the 2008 TaxPack have different methods of excluding material in these publications from public ruling status. This raises the issue that taxpayers who rely on one publication rather than the other may obtain a different level of protection against the payment of tax, penalties and interest if any advice in the relevant publication is wrong.

Binding status of 2007 and 2008 electronic TaxPacks

4.11 The 2008 electronic version of TaxPack specifically excludes a significant number of questions (28 in all) from having binding ruling status. The excluded questions include all questions concerning capital gains tax, all questions concerning

²¹ The Commonwealth Treasury, *Report on Aspects of Income Tax Self Assessment*, August 2004 at paragraph 2.3.1.

rental income and deductions, and all questions concerning entitlement to the net medical expenses offset.

4.12 The 2007 electronic version of TaxPack did not exclude particular questions from having binding ruling status. It listed that the following areas were not subject to public ruling protection:

- amounts of any pre-filled data;
- amounts of any calculations stated to be estimates;
- the publications 2007 module;
- the capital gains tax 2007 module; and
- the e-tax Medicare tax statement online 2007 program.

4.13 Although the exact meaning of the 2007 exclusions is unclear, it does seem to be clear that these exclusions are not as wide as those listed in the 2008 electronic TaxPack. In other words, between the 2007 and 2008 years of income the Tax Office has actually decreased the amount of material in its electronic TaxPack which it states will give binding ruling protection. This appears to be clear evidence that it has made its advice in this area 'more limited, cautious and conditional'.

Binding status of 2007 and 2008 paper TaxPacks

4.14 The paper versions of the 2007 and 2008 TaxPacks have methods of excluding material in these publications from public ruling status which differ from the electronic versions. In both sets of material the exclusion is made by way of a Tax Office 'commitment to you' statement.

4.15 The 2008 version of this commitment statement is reproduced in Appendix 5.

4.16 This commitment statement does not clearly indicate:

- whether the material in the TaxPack supplement forms part of the binding ruling part of TaxPack; or
- whether binding ruling status extends to individuals who have their returns prepared by tax agents.

4.17 There is also some doubt as to whether this commitment statement applies to individuals who operate a business. This is because the recommendation from Treasury's RoSA review, which referred to the Commissioner being empowered to declare that TaxPack is legally binding, only referred to this legally binding ruling status being extended to *non-business* individual self preparers.²²

²² See Recommendation 2.3 in: Commonwealth Treasury, *Report on Aspects of Income Tax Self Assessment*, August 2004, at page 11.

4.18 The Tax Office has advised the IGT that the commitment statement in its 2008 TaxPack is *meant* to apply to all individual self-preparers for the material in the TaxPack document alone. This means it is not limited to just non-business individual self preparers. It also means that public ruling status does not extend to individuals who have their returns prepared by a tax agent or to the TaxPack supplement. However, the words used in the commitment statement do not make any of this clear as there is no specific reference in the TaxPack commitment statement to 'self preparers', 'business' individuals nor to the Tax Pack supplement.

4.19 The 2008 commitment statement in the paper version is also different from that used in 2007. The 2007 version (which is also reproduced in Appendix 5) also did not clarify any of the above three issues. However, in addition, the 2007 commitment statement was confusing and apparently contradictory on what parts of TaxPack were and were not a binding public ruling.

4.20 The 2007 statement said that if the Tax Office stated the law incorrectly and taxpayers did not pay enough tax the Tax Office would not ask taxpayers to pay that tax. Immediately after this statement, however, and in apparent contradiction to it, the statement says that if any 'other information' in TaxPack is incorrect and as a result a taxpayer does not pay enough tax the Tax Office may ask them to pay that tax. The meaning of the 'any other information' that, if incorrect, would not protect taxpayers was unclear.

4.21 Early in this review, the Inspector-General brought the contradictory statement issue (as well as the other issues listed above) to the Tax Office's attention. The 2008 commitment statement is now somewhat clearer than the 2007 statement. It specifies that the 'any other information' which will not give binding ruling protection is those parts of TaxPack which amount to guidance to help taxpayers complete their returns. However, it is still not clear how this form of guidance can be distinguished from the rest of the material in TaxPack.

Pre and post RoSA binding material

4.22 Since 1 January 2006, the Tax Office has issued at least 30 public rulings, determinations, practice statements or ATO IDs which involve replacing in whole or in part a pre RoSA ruling or determination. Of these:

- seven involve an increase in the amount of binding material in the post RoSA material. These include the rulings on effective life for depreciation purposes and the annual tax determination for the value of stock deemed to be taken for private purposes (these were both formerly issued as non-binding rulings but are now issued as binding rulings);
- eight involve a decrease in the amount of binding material;
- eleven involve no change in the amount of binding material; and
- in four cases it is unclear whether the amount of binding material has changed.

4.23 One notable example of where the Tax Office has withdrawn a pre RoSA ruling and replaced at least parts of it with less binding material is TR 99/5 (which deals with employee benefit arrangements). This previously binding ruling has been withdrawn in full but has to date only been replaced with two ATO IDs²³.

4.24 Other examples where the replacement material is less binding than the former material are in:

- a ruling on sale and lease backs²⁴;
- a practice statement which replaced the formerly administratively binding ruling on PAYG withholding penalties²⁵; and
- material contained in a non-binding guidebook on the research and development concession which replaced material contained in three withdrawn, formerly administratively binding, rulings.²⁶

4.25 The Inspector-General considers that, in line with the apparent intent of the 2006 changes to the rulings law, there should, post RoSA, generally be no cases where the Tax Office issues material post RoSA which is *less* binding than what existed pre RoSA.

Absence of Tax Office processes to review the binding/non-binding status of pre 2006 rulings

4.26 During the period from 1992 to the beginning of 2006 the Tax Office issued a number of rulings in its TR and TD (as well as its MT series) which despite being labelled 'rulings' actually contained preambles which indicated that they were not in fact public binding rulings and were only 'administratively binding' on the Tax Office (that is, their binding status was similar to those issued in the old IT series of rulings).

4.27 Examples of rulings in the TR or TD series which contain a preamble which states that they are not in fact binding rulings are:

- TR 2005/1, which deals with the issue of carrying on a business as a professional artist;
- TD 2004/24, which deals with whether there is a deemed assessment when a company lodges a non-taxable return;
- TR 2003/1, which deals with thin capitalisation;
- TD 2002/26, which deals with the value of goods taken from stock for private use;

23 ATO ID 2007/194 and ATO ID 2007/204.

24 TR 2006/13.

25 PS LA 2007/22.

26 The relevant rulings are IT 2442, 2451 and 2552, all of which were withdrawn on 6 August 2008. Any material in these former rulings which was current is now included in Part C of the ATO's *Guide to the R&D Tax Concession*, accessible at law.ato.gov.au.

- TR 2001/13 which deals with interpreting Australia's double tax treaties; and
- TR 2000/15 which deals with company groups and company subsidiaries.

4.28 The Tax Office has no systematic process for going back over the rulings it issued in its TR, TD or MT series which were not rulings and were only administratively binding and reissuing these as binding rulings. There are estimated to be about 22 of these kinds of rulings which are still current. Such a process could, for example, be introduced whenever the Tax Office is confirming the application of those rulings to a number of taxpayers.

Withdrawal in 2003 of Tax Office statements on whether or not particular documents represented its general administrative practice

4.29 In 2003 the Tax Office issued a practice statement, PS LA 2003/3 which clearly stated that the following Tax Office documents all represented its 'general administrative practice' for the legislative provisions that they covered for penalties protection purposes:

- public rulings;
- publicly issued draft rulings;
- ATO IDs;
- documents listed in the Tax Office's schedule of sources of ATO precedential views.²⁷

4.30 In 2007 the Tax Office withdrew the parts of PS LA 2003/3 which contained the above views. The Tax Office no longer considers that ATO IDs and material contained in its Schedule of ATO precedential views represent its general administrative practice. This change clearly represents a shift in the direction of making its public advice more 'limited, cautious and conditional'. This issue is discussed in more detail in the next chapter of this report.

Other issues

Tax Office's communication of the binding/non-binding status of public rulings

4.31 Some TR and other rulings on the Tax Office's website dated between 1998 and 1999 do not contain a preamble indicating their binding status in the 'printable' version of the ruling (see for example TR 99/5). Taxpayers must view the 'pdf' version of such a ruling to obtain the relevant preamble. The Tax Office has not advertised to taxpayers they need to do this to obtain the full version of the relevant ruling.

4.32 The Tax Office has also advised that the pdf version of rulings is the only authorised version. This point has not been clearly communicated to the public.

²⁷ PS LA 2003/3 Precedential ATO view, dated 12 May 2003 at footnotes 11, 13, 15 and 17.

4.33 In addition, the Inspector-General considers that it is not appropriate for the Tax Office to communicate the binding/non-binding status of rulings in a preamble which many taxpayers may overlook. This communication should be set out in the body of the ruling itself, with considerable prominence.

Effect of misleading income tax advice in a public binding ruling

4.34 The Tax Office has a policy that where income tax advice in a public ruling is misleading a taxpayer who follows that advice and makes a mistake will be protected against the payment of penalties and interest, but not against the payment of tax.²⁸

4.35 This policy has been applied to the 2008 TaxPack (see the 'commitment to you' statement which is set out in Appendix 5).

4.36 However, in two recently issued Miscellaneous Tax Rulings dealing with penalties, MT 2008/1 and MT 2008/3, both of which are binding public rulings, the Tax Office appears to have departed from this policy. The preambles to both these rulings state that if the advice in these rulings is misleading and the taxpayer makes a mistake as a result of having relied on this advice, no tax, nor penalties nor interest, will be payable.

4.37 The Inspector-General considers that the Tax Office should adopt a consistent position across all of the rulings that it issues on income tax matters on the extent to which it will be bound by advice that is misleading for the purposes of the payment of prior period tax.

Communication by the Tax Office of changes it makes to its practice statements

4.38 The review also found that although the Tax Office has been issuing an increasing number of non-binding detailed practice statements, sometimes in substitution for what was previously documented in administratively binding public rulings, some of its communication strategies around these statements require improvement.

4.39 For example, it has no formal processes in place to notify the community of when practice statements have been withdrawn. In contrast, when a public ruling is withdrawn, the Tax Office issues a formal notification of the withdrawal.

4.40 Similarly, when a practice statement is amended, the precise nature of any amendments is not detailed by the Tax Office. Again this contrasts with Tax Office practices in relation to binding public rulings.

4.41 Furthermore, in some cases, the Tax Office does not make available on its website the content of previous versions of amended or withdrawn practice statements. These previous versions can only be obtained by contacting the Tax Office directly. Again, this practice stands in contrast to the public binding rulings process.

28 See PS LA 2008/3 at paragraph 21.

4.42 An example of these communication issues associated with Tax Office practice statements is as follows. In 2007, just prior to the announcement of this review, the Tax Office made changes to PS LA 2003/3 to make it clear that reliance by a taxpayer on certain Tax Office document (such as ATO IDs) would, as a result of the 2006 changes to the rulings laws, protect a taxpayer from an interest charge if the relevant Tax Office document was wrong.

4.43 These changes were not embodied in a newly issued 2007 practice statement but by way of making changes to a 2003 practice statement. The fact that this 2003 practice statement had been changed in 2007 was not formally made known to taxpayers. As a result, many taxpayers, tax practitioners and, it seems, Tax Office staff were unaware of these changes.

4.44 A copy of the revised version of the 2003 practice statement is available on the Tax Office's website. This version does disclose that the practice statement was changed in mid 2007, but does not detail the nature of those changes. Taxpayers can only ascertain the full nature of these changes by requesting a copy of the original practice statement from the Tax Office.

4.45 As the Tax Office appears to be increasingly relying on practice statements as a vehicle for explaining and documenting its approaches, these documents should be subject to the same disciplines regarding any changes made to them that are currently applied to binding public rulings.

Inspector-General's recommendations

4.46 The comments made in this chapter lead to the following recommendations.

KEY RECOMMENDATION 2

The Inspector-General recommends that the Tax Office take steps to ensure that any rulings in its TR, TD or MT series which are currently called 'rulings', but which are not in fact legally binding rulings, are separately identified or are re-named in a way which ensure that taxpayers are not misled as to the legal status of such 'rulings'.

Tax Office response

4.47 The Tax Office disagrees with this recommendation.

4.48 The Tax Office considers the preamble to each of these rulings is clear and unambiguous in identifying their status and stating the protection afforded to taxpayers. The preamble is considered to be located in a logical and transparent place in the document, being immediately below the header. In addition, post-ROSA, each page of a formal series ruling which contains legally binding material carries a label in the header identifying that page of the document as being legally binding.

4.49 Moreover, the Tax Office considers that these documents have been known and viewed as rulings for considerable time, even though they may not be capable of being legally binding. These include the Income Tax (IT) series and the Superannuation

Guarantee (SG) series of rulings and determinations. The Tax Office is not aware of any evidence that there is confusion about the status of such documents. Indeed, the Tax Office considers that the implementation of this recommendation, particularly in relation to pre-ROSA rulings referred to in the report, would cause rather than remove confusion, and would not alter the way in which these rulings might be used or viewed by the community.

4.50 Nevertheless, going forward, the Tax Office will make appropriate further enhancements to the existing page status label in its formal series rulings to address any perceived confusion about the binding nature of the material on any particular page.

Inspector-General's comments on Tax Office response

4.51 This recommendation could have been addressed by the Tax Office agreeing to change the citation name of all rulings which are called 'rulings' but which are not in fact legally binding to something like 'TR (not legally binding)' or 'TR (NLB)'. There were 22 rulings of this type identified in the Inspector-General's report. This would have meant that when such rulings are cited by the Tax Office or by tax practitioners in any advice or in any other document it will be clear to the reader of the relevant advice or document that the ruling which is being referred to is not legally binding. The Inspector-General notes that the Tax Office has adopted this kind of process to differentiate 'general administration' practice statements from other practice statements.

KEY RECOMMENDATION 3

The Tax Office should enhance its systems to promptly inform the community of any material changes it makes to its practice statements, the nature of those changes and their date of effect. It should also consider making available to the community via its website the full text of the new and old versions of the relevant practice statements so that a full history is available.

Tax Office response

4.52 The Tax Office agrees with this recommendation.

4.53 The Tax Office does aim to inform the community when changes to law administration practice statements (LAPS) have occurred and currently does so via 'alerts' to subscribers, in the Tax Agent Newsletter, and other means. The Tax Office agrees that it could be useful and more transparent to highlight material changes to any LAPS via our Tax Office website and will explore how this might be best achieved prospectively.

4.54 The report contrasts a number of the Tax Office processes for public rulings with those for practice statements. In this respect, it should be noted that the Tax Office makes its LAPS available to the community in the interests of openness and transparency, whereas publication of public rulings is required under the law. The

Tax Office agrees that this transparency would be improved if old versions of LAPS were to be more readily available and will explore how this might be achieved where material changes to LAPS occur in the future.

Subsidiary recommendation 1

The Inspector-General recommends that the Tax Office should:

- take steps to advise taxpayers that the pdf versions of rulings on its website are the only authorised versions of rulings;
- ensure that any other versions of rulings made available to the public always contain the full text of the pdf versions, including any material which indicates the binding status of the relevant rulings; and
- ensure that the binding status of rulings is set out in the body of any ruling rather than in a preamble that may be overlooked by taxpayers.

Tax Office response

4.55 The Tax Office agrees with the first two dot points and disagrees with the last dot point of this recommendation.

4.56 The ROSA law clearly requires that a public ruling be labelled as a public ruling so that its status is clear and unambiguous. The preamble indicates the extent to which a Tax Office formal series ruling is a public ruling under the law. The Tax Office considers the present location of the preamble immediately below the header to the document on the first page is the most logical and transparent place in the document for this information. As the preamble also contains a protection statement, this is consistent with the approach across all Tax Office publications. In addition, each page which contains legally binding material carries a label in the header indicating that it has that status.

4.57 There is a danger that if this message was located elsewhere, such as within the body of the document, it would be overlooked.

Inspector-General's comments on Tax Office response

4.58 The Inspector-General notes that the Tax Office could have addressed the last dot point of this recommendation by including the words of the preamble (or a summarised version thereof) in the body of the ruling *as well as* in the preamble itself.

Subsidiary recommendation 2

The Inspector-General recommends that any 'commitment to you' (or similar statements in any of its publications) which set out the extent to which the Tax Office will be bound by the material set out in that publication:

- be identical for different versions of the same publication (for example, for the electronic and paper versions of TaxPack);
- clearly state the categories of taxpayers to which any such commitment applies (for example, that the Taxpack commitment statement only applies to self-preparers, not individuals who use tax agents); and
- clearly state what material is covered by the commitment (for example, that the Taxpack commitment does not extend to material in the TaxPack supplement).

Tax Office response

4.59 The Tax Office disagrees with dot point 1 of the recommendation but agrees with the principles in dot points 2 and 3.

4.60 On the first dot point, the Tax Office agrees that commitment statements in our publications should be consistent in their application to different versions of the same publication or to the same material contained in different publications. However this consistency in application will not necessarily be achieved by having 'identical' commitment statements in all cases.

4.61 A number of Tax Office publications are the same in substance and merely made available in different formats, such as paper or downloadable PDF documents. In such cases, the protection and commitment statements should be the same.

4.62 However, the Tax Office considers that its *e-Tax* product and the paper and downloadable versions of *TaxPack* and the *TaxPack Supplement* are quite distinct products. The Tax Office considers that *e-Tax* is not just an electronic version of *TaxPack*. Instead, *e-Tax* is a more integrated publication, which by its nature is quite different to the paper version. For instance, it allows users to roll-over information from previous years and enables the pre-filling of certain types of information.

4.63 For these reasons, it is necessary to use a different type of commitment statement to separately identify those parts of *e-Tax* that are equivalent to *TaxPack* and the *TaxPack Supplement* respectively to ensure consistent treatment. In developing the commitment given to *e-Tax* users, the Tax Office has endeavoured as far as possible, to ensure that *e-Tax* users have the same level of protection as they would if they had used *TaxPack* and, if necessary, the *TaxPack Supplement* and the publications referred to in them. The respective commitment statements are therefore intended to bring about a consistent outcome, but are not 'identical'.

4.64 As to dot points 2 and 3, the Tax Office also agrees that a commitment statement should be clear as to its application, both in terms of categories of taxpayers

and the material which is covered by the statement. In the report, the Inspector-General suggests that this objective has not been achieved with the commitment statement applicable to *TaxPack* contending that it is not clear that *TaxPack* is a public ruling only for individual self-preparers. The Tax Office disagrees with this for the following reasons:

- Where a taxpayer uses both *TaxPack* and the *TaxPack Supplement* to prepare their personal income tax return, the commitment statements in each apply separately to each publication. Therefore, the Tax Office considers it is clear that the commitment statement in *TaxPack* applies to the material in *TaxPack* and not to the *TaxPack Supplement*.
- The commitment statement in *TaxPack* makes it clear that it is 'a public ruling for individuals who use it reasonably and in good faith to complete their 2008 personal tax return' (that is, self-preparers). This commitment statement for *TaxPack* applies to all individual self-preparers for the material in *TaxPack*, not just non-business individual self-preparers. The Tax Office considers it is also clear that this commitment statement does not apply to those who have their return prepared by someone else, such as a tax agent.

4.65 Nevertheless, as part of continuous improvement, we will seek feedback on the issues raised by the Inspector-General in dot points 2 and 3 through our normal user acceptance testing processes to determine whether any changes to *TaxPack*, etc. are warranted.

Inspector-General's comments on Tax Office response

4.66 The Inspector-General is pleased to note that in its response the Tax Office, although disagreeing with dot point 1 of the Inspector-General's recommendation, has confirmed that it intends that the commitment statements in the paper and electronic versions of *TaxPack* should have a consistent outcome in the future.

Subsidiary recommendation 3

The Inspector-General recommends that the Tax Office should ensure that its policy on the effect of misleading advice in a binding income tax ruling is applied consistently to all binding income tax rulings.

Tax Office response

4.67 The Tax Office agrees that its policy on the effect of misleading advice should apply consistently to all binding income tax rulings, and considers this has been done.

4.68 In the report, the Inspector-General suggests that the Tax Office appears to have departed from this policy in two recently issued Miscellaneous Tax Rulings dealing with administrative penalties (MT 2008/1 and MT 2008/3). This suggestion is based on the wording of the protection statement in the preamble to each ruling. The Tax Office disagrees with this suggestion for the following reasons:

- These rulings deal solely with administrative penalties dealt with in provisions of the law about the collection and administration of tax generally. As these penalty provisions apply across all taxes administered by the Tax Office, the ruling is declared in the preamble to be a public ruling under the GST law as well as being a public ruling relating to administration of the taxes listed in section 357-55 (income tax, excise, etc). They are not rulings about income tax as such.
- The protection statement in the preamble has been specifically tailored to deal appropriately with the subject matter (penalties) and the context (across all taxes) of these rulings. Protection in respect of these administrative penalties rulings is provided where any statement therein is incorrect or misleading and a taxpayer makes a mistake as a result of relying on that statement. This is consistent with Tax Office policy.
- While the protection statement does mention, in addition to penalties and interest, 'any resulting underpaid tax', this is of no practical consequence as the rulings do not deal with tax liability issues as such (whether for GST, income tax, excise, etc). Therefore any statement in the ruling will not directly affect a taxpayer's primary tax liability.

4.69 The Tax Office seeks to ensure that any protection statement gives the intended level of protection, is relevant to the material to which it relates, and that no-one will suffer any detriment as a consequence.

Inspector-General's comments on Tax Office response

4.70 The Inspector-General is pleased to note that the Tax Office in its response has confirmed that it agrees that its policy on the effect of misleading advice should apply consistently to all binding income tax rulings. However, he considers that the Tax Office could have done more to ensure that this consistency was achieved with respect to MT 2008/01 and MT 2008/03.

CHAPTER 5: TAX OFFICE'S PRACTICES AS REGARDS ITS 'GENERAL ADMINISTRATIVE PRACTICE'

5.1 The Inspector-General's findings set out in Chapters 3 and 4 above indicate that current Tax Office practices on what public advice it will and will not issue in a binding form do not give full effect to the apparent intent of the 2006 RoSA legislative changes to the rulings regime. These legislative changes were, as the Tax Office acknowledged, meant:

to improve certainty for taxpayers by making Tax Office advice more reliable, accessible, timely, and legally binding on the Commissioner for a wider range of topics.²⁹

5.2 However, under the post 2006 rulings regime some Tax Office public advice has become more 'limited, cautious and conditional'. This was a possible consequence which Treasury's initial RoSA discussion paper flagged may occur.

5.3 This problem could be addressed by legislative and/or administrative means.

A possible administrative approach

5.4 During this review, the Inspector-General suggested to the Tax Office that it could achieve the apparent intent of the 2006 rulings law changes that more of its advice would be legally binding through the following administrative process. This process is one where the Tax Office clearly sets out, for the benefit of the community, what types of material it will regard as constituting its 'general administrative practice'.

5.5 The Inspector-General considers that the post 2006 rulings law changes which refer to the concept of a 'general administrative practice' offer considerable opportunity for increasing certainty, efficiency and community confidence in the tax system.

5.6 Acknowledgement by the Tax Office that a particular document embodies its general administrative practice (GAP) will have the following effects under the present rulings regime:

- any change to that practice will protect taxpayers who have relied on the Tax Office's previous practice against the levy of any penalty for prior tax periods;
- any change to that practice will protect taxpayers who have reasonably relied in good faith on the Tax Office's previous practice against the levy of interest on tax that was not paid for prior periods; and

²⁹ Australian Taxation Office, *Review of self assessment – provision of advice*, downloaded from the Tax Office's website at: www.ato.gov.au/taxprofessionals/content.asp?doc=/content/59678.htm on 12 October 2007.

- any change to that practice that is made by a public ruling, will practically operate on a prospective basis only.³⁰

5.7 In addition, under the Tax Office's current administrative practice, any change to such a practice that is made otherwise than by a public ruling will, under the Tax Office's Practice Statement PS LA 2008/3 (paragraph 32), generally operate on a prospective basis, unless the practice has been exploited or been the subject of tax avoidance.

5.8 These consequences are largely equivalent to giving the relevant document legally binding status. The only difference is that where a document is a general administrative practice the Tax Office will be able to change that with retrospective effect where the practice has been exploited or been the subject of tax avoidance.

5.9 During this review the Tax Office has not issued comprehensive guidance to its staff or to the public on the meaning of the term 'general administrative practice' (with practical examples).

5.10 The issue of such guidance was one of the key recommendations from the IGT's January 2007 service entities case study review and was a recommendation which the Inspector-General understood, at the time of that review, the Tax Office had agreed to implement.

5.11 The Tax Office has since asserted it has addressed this recommendation by issuing TR 2006/10. However, this document was issued *prior* to the IGT's service entities report which specifically deals with TR 2006/10 and states that the material in this ruling on this issue is not adequate.

Adequacy of existing material on the meaning of 'general administrative practice'

5.12 During this review the Tax Office has asserted the publicly available material on the meaning of the term 'general administrative practice' is adequate and that there is no need for additional Tax Office guidance on this topic.

5.13 However, current publicly available material on the meaning of this term is widely considered to be limited.

5.14 The IGT's previous review on the Tax Office's administration of service entity arrangements examined in some detail the available public material on the meaning of this term and considered that it was inadequate.

5.15 At the time of this previous review it was noted that the only public statements on this term have been those made in one court case, in an explanatory memorandum and (from March 2006) in two Tax Office practice statements and one Tax Office ruling. Since that time only one further Tax Office practice statement

³⁰ The practical prospective operation of a change in a general administrative practice is explained in: Commonwealth of Australia, *Explanatory Memorandum to Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005* at paragraph 3.132.

(PS LA 2008/3) has been issued which refers to this matter. This new practice statement has not added any new material on the issue.

5.16 The following eight paragraphs are essentially a repeat of the material contained in the IGT's previous service entities review, with an update to reflect the issue of PS LA 2008/3.

5.17 The court case where the term 'general administrative practice' was considered is *Prebble v F C of T* (2002) 51 ATR 459. In this case, at page 470 Justice Cooper noted that, although there was some evidence of a general administrative practice of the Commissioner in the circumstances of the case, that practice must still exist at the time a taxpayer makes a statement in a tax return for it to be a ground for the non-application of any penalty.

5.18 The term was also discussed in the explanatory memorandum which accompanied Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 (TLAB (No. 2) 2005). This Bill introduced the new legislative regime for Tax Office rulings and also introduced changes in the extent to which reliance by a taxpayer on a Tax Office general administrative practice would protect that taxpayer from the imposition of interest (and also possibly of primary tax).

5.19 The explanatory memorandum makes the following points on the meaning of the term 'general administrative practice':³¹

- 'General administrative practice' will usually be established by the Tax Office having communicated consistently to a wide range of taxpayers on a particular issue.
- It will often be documented in a Tax Office practice statement, a Tax Office policy document or other precedential material (such as an ATO Interpretative Decision).
- Where a draft public ruling represents the Commissioner's only public statement on an issue, the draft ruling will usually represent the Commissioner's general administrative practice.
- A 'general administrative practice' is not established merely because there are several similar private rulings on a matter, although evidence of a significant number of uncontradicted private rulings on a matter over time will tend to support such a conclusion.
- A bare failure by the Commissioner to take some action within his power does not establish a general administrative practice, but a repeated failure by the Commissioner to exercise that power after the issue is drawn to the Commissioner's attention will tend to do so.

31 Commonwealth of Australia, *Explanatory Memorandum to Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005* at paragraph 3.130 to 3.132.

- Mere silence or failure to issue a public ruling on a matter does not constitute general administrative practice but it will be established where, following identification of an issue, ATO officers have accepted it as the basis on which taxpayers should treat the issue in a range of situations.

5.20 The only guidance which the Tax Office has issued on the meaning of the term 'general administrative practice' is contained in:

- three practice statements that were issued after 1 January 2006. These are PS LA 2006/2 (which deals with penalties for false and misleading statements), PS LA 2006/8 (which deals with the remission of interest), and PS LA 2008/3 (which deals with the provision of advice); and
- Tax Office ruling TR 2006/10 which was also released after 1 January 2006. This ruling contains comments on the non-application of primary tax to arrangements entered into prior to a change in the Commissioner's general administrative practice. It only applies however where a change in practice has been made by the issue of a binding public ruling and not where that change has been made by other means.

5.21 None of these Tax Office statements contain a comprehensive statement of the meaning of the term 'general administrative practice'.

5.22 TR 2006/10 contains the most comprehensive commentary on this term. This ruling essentially repeats what is already set out in the Explanatory Memorandum to TLAB (No. 2) 2005. However, it appears to contain an additional statement which contradicts the Explanatory Memorandum. As noted above, the Explanatory Memorandum states that:

A general administrative practice ... will often be documented. ... in other precedential material (such as an ATO Interpretative Decision).

5.23 However, TR 2006/10 states that:

... not all precedential material (such as ATO Interpretative Decisions (ATO IDs)) indicate a general administrative practice. An ATO ID will only be accepted by the Tax Office as representing general administrative practice where the view contained therein is supported by other evidence of a pattern of Tax Office treatment of the issue consistent with the view expressed in the ATO ID (for example, a significant number of private rulings on the same matter which reach the same conclusion).

5.24 Neither this ruling, nor any of the three practice statements referred to above, contains practical examples to guide tax officers and taxpayers on the meaning and application of this term.

Effects of absence of detailed Tax Office guidance on 'general administrative practice'

5.25 The absence of detailed guidance on the meaning of the term 'general administrative practice' has the following adverse results.

5.26 First and foremost it creates uncertainty and additional compliance costs for taxpayers.

5.27 In particular, it creates uncertainty and additional compliance costs in the situation where a taxpayer is in the process of weighing up whether or not they should seek a private binding ruling on a particular tax issue. This is because, if there is a Tax Office document dealing with this issue which is not a public ruling but is something which amounts to a 'general administrative practice', this document will give the taxpayer benefits (in the form of protection against the payment of penalties, interest and possibly prior year tax) that will in many cases be almost as good as that of a private binding ruling. Hence the taxpayer may not actually need to incur the costs in terms of time and money of obtaining a private binding ruling on the relevant topic.

5.28 Secondly, the absence of such guidance creates uncertainty and additional administrative costs for Tax Office staff. This is because the existence of a 'general administrative practice' on a particular matter, and whether the taxpayer has relied on that practice, are now of critical importance in determining, under the current legislative regime, the level of penalties, interest and back taxes that a taxpayer may be required to pay in any Tax Office audit.

5.29 Without clear guidance on what is a 'general administrative practice', there is a risk that decisions made by Tax Office auditors on whether a particular document may be regarded as embodying a 'general administrative practice' will be wrong, inconsistent with decisions made for other taxpayers in similar circumstances or subject to delays as the relevant matter is escalated to more senior personnel inside the Tax Office.

5.30 The effect of the absence of clear guidance from the Tax Office is evident in the responses which the Inspector-General obtained from the Tax Office to direct questions on whether certain specific Tax Office documents and other general categories of Tax Office documents embodied its 'general administrative practice'.

5.31 The results of these inquiries are set out in the following table:

Specific Tax Office document	Tax Office written responses provided during the course of the review	Tax Office written responses provided to final IGT report
1: Annual TaxPack and its supplement	'While some of the material could evidence a general administrative practice, the most appropriate time to consider whether guidance material documents a general administrative practice is at the time the Commissioner becomes aware that a change in that material may be warranted, either through internal or external channels.'	No change.
2: Annual Tax Office guidebook on rental properties	'It's difficult to conclude that the document itself represents or describes general administrative practices'. The Tax Office later supplemented this written response by stating verbally to staff of the Inspector-General that this document did not represent its general administrative practice.	To the extent that the document describes a practice, determining whether that practice is a GAP can only be determined after considering the actions of the Commissioner in an appropriate number of instances at the relevant time.
3: Guide to service entity arrangements	Does not represent the Tax Office's general administrative practice.	The service trusts booklet provides some general qualified guidance but remains subject to the principles set out in the underlying service trusts rulings. The booklet cannot be represented as providing, in itself, a definitive practice which is somehow different to the view set out in the rulings and which could provide the protection asserted. While the booklet could evidence a GAP, it is the actions of the Commissioner in an appropriate number of instances over time that also needs to be taken into account in finally determining the existence of a GAP. Each situation would need to be considered at the appropriate time to determine the existence of a GAP.
4: MT 2006/1	Does not represent the Tax Office's general administrative practice.	The document provides advice and a GAP is not 'advice' but is a 'practice' which may be evidenced in a document. GAP can only be determined after considering the actions of the Commissioner in an appropriate number of instances at the relevant time. The preamble to MT 2006/1 clearly indicates it is administratively binding. Administratively binding advice and the protection that applies to it are described in PS LA 2008/3 at paragraphs 205-216.
5: PS LA 2007/9 on share buybacks	Represents the Tax Office's general administrative practice.	While each situation needs to be considered at the appropriate time to determine the existence of a GAP, it would be expected that this LAPS evidences a GAP.
6: PS LA 2007/21 on substituted accounting periods	Represents the Tax Office's general administrative practice.	While each situation needs to be considered at the appropriate time to determine the existence of a GAP, it would be expected that this LAPS evidences a GAP.
7: PS LA 2007/22 on penalties for failing to make PAYG withholdings	Represents the Tax Office's general administrative practice.	While each situation needs to be considered at the appropriate time to determine the existence of a GAP, it would be expected that this LAPS evidences a GAP.
8: PS LA 2006/1(GA) on cost base calculations for CGT purposes	The Tax Office's response did not indicate whether or not this document amounted to its general administrative practice.	While each situation needs to be considered at the appropriate time to determine the existence of a GAP, it would be expected that this LAPS evidences a GAP.
9: ATO ID 2007/106 and ATO ID 2007/165 on consolidation issues	Do not represent the Tax Office's general administrative practice 'as this is the first occasion on which the Tax Office has been asked to provide advice on this particular issue'.	An ATO ID will only be accepted by the Tax Office as representing a GAP where the view contained therein is supported by other evidence of a pattern of Tax Office treatment of the issue consistent with the view expressed in the ATO ID. Each situation would need to be considered at the appropriate time to determine the existence of a GAP.

General categories of Tax Office documents	Tax Office response during the course of the review	Tax Office written response provided to IGT's final report
1: Those parts of binding public rulings which are non-binding	'Would only represent the Commissioner's general administrative practice to the extent that it describes an administrative practice adopted for the efficient administration of the tax system.'	The Explanation part of a formal series ruling could evidence a GAP. However, each situation would need to be considered at the appropriate time to determine the existence of a GAP, having regard to the Commissioner's actions. More commonly however, the Explanation provides the technical reasoning behind the view of the law expressed in the binding part of the ruling.
2: Rulings which are only administratively binding	The Tax Office's response did not indicate whether or not these documents amounted to its general administrative practice.	GAP is not 'advice' but is a 'practice' which may be evidenced in a document. GAP can only be determined after considering the actions of the Commissioner in an appropriate number of instances at the relevant time. Administratively binding advice and the protection that applies to it are described in PS LA 2008/3 at paragraphs 205-216.
3: ATO IDs that are withdrawn (during the period of time when there is no ATO document which replaces them)	'As the ATO ID has been withdrawn and consequently has no status, it cannot evidence any general administrative practice for the post withdrawal period.'	As the ATO ID has been withdrawn and consequently has no status, it cannot support the existence of any general administrative practice for the post withdrawal period.

Inspector-General's Comments on Tax Office responses provided during the course of the review

5.32 As can be seen from the above table, the Tax Office provided two sets of written comments to the case studies listed in the above table – one during the review itself and the second in response to the Inspector-General's final report on the review.

5.33 In the first set of comments provided during the course of the review the Tax Office was prepared to state in writing that all the specific practice statement examples raised by the Inspector-General amounted to its general administrative practice.

5.34 However, it advised in writing that the following did not represent its general administrative practice:

- a miscellaneous tax ruling;
- two ATO IDs;
- a guidebook; and
- withdrawn ATO IDs (when there was no replacement Tax Office document).

5.35 The Tax Office has not confirmed in writing whether TaxPack, a practice statement in the general administration series or a second guidebook represented its general administrative practice. It also did not state whether rulings which are only administratively binding embody its general administrative practice.

5.36 It is notable that most of these documents qualify as 'precedential ATO views' which Tax Office staff must generally apply in dealing with the relevant issue, in accordance with a publicly available practice statement.³²

Non-binding parts of rulings

5.37 The Tax Office did not state categorically that the non-binding sections of binding rulings represented its general administrative practice. Its complete response on this issue was as follows:

The Explanation part of a formal series ruling would only represent the Commissioner's general administrative practice to the extent that it describes an administrative practice adopted for the efficient administration of the tax system. More commonly however, the Explanation part contains a detailed explanation of the technical reasoning behind the view of the law expressed in the binding part of the ruling (that is, the part that is a 'public ruling' under Div 358).

It is more likely that any general administrative practice adopted by the Commissioner for the purpose of practical and efficient administration would be described elsewhere, such as in a Practice Statement. The reason being that a ruling (including any explanation part) will set out the Commissioner's view of the technically correct meaning of the law, whereas a general administrative practice is adopted for efficient administration of the law as an inherent part of the Commissioner's general power to administer the tax laws.

An illustrative example of this is TD 2005/47 which describes the Commissioner's technical view of the law with respect to the meaning of 'can deduct' in the CGT provisions. While this Determination sets out the technically correct view of the law, the Commissioner has necessarily adopted a general administrative practice as described in PS LA 2006/1 (GA) for the purposes of practical administration. This practice represents a more concessionary position for required recordkeeping as compared to the technically correct view set out in the Determination. However, the taxpayer can choose to rely on the Determination if they wish to do so. Should the Commissioner ever consider changing the general administrative practice set out in PS LA 2006/1 (GA), he would only do so prospectively unless tax avoidance was involved or the practice was being exploited in an unintended way (consistent with paragraph 32 of PS LA 2008/3 and paragraph 3.132 of the EM to the RoSA Bill).

Service entities booklet

5.38 The Tax Office did not consider that the service entities guidebook represented its general administrative practice. The full text of the Tax Office's response to this issue is as follows:

The booklet is a guide only and the guidance contained therein does not represent the Tax Office's general administrative practice for the following reasons:

³² See PS LA 2003/3.

- The Tax Office's current compliance approach to service entity arrangements is consistent with the established and widely understood principles on the relevant issues involved. The central tax issue is that fees under a related-party service entity arrangement must be commercial. This has at all times been identified by the Tax Office as the tax compliance issue on which appropriate advice has been published. The answer to this issue is a question of fact which means that the correct amount deductible under the law can only be determined in relation to the circumstances of each particular arrangement. Whether a particular arrangement is commercial is a business issue and is not a tax issue.
- Nevertheless, the Tax Office responded to uncertainty on these matters of ordinary business judgment and indicated what, in its opinion, would reflect commercial conditions in the type of conventional service entity arrangements described in the booklet. Taxpayers can choose to adopt these arrangements and manage the risk of audit of their tax affairs. Legally binding advice can be sought on an individual arrangement.

MT 2006/1

5.39 The Tax Office did not consider that MT 2006/1 represented its general administrative practice. The full text of its response to this issue is as follows.

We do not consider that MT 2006/1 represents the Tax Office's general administrative practice. This is because the ruling is primarily a document which discusses the technical meaning of key words and phrases used to define the terms 'entity' and 'enterprise'.

As previously advised in question 3 above, MT 2006/1 is administratively binding on the Commissioner. The level of protection provided by publicly issued rulings that are not legally binding is set out in paragraphs 68 to 74 in PSLA 2008/3. The basic administrative policy of the Tax Office is to stand by what is said in these types of rulings and to depart from them only if there are good and substantial reasons.³³

5.40 The Inspector-General notes that the non-binding parts of binding rulings are subject to the highest level of internal quality control by the Tax Office prior to their public release.

5.41 He also notes that both MT 2006/1 and the service entities booklet were subject to high quality control standards prior to their issue. In both cases, this consisted of extensive public consultation. Furthermore, because MT 2006/1 was treated as a 'ruling', it was subject to the same very high level of internal Tax Office quality control that is applied to the non-binding parts of binding rulings.

5.42 It is difficult, on this basis, to understand why the Tax Office is not prepared to state unequivocally that all these documents represent its 'general administrative practice'.

5.43 The Tax Office's view that MT 2006/1 does not represent its general administrative practice appears to be contradicted by its statement that this document

³³ See paragraph 72 of PS LA 2008/3.

is administratively binding. If a document is administratively binding, a taxpayer who relies on such a document appears to achieve essentially the same protection against the payment of back tax, penalties and interest as if the document were a general administrative practice.

5.44 The Inspector-General considers that the responses that the Tax Office has given to him on whether or not particular documents represent its general administrative practice, together with the other material in this chapter setting out the existing state of guidance on this topic, underscore the need for further guidance on this issue to both tax officers and taxpayers.

5.45 The GAP provisions offer the Tax Office a clear opportunity to provide more certainty to taxpayers and to increase community confidence in their administration. If the Tax Office were to use the GAP concept, the issue and complexity of how much of its advice was legally binding might largely disappear.

5.46 Use of the GAP provisions would also avoid the Tax Office's major concern that it must apply its legally binding advice even where it is exploited.

5.47 The Explanatory Memorandum to the Bill which introduced the 2006 changes to the rulings laws concerning general administrative practice also indicates that Parliament clearly intended that any certainty afforded by the GAP provisions would not apply where exploitation or tax avoidance was involved.³⁴

5.48 There are also advantages for the Tax Office in pre-determining which of its documented approaches embody its GAP. The GAP provisions therefore provide the Tax Office with a low risk opportunity to improve its administration.

Inspector-General's Comments on Tax Office response to the IGT's final report

5.49 When providing the second set of responses to the above cases studies the Tax Office said:

We acknowledge that the words in the table are based on responses provided by us. However, we consider that the current text represents an incomplete picture of our position on GAP and may be misleading to a reader. For example, some of the previous discussion as to whether particular documents set out a GAP may have turned on whether the relevant document described a practice at all (let alone a *general administrative practice*). Moreover, we query the merits of this listing given that it would be ineffective since GAP is not established or refuted by describing the document as GAP or not. While some of the material could evidence a GAP, the practice can only be determined after considering the actions of the Commissioner in an appropriate number of instances at the relevant time. The suggested text below provides a more comprehensive answer as to whether the relevant may set out a GAP. We would ask that it be substituted for the current wording.

³⁴ Commonwealth of Australia, *Explanatory Memorandum to Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005* at paragraph 3.132.

5.50 In this revised set of responses the Tax Office has essentially replaced all of the responses which it previously provided to each case study with words to the effect that the presence or otherwise of a pre-existing general administrative practice can only be assessed at the relevant time, for example, where it might be considering a change in that practice.

5.51 Accordingly it no longer asserts that its practice statements definitely represent its general administrative practice, only that it could be expected that they would (that is, that they *may* embody a general administrative practice). Similarly, it no longer categorically asserts that its guidebook on rental properties, the service entitles booklet, MT 2006/1 or two ATO IDs do not represent its general administrative practice. In all cases the Tax Office again asserts that the relevant documents *could* evidence a general administrative practice.

5.52 The effect of the Tax Office's replacement responses is that it has not indicated, for the benefit of the Inspector-General, taxpayers generally or its own staff whether any of its approaches that are embodied in the case studies nominated by the Inspector-General (some of which are key, public Tax Office documents) represent its general administrative practice.

5.53 This response provides less certainty than the Tax Office's original set of responses. This original set of responses stated definitely that some ATO documents represented its general administrative practice while some documents did not.

Inspector-General's comments

5.54 Neither set of Tax Office responses takes into account a fundamental principle of Australia's self assessment system. This principle is that it is taxpayers – not the Tax Office – who must, year by year, determine the extent of their income tax liability. As part of this self assessment process taxpayers need to know, on an ongoing basis, if a particular tax matter is covered by a Tax Office general administrative practice, as this will significantly affect the approach they adopt to the relevant issue.

5.55 The Inspector-General considers that a change in Tax Office approach on this matter is required.

5.56 Firstly, the Tax Office should seek independent legal advice on the meaning of the term 'general administrative practice'. This advice should cover all documents that are potential candidates for the Tax Office's 'general administrative practice'.

5.57 The uncertainty on the issue of what constitutes a 'general administrative practice' that arises from the Tax Office's second set of comments on the case studies examined during this review appears to reinforce the need for such advice.

5.58 Once this advice is obtained it should then issue further guidance for its staff and publish its views on how it will generally interpret and apply the term 'general administrative practice'.

5.59 In this guidance the Tax Office should, subject to the independent legal advice, publicly confirm that at least all documents which the Tax Office refers to as 'precedential ATO views' in PS LA 2003/3, together with all its publicly available

practice statements, represent its 'general administrative practice' for the purposes of the income tax laws.

5.60 This will mean that at least all the following types of documents will represent the Tax Office's 'general administrative practice':

- publicly issued practice statements;
- publicly issued binding rulings;
- draft public rulings and other publicly issued rulings;
- ATO Interpretative Decisions (ATO IDs);
- decision impact statements; and
- documents listed in the Tax Office's Schedule of documents containing precedential ATO views (these documents include the Tax Office's guidebook on the research and development concession, the Tax Office's annual rental guidance booklet, as well as other major annual publications).

5.61 The Inspector-General has therefore made the following key recommendation:

KEY RECOMMENDATION 4

The Inspector-General recommends that the Tax Office:

- seeks independent legal advice on the meaning of the term 'general administrative practice';
- ensures that this advice also deals directly with the types of documents the Inspector-General has raised with the Tax Office during the course of this review as being potential candidates for 'general administrative practice', as well as situations where no formal ATO document refers to the alleged practice;
- issues further guidance to its staff on the meaning of the term 'general administrative practice' following the receipt of the independent legal advice; and
- publicly confirms in this guidance that, subject to the independent legal advice, all documents which the Tax Office refers to as 'precedential ATO views' in PS LA 2003/3, together with all its publicly available practice statements, represent its 'general administrative practice' for the purposes of the income tax laws.

Tax Office response

5.62 The Tax Office agrees with the first three dot points and disagrees with the fourth dot point of this recommendation.

5.63 Our position is that the existence of a general administrative practice (GAP) is a question of fact to be determined having regard to all the facts and circumstances at the relevant time. While a Tax Office publication may evidence a GAP, and be one of the circumstances taken into account in determining whether a GAP exists, it is the consistent actions of the Commissioner in an appropriate number of instances that determine the existence or otherwise of a GAP, not the existence of a particular document. This view is supported by the explanation of GAP in the Explanatory Memorandum (EM) to the ROSA legislation and is reflected in our discussion of this issue in TR 2006/10, our public ruling on the post-ROSA public rulings system.

5.64 Consequently, simply declaring a publication as representing a GAP cannot of itself confer GAP status on a particular practice or course of action; nor can the absence of such a declaration effectively deny GAP status to a practice described therein. Rather, the existence of a GAP is an objective matter of fact in each specific instance, to be considered on a case by case basis as and when the question might arise.

5.65 In addition, we consider that to declare publications as GAP runs counter to the intent of ROSA. We consider that the thrust of ROSA is that we be clear about the level of protection that applies to taxpayers who reasonably rely in good faith on information contained in our publications. We consider that this has been achieved by specifying the level of protection on each publication. We also consider that the framework established by ROSA identified a public ruling as the vehicle for the Commissioner to provide legally binding public advice.

5.66 The Tax Office has publicly expressed its view of how the ROSA law applies, including an explanation on GAP, in Taxation Ruling TR 2006/10. A further explanation of the post-ROSA framework, for the provision of Tax Office advice and guidance, including public rulings, is provided for Tax Office staff in Law Administration Practice Statement PS LA 2008/3, Provision of advice and guidance by the Tax Office, which is publicly available. We note the very positive comments in the Inspector-General's report at paragraphs 2.25 to 2.27 in reference to these publications.

5.67 Notwithstanding our position, we agree to seek independent legal advice on the meaning of GAP.

5.68 In the course of the review, your officers asked Tax Office staff a series of questions about particular documents, including whether the document evidenced a GAP in relation to the matters dealt with in that document. Your report sets out a summary based on the responses to this question. In some instances, we considered that the summarised responses needed clarification. Consequently, we provided supplementary material to ensure that our position is clear.

5.69 Given this, we accept that there is room to further clarify the nature of GAP for our staff and accordingly will supplement our existing guidance on this matter, as you have recommended, subject to the legal advice received.

Inspector-General's comments on Tax Office response

5.70 The Tax Office has partly agreed with this key recommendation. If the Tax Office were to acknowledge that key examples of its non-binding published advice (such as the supplement to TaxPack and the annual guidebook on rental properties)

represent its 'general administrative practice' under the law, any changes to this advice would only have a retrospective impact on taxpayers in cases where the advice has been exploited or has been the subject of tax avoidance. The Inspector-General considers that such an acknowledgement would increase certainty, efficiency and community confidence in the tax system.

5.71 Whilst the Tax Office has not made this acknowledgement, it has agreed to seek independent legal advice on the meaning of the term 'general administrative practice'. This may lead to closer alignment between the respective views of the Tax Office and the Inspector-General. The Tax Office has also agreed to issue further guidance to its staff on the meaning of this term after receiving this advice.

Possible legislative approaches

5.72 Further legislative changes to the rulings regime are one way to bring current Tax Office practices more into line with the aim of the RoSA review changes.

5.73 The IGT has not, at this stage, explored this option in detail, but notes that this could be a matter explored at a later time, in the light of the Tax Office's response to this review.

5.74 In this context, one possible legislative option to address the Tax Office's reluctance to define what is or is not GAP has been raised by one tax professional body in a submission they made to the original exposure draft legislation which introduced the 2006 rulings regime. This would be to introduce into the rulings law an objective set of criteria of what is/is not a 'general administrative practice'.³⁵

5.75 Another option would be to amend the law so that the Tax Office is obliged to forego prior period tax, penalties and interest in cases where a taxpayer has relied on advice to the public that has been published by the Tax Office.

35 Taxation Institute of Australia, submission to the Department of Treasury on Exposure Draft of Taxation Laws Amendment (Improvements to Self Assessment) Bill (No. 2), 29 June 2005.

APPENDIX 1: TERMS OF REFERENCE AND CONDUCT OF THE REVIEW

TERMS OF REFERENCE

A1.1 On 12 October 2007 the Inspector-General announced the terms of reference for his review of the Tax Office's administration of public binding advice. The terms of reference for this review were as follows:

This review will examine the extent to which the Tax Office has met expectations by making its advice legally binding for a wider range of topics, while balancing appropriate risk management considerations with the aim of improving certainty. It will also examine the relationship between concepts such as 'general administrative practice', 'general guidance' and 'legally binding advice'.

Conduct of review

A1.2 The Inspector-General advertised the review on his website, www.igt.gov.au, from 12 October 2007. 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, with representatives of various professional bodies representing lawyers and accountants and with Treasury officers.

A1.5 During the review, all Tax Office rulings, determinations and practice statements which related to income tax issues and which were issued after 1 January 2006 were examined to determine the extent to which these documents replaced Tax Office material that was issued pre 1 January 2006. The review also examined a number of ATO interpretative decisions issued after this date for the same reason.

A1.6 The 1 January 2006 date was chosen because this was the date on which the changes to the rulings law as a result of the Government's Review of Aspects of Income Tax Self Assessment (RoSA) came into effect.

A1.7 The Commissioner of Taxation was asked to provide information and documents relevant to the review. Visits were made to the Tax Office's National Office in Canberra to interview relevant Tax Office staff.

A1.8 The review also took into account a number of other inquiries relevant to this review.

APPENDIX 2: TAX OFFICE'S RESPONSE TO THE REVIEW



Australian Government
Australian Taxation Office

SECOND COMMISSIONER OF TAXATION

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

Dear Ali

Thank you for your final report on the review of the Tax Office's administration of public binding advice provided on 18 March 2009.

The Tax Office responses to your specific recommendations are at Attachment 1.

As you will see, we disagree with some of the report's findings and recommendations and this requires some comment.

Compliance with outcomes of the Review of Self Assessment

Your report claims that the Tax Office is not giving full effect to changes to the law arising from the Review of Self-Assessment (ROSA).¹ We strongly reject this claim. We consider our administration of the post-ROSA system for advice has been entirely consistent with the recommendations of the ROSA report and legislation, and demonstrates our commitment to providing appropriate and useful advice and guidance for taxpayers.

ROSA and the resulting law clearly envisaged two main forms of Tax Office advice:

- Legally binding, where taxpayers who reasonably rely on it would be protected from additional primary tax, penalties and interest, and
- Other advice (which we call guidance), where taxpayers who reasonably rely on that guidance would be protected from penalty and interest charges.

In our view this is quite logical and necessary in a self assessment environment.

Providing advice and guidance on the application of the laws administered by the Commissioner is central to the role of the Tax Office. It enables taxpayers to understand and meet their obligations and to be aware of their rights and entitlements in a self-assessment system. However, the assistance provided must be relevant to the intended audience. Plainly, the community is quite diverse when it comes to its need for assistance on taxation matters. Our experience is that most taxpayers, especially individuals and small businesses, are looking for guidance that is simply expressed and provides practical step by step assistance. This guidance does not readily lend itself to be legally binding. 'Binding' means that if the Commissioner provides favourable advice that is wrong, taxpayers who rely on that guidance are advantaged relative to those that comply with the law. That is, errors made by the Commissioner in binding material exact a high price on the community, which must forgo the related revenue.

Because of this risk, binding advice needs to be prepared rigorously and needs to be expressed in precise, often legalistic terms. While Tax Office public and private rulings provide this type of advice, they often do not meet the needs of those taxpayers seeking the

¹ ROSA here refers to the legislative changes arising from The Treasury Report on Aspects of Income Tax Self Assessment (ROSA) in August 2004, which were implemented on 1 January 2006 in respect of rulings and other Tax Office advice. These changes had been enacted by the Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005 (the ROSA law).

simply expressed guidance referred to above. Of course, as you know, any taxpayer who wants a private ruling can seek one.

General Administrative Practice

This brings me to what I see as the most significant recommendation of your report – key recommendation 4 - especially that part which calls for many of our publications to be declared as our general administrative practice (GAP). With this, we disagree.

The existence of a GAP is a question of fact to be determined having regard to all the facts and circumstances at the relevant time. While a Tax Office publication may evidence a GAP, and be one of the circumstances taken into account in determining whether a GAP exists, it is the consistent actions of the Commissioner in an appropriate number of instances that determine the existence or otherwise of a GAP, not the existence of a particular document. This view is supported by the explanation of GAP in the Explanatory Memorandum (EM) to the ROSA legislation and is reflected in our discussion of this issue in TR 2006/10, our public ruling on the post-ROSA public rulings system.

Consequently, simply declaring a publication as representing a GAP cannot of itself confer GAP status on a particular practice or course of action; nor can the absence of such a declaration effectively deny GAP status to a practice described therein. Rather, the existence of a GAP is an objective matter of fact in each specific instance, to be considered on a case by case basis as and when the question might arise.

In addition, we consider that to declare publications as GAP runs counter to the intent of ROSA. We consider that the thrust of ROSA is that we be clear about the level of protection that applies to taxpayers who reasonably rely in good faith on information contained in our publications. We consider that this has been achieved by specifying the level of protection on each publication. We also consider that the framework established by ROSA identified a public ruling as the vehicle for the Commissioner to provide legally binding public advice.

The Tax Office has publicly expressed its view of how the ROSA law applies, including an explanation of GAP, in Taxation Ruling TR 2006/10. A further explanation of the post-ROSA framework, for the provision of Tax Office advice and guidance, including public rulings, is provided for Tax Office staff in Law Administration Practice Statement PS LA 2008/3, Provision of advice and guidance by the Tax Office, which is publicly available. We note the very positive comments in the Inspector-General's report at paragraphs 2.25 to 2.27 in reference to these publications.

Nevertheless, we accept that there is room to further clarify the nature of GAP for our staff and accordingly will supplement our existing guidance on this matter, as you have recommended. However, before doing so, we will also take on board your recommendation to seek independent legal advice on the meaning of GAP.

Key Recommendation 2 – TR, TD and MT series rulings which are not legally binding

We disagree with your recommendation to change the title of some past rulings that are not legally binding. We are not aware of any confusion as to the status of these documents, and we consider that implementing your recommendation would add to, rather than reduce, any perceived confusion. Tax Office formal series rulings contain a preamble which is clear and unambiguous in identifying the status of the document, including whether it is legally binding or, where not legally binding, the extent to which the Tax Office will stand by the contents. Post-ROSA, these formal series rulings also carry a statement which clearly sets out the level of protection that applies where the contents are relied upon.

Nevertheless, going forward, the Tax Office will make appropriate further enhancements to the existing page status label in its formal series of public rulings to address any perceived confusion about the binding nature of the material on any particular page.

You will also note we disagree with parts of Subsidiary Recommendations 1 and 2 and I refer you to the commentary in the Attachment.

Additional comments

Some other findings that we take issue with are

- that an increase in the number of practice statements issued by the Tax Office supports the assertion that some Tax Office advice is becoming more 'limited, cautious and conditional' (paragraph 2.37). We consider this statement to be incorrect and misrepresents the nature of our practice statements. Practice statements are instructions to tax officers on approaches to be taken in performing technical work. Practice statements do not instruct staff on interpretational issues and are not 'precedential ATO views' under PS LA 2003/3. Therefore, an increase in the overall number of practice statements being issued is not an indicator of any trend in the amount of interpretative material being issued. Rather, we consider this increase to be a positive move in providing comprehensive guidance to our staff to ensure consistency in the manner in which our technical work is performed.
- that a replacement ruling on sale and lease backs (TR 2006/13) is somehow less binding than the ruling which it replaced (TR 95/30) (paragraphs 2.41). The reason given for this conclusion is that whereas only the Ruling section of TR 2006/13 is labelled as legally binding, the preamble to TR 95/30 effectively operated so that the entire document, not just the Ruling section, was capable of being a public ruling. The difference in wording merely reflects changes to the wording of our preambles following Federal Court comments in the *Bellinz* case. Moreover, our view is that the change to the preamble does not mean that there is in fact any difference in the binding content of each ruling. Regard would still have had to be given to whether the material in TR 95/30 was *capable* of being binding, according to the terms of the rulings provisions applying at that time. We note that no specific examples have been given of material contained in TR 2006/13 that is potentially less binding than the equivalent material in TR 95/30, nor are we aware of any such material.

Thank you for the opportunity to provide this response to your report.

Yours sincerely



Bruce Quigley

Second Commissioner

27 March 2009

APPENDIX 3: HISTORY OF AUSTRALIA'S SYSTEM FOR PUBLIC ADVICE ON INCOME TAXATION MATTERS

A3.1 The beginning of Australia's current public rulings system can be traced back to 1982. The first official taxation ruling of the Income Tax (IT) series (IT 1) was issued on 6 December 1982 to coincide with the commencement of the *Freedom of Information Act 1982*.

A3.2 IT 1 stated that a taxation ruling would be issued for any decision which satisfied the following three criteria:

- it provides an interpretation, guideline, precedent, practice or procedure to be followed in making a decision that affects the rights or liabilities of taxpayers; and
- it establishes a new or revised interpretation of the ATO's administration of the tax laws; and
- it affects all taxpayers or a section of the tax-paying community, that is, not simply an individual instance.

A3.3 In 1986 section 169A of the *Income Tax Assessment Act 1936* was introduced. This section allowed taxpayers to ask the Tax Office specific questions on their tax returns. Section 169A determinations were the precursor to a private rulings system.

A3.4 From 1982 to 1992 Tax Office public rulings were numbered as being part of either an 'IT' or 'MT' series. The legal basis for these public rulings was the Commissioner's general powers of administration. IT 1 said that rulings could be overruled by legislative amendment to the law or by decision of an appellate tribunal.

A3.5 In 1992 the Government introduced a full self assessment system for income tax. At this time, a specific legislative regime for both public and private rulings was introduced. This regime allowed the Commissioner to issue both public and private rulings which were legally binding on the Commissioner but not on taxpayers. This meant that the Commissioner could not levy additional primary tax, penalties and interest if the advice in the ruling was wrong and a taxpayer had followed that advice.

A3.6 From this time income tax rulings were numbered as being part of the 'TR' series to distinguish them from pre 1992 non-binding rulings. Rulings which the Tax Office considered could not be made legally binding continued to be issued as part of a 'MT' series.

A3.7 The 1992 legislative regime for rulings only applied to Tax Office advice that met the legislative requirements of being either public or private rulings. The regime did not expressly deal with non-rulings forms of Tax Office advice. However, the regime did contain a provision (section 284-215 of Schedule 1 of the TAA 1953),

located in the penalties provisions, which had the effect that no penalty would be payable to the extent that it resulted from a taxpayer or their agent treating the law in a particular way and:

- (c) that way agrees with:
 - (i) advice given to you or your agent on or behalf of the Commissioner; or
 - (ii) general administrative practice under that law; or
 - (iii) a statement in a publication approved in writing by the Commissioner.

A3.8 In 1998 a system of product rulings was established. Product rulings are binding public rulings about a product such as an investment arrangement, a tax-effective arrangement, a financial arrangement, or an insurance arrangement. In 2001 a system of class rulings was established. Class rulings are binding public rulings issued to a specific class of persons, in relation to a particular matter.

A3.9 In 2001 the Tax Office, in response to the recommendations of an internal review conducted by Mr Tom Sherman³⁶, also commenced a process of publishing on its website the content of private binding rulings. The published content of these rulings was edited to remove any material (such as names) which could identify the taxpayers to whom the relevant ruling had been issued.

A3.10 In 2006, following Treasury's 2004 Report of Aspects of Income Tax Self Assessment (RoSA), the legislative provisions dealing with public and private rulings were completely replaced. The new provisions aimed to:

- improve certainty through providing a better framework for the provision of Tax Office advice and introducing ways to make that advice more timely, accessible and binding in a wide range of cases.³⁷

A3.11 The new legislative regime for rulings expanded the circumstances in which the Commissioner could give legally binding advice in the form of a ruling to cover matters of administration, collection and ultimate conclusions of fact.

A3.12 The law was also amended to give protection to taxpayers from interest charges where they relied on Tax Office advice or a general administrative practice that was not a ruling.

A3.13 This protection is contained in the present section 361-5 of Schedule 1 of the TAA 1953. This section operates to prevent interest being levied where a tax shortfall is a result of:

- (a) you reasonably relying in good faith on:

³⁶ 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.

³⁷ Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 – Second Reading Speech by Senator the Hon Chris Ellison, 7 December 2005.

- (i) advice (other than a ruling) given to you or your agent by the Commissioner; or
 - (ii) a statement in a publication approved in writing by the Commissioner;
- unless the advice, or the statement or publication, is labelled as non-binding; or

(b) you reasonably relying in good faith on the Commissioner's general administrative practice.

A3.14 The legislative provision which, under the former regime, gave protection to taxpayers from penalties if the advice was wrong, (section 284-215 of Schedule 1 of the TAA 1953) was not changed and therefore continues to apply under the new rulings regime.

A3.15 The new legislative rulings regime also contained a provision which, according to the RoSA review was designed to ensure that where the Tax Office changed a longstanding practice to the detriment of taxpayers that change should take effect from a future date. This was so as to allow affected taxpayers reasonable time to become aware of, and act upon, the change.³⁸

A3.16 This new provision operates to give taxpayers protection against the payment of primary tax in situations where a general administrative practice of the Commissioner has been changed by a public ruling. It is contained in subsection 358 – 10(2) of the TAA 1953, which states that:

A public ruling that relates to a scheme does not apply to you if the scheme has begun to be carried out when the ruling is published and:

- the ruling changes the Commissioner's general administrative practice; and
- the ruling is less favourable to you than the practice.

A3.17 This provision replaced an administrative practice of the Tax Office that has applied since 1992 that any public ruling less favourable to taxpayers which contradicted or overruled a long standing Tax Office practice would usually only have future application.³⁹

38 The Treasury, *Report on Aspects of Income Tax Self Assessment*, August 2004, Commonwealth of Australia recommendation 2.6 at page 13.

39 This administrative practice is referred to in TR 92/20 at paragraph 16.

APPENDIX 4: PUBLIC AND PRIVATE RULINGS SYSTEMS OF SELECTED OTHER COUNTRIES

NEW ZEALAND

Types of binding rulings

A4.1 New Zealand's binding rulings system was introduced in 1995.

A4.2 The Inland Revenue Department (IRD) can issue three types of binding rulings on the interpretation of tax laws: public rulings, private rulings and product rulings. Additionally the IRD will issue binding status rulings to taxpayers who have applied for and obtained private or product rulings and who require certainty on the effects of legislative change to their ruling(s).

A4.3 The legislative basis for all these types of rulings is sections 91A-91J of the Tax Administration Act 1994.

A4.4 The IRD charges fees for private, product and status rulings.

A4.5 Binding private rulings can be on proposed, current and/or completed arrangements. However, proposed arrangements must be at least 'seriously contemplated' by the parties involved.

A4.6 Private rulings are not published, even in a sanitised form. However, public and product rulings are published in the IRD's *Tax Information Bulletin*. This bulletin is available on the IRD's website.

A4.7 Binding private rulings are not disputable decisions that can be challenged through the IRD's dispute resolution process.

A4.8 The IRD cannot issue binding rulings on matters involving the IRD's rights or obligations to exercise powers regarding the administration of the tax system, that is, it cannot issue binding rulings on matters involving the imposition or remission of penalties or prosecution or debt recovery.

A4.9 Private rulings cannot be issued on questions of fact, or if the ruling would require the Commissioner to form an opinion as to a generally accepted accounting practice or to form an opinion as to a commercially acceptable practice.

A4.10 Public rulings are created by a Public Rulings unit which is within the Office of Chief Tax Counsel of the IRD. Draft public rulings are subject to public consultation which generally runs for a minimum of six weeks.

Binding status of public rulings

A4.11 Public rulings are legally binding on the Commissioner of Inland Revenue. This means the IRD must apply taxation law relating to the person and/or arrangement in question in accordance with the ruling, provided the taxpayer has chosen to rely on that ruling in relation to their arrangement. If a public ruling is withdrawn, the Commissioner is still bound to apply the ruling to the related arrangement provided it has been entered into prior to the date of withdrawal, either for the remainder of the period or tax year specified in the ruling, or for three years after the date stated in the notice of withdrawal.

A4.12 For this reason, it is standard practice to set the period for which a public ruling is valid as either three or five years in the first instance. Once this period is up, the issues addressed in the ruling are re-considered before the ruling is published again. After a ruling has been issued once, the IRD will consider re-issuing it for an indefinite period if the relevant law is considered 'settled' and no substantial changes had to be made when re-considering the issues.

A4.13 This means that as long as the ruling remains in force (that is, it is not withdrawn), taxpayers are protected from the effects of penalties and interest should they choose to rely on that ruling.

CANADA

A4.14 The Canada Revenue Agency (CRA) issues two broad types of guidance on the interpretation of its income tax laws: guidance which is provided to specific taxpayers and guidance which is provided to the public generally.

A4.15 Guidance provided to specific taxpayers will generally take the form of either an advance income tax ruling or a technical interpretation. The income tax laws of Canada do not require the CRA to issue advance income tax rulings or interpretations.

A4.16 Guidance provided to the public consists of Interpretation Bulletins, Information Circulars, various guides, website material and a newsletter, published on an ad hoc basis, called Income Tax Technical News. The last Interpretation Bulletin was issued in 2005.

A4.17 The advance income tax ruling process has been in place since 1970 and applies when a taxpayer seeks advice on a proposed transaction. The technical interpretations process applies when a taxpayer seeks general interpretive assistance with respect to the Income Tax Act or the Income Tax Regulations.

A4.18 The CRA charges a cost recovery fee for advance income tax rulings. No fees are charged for technical interpretations.

A4.19 All advance income tax rulings are released to the public in a sanitised form. This is done via third party tax publishers who charge a subscription fee for accessing this material and produce bilingual versions.

A4.20 Publication of advance income tax rulings is done for information purposes only. Advance income tax rulings can be relied upon by other taxpayers only if the facts are identical to the proposed transactions in the advance rulings. However, similar transactions often have different facts.

A4.21 The CRA does not issue advance rulings in various situations, some of which include:

- whether a transaction is income or capital;
- where the transaction involves a determination of a fair market value; or
- where the matter involves a question of fact.

A4.22 Advance income rulings are regarded as administratively binding upon the CRA. Technical interpretations are not binding on the CRA.

A4.23 Interpretation Bulletins, Information Circulars and the Income Tax Technical News do not have the force of law but can be generally relied upon to reflect the CRA's interpretation of the relevant law in force at the time of their publication.

A4.24 In Canada, if a taxpayer relies on an interpretation set out in a document published by the CRA and that interpretation is wrong, tax will be assessed but penalties and interest will generally be waived or cancelled.⁴⁰

SINGAPORE

A4.25 A binding private rulings system (called an advance private rulings system) was introduced in 2006. There is no binding public rulings system, although the Inland Revenue Authority of Singapore (IRAS) publishes its general practices and treatments in the form of electronic tax guides on its website.

A4.26 The legislative basis for the advance private rulings system is section 108 and the Seventh Schedule of the Singapore Income Tax Act.

A4.27 Fees are charged for advance private rulings on a cost recovery basis.

A4.28 Advance private rulings are not published, even in a sanitised form, and are not subject to the appeal process provided in the Singapore Income Tax Act.

A4.29 The IRAS will issue private advance rulings on a wide range of tax issues for business arrangements. However, private advance rulings will not be issued where the proposed ruling involves:

- the application of tax law which is well established;
- issues that do not require an interpretation of the tax law;

⁴⁰ See: Canada Revenue Agency, Income Tax Information Circular IC07-1, dated 31 May 2007.

- a confirmation of administrative procedures;
- a refund or waiver of penalties; or
- issues involving tax treaty considerations.

A4.30 Advance private rulings can only be issued for proposed transactions.

A4.31 Taxpayers are required to indicate on tax returns that an advance private ruling has been obtained and whether the taxpayer has relied on the ruling in completing the return.

UNITED STATES OF AMERICA

A4.32 In the USA there are two broad types of guidance on the US tax code: public guidance and private guidance.

Public guidance

A4.33 Public guidance consists of regulations (issued jointly by the US Treasury and US Internal Revenue Service (IRS)) and revenue rulings, revenue procedures, notices and announcements (issued by the IRS).

A4.34 Regulations do not have the force and effect of law but are the most authoritative source for interpreting the US tax code. By law, they generally cannot operate retrospectively. Regulations are prepared cooperatively by the IRS and Treasury and are submitted to the public for comment. The courts generally uphold Treasury regulations if they are a reasonable interpretation of the tax code. This means courts give regulations a great deal of deference in interpretative matters.

A4.35 Revenue rulings, revenue procedures, notices and announcements are generally issued by the IRS without any public input.

A4.36 The IRS issues revenue rulings on interpretative matters if the issue is common to a number of taxpayers. Unlike regulations, revenue rulings can be retrospective in operation. The IRS states that it will be bound by revenue rulings. Courts will also give some weight to these rulings.

A4.37 Revenue procedures are IRS statements of the procedures that affect taxpayers under the US tax code. Two examples of matters dealt with in these statements are how to calculate certain entitlements and what constitute safe harbours in matters involving examination by IRS personnel. Substantive revenue procedures are binding on the IRS in the same manner as revenue rulings are.

A4.38 Notices and announcements by the IRS deal with a wide variety of matters including the provision of interim guidance on matters that are likely to be finalised at a later date. These documents can be binding on the IRS but these types of documents will generally state whether this is the case.

Private guidance

A4.39 In the US there are five main types of private guidance: private letter rulings issued to taxpayers, technical advice memoranda, closing agreements and other specialised documents such as advance pricing agreements and pre-filing agreements.

A4.40 Private letter rulings are issued prior to the date of lodgement of a return. Technical advice memoranda are issued after the date of lodgement of a return by the IRS's technical area in response to requests by IRS auditors. Closing agreements are agreements which resolve issues permanently and are usually entered into at the conclusion of an audit, although they can be made at any time. Advance pricing agreements resolve transfer pricing issues involving multinational companies for future years. Pre-filing agreements are agreements entered into with taxpayers prior to the lodgement of a return.

A4.41 Private letter rulings have been published by commercial publishers in a sanitised form since the late 1970s. Taxpayers must pay for them on a flat fee basis.

A4.42 Private letter rulings will not be issued on certain subject matters. These subject matters are published in annual revenue procedures.

A4.43 By law, a private letter ruling may not be relied on as precedent by other taxpayers or by IRS personnel. However, they are considered binding on the IRS in respect of the taxpayer to whom they are issued if the taxpayer has fully and accurately described the proposed transaction in the original request for ruling and carries out the transaction as described.

UNITED KINGDOM

A4.44 The United Kingdom does not have a public rulings process. However, where there has been a change of policy as the result of legislation, litigation or internal policy review the UK revenue authority, HM Revenue & Customs (HMRC) will normally publish on the internet a Revenue and Customs Brief. HMRC also provides other guidance on aspects of the tax system in the form of internet pages and printed leaflets.

A4.45 HMRC provides telephone help lines both for business and individual taxpayers to assist them in understanding and meeting their obligations. HMRC also provides written advice to taxpayers on areas of the law that are unclear. There are separate systems in place for business and non-business taxpayers. For businesses, a new process called 'non statutory clearances' has been in place since April 2008. A non-statutory clearance is written confirmation of HMRC's view of the application of tax law to a specific transaction or event.

A4.46 A taxpayer is under no obligation to act on a clearance, for example when completing their return, as it merely constitutes advice. Clearances are also not appealable (apart from where a specific appeal right exists in statute – for example certain VAT clearances may constitute a decision which is appealable under the

VAT Act 1994) and are never made public. HMRC do not charge for providing a clearance.

A4.47 A clearance will only be provided where:

- there is genuine uncertainty as to the tax treatment to which the request relates (that is, it is not covered by HMRC's published guidance);
- (for business clearances) the transaction is of commercial significance to the taxpayer in question.

A4.48 HMRC will not issue clearances that do not meet these criteria or in the following circumstances:

- where the clearance is an attempt at tax avoidance or evasion;
- where the clearance is an iterative response to a previous ruling;
- where it relates to transfer pricing or pre transaction salary sacrifice schemes and valuations.

Binding status of advice issued by HMRC

A4.49 HMRC has issued a guidance document which sets out where taxpayers can rely on information or advice provided by HMRC. The principles set out in this document do not distinguish between advice that is given in writing, provided in the form of guidance on the internet or given in person over the phone or via email. The principles of where the taxpayers can rely on the advice they have received are therefore the same for all forms of guidance and communication.

A4.50 The law that governs where taxpayers can rely on advice is administrative law (chiefly established in case law⁴¹).

A4.51 HMRC's guidance document states that its primary duty is to collect tax according to the statute. This duty may mean that it is no longer bound by advice it has given. This could occur in the following circumstances:

- for pre-transaction advice, where the nature of the transaction changes in a way that has a material impact on the transaction as a whole;
- where the taxpayer provides incorrect or incomplete information;
- where a court or tribunal changes the prevailing interpretation of the law and the taxpayer's liability to tax has not been finalised;
- where the relevant statutory law changes.

⁴¹ For an explanation of some of the principles that the courts apply see the case of: *R (on the application of Bamber) v Revenue and Customs Commissioners* (No. 2) [2007] EWHC 798 (Admin).

A4.52 The guidance statement also states that if information or advice provided by HMRC is incorrect in law, HMRC will be bound by such advice provided that it is clear, unequivocal and explicit and the taxpayer can demonstrate that:

- they reasonably relied on the advice;
- where appropriate, they made full disclosure of all the relevant facts;
- the correct application of the law would result in the taxpayer's financial detriment. Financial detriment means that a taxpayer who received incorrect advice would be financially worse off than a taxpayer who received correct advice.

A4.53 Where a taxpayer has made a return in accordance with an incorrect ruling, HMRC will not seek penalties, where the penalty is dependent on the presence of negligence by the taxpayer.

APPENDIX 5: EXTRACTS FROM 2007 AND 2008 TAXPACKS

2008 TaxPack

Our commitment to you

TaxPack 2008 is a public ruling for individuals who use it reasonably and in good faith to complete their 2008 personal tax return. This means that if we state the law incorrectly, or our advice on the application of the law is incorrect and as a result you do not pay enough tax, we will not ask you to pay the extra tax.

TaxPack 2008 also contains guidance to help you complete your tax return. If any of our guidance in TaxPack 2008 is incorrect or misleading and as a result you do not pay enough tax, we may ask you to pay the extra tax, but we will not charge you a penalty. Also, if you acted reasonably and in good faith we will not charge you interest.

If our advice in TaxPack 2008 is misleading and you make a mistake as a result, we must still apply the law correctly. If that means you owe us money, we must ask you to pay it, but we will not charge you a penalty. Also, if you acted reasonably and in good faith we will not charge you interest.

If you make an honest mistake when you try to follow our advice and guidance in TaxPack 2008 and you owe us money as a result, we will not charge you a penalty. However, we will ask you to pay the money, and we may also charge you interest. If correcting the mistake means we owe you money, we will pay it to you. We will also pay you any interest you are entitled to.

2007 TaxPack

Our commitment to you

We are committed to providing you with advice and information you can rely on and we make every effort to ensure that our advice and information is correct.

TaxPack 2007 is a public ruling for individuals who use it reasonably and in good faith to complete their 2007 personal tax return. This means that if we state the law incorrectly and as a result you do not pay enough tax, we will not ask you to pay the extra tax.

If any other information in TaxPack 2007 is incorrect and as a result you do not pay enough tax, we may ask you to pay the extra tax. However, we will not charge you a penalty or interest. If our advice in TaxPack 2007 is misleading and you make a mistake as a result, we must still apply the law correctly. If that means you owe us money, we must ask you to pay it. However, we will not charge you a penalty or interest if you acted reasonably and in good faith.

If you make an honest mistake when you try to follow our advice and you owe us money as a result, we will not charge you a penalty. However, we will ask you to pay the money, and we may also charge you interest.

If correcting the mistake means we owe you money, we will pay it to you. We will also pay you any interest you are entitled to.

APPENDIX 6: ABBREVIATIONS

ABN	Australian Business Number
ACN	Australian Company Number
AR	Annual Report
ATO	Australian Taxation Office
ATO ID	ATO Interpretative decision
ATP	Aggressive Tax Planning
ATR	Australian Tax Reports
BSL	Business Service Line
CRA	Canada Revenue Agency
Commissioner	Commissioner of Taxation
EM	Explanatory Memorandum
EXC	Excise
FCT	Federal Commissioner of Taxation
GAP	General administrative practice
GIC	General interest charge
GST	Goods and services tax
HMRC	HM Revenue & Customs
IGT	Inspector-General of Taxation
IGT Act	<i>Inspector-General of Taxation Act 2003</i>
Inspector-General	Inspector-General of Taxation
IRAS	Inland Revenue Authority of Singapore
IRD	Inland Revenue Department
IRS	Internal Revenue Service
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
MT	Miscellaneous Tax Ruling

Abbreviations (continued)

NTLG	National Tax Liaison Group
Ops	Operations
PAYG	Pay-As-You-Go
PS	Practice Statement
PS LA	Practice Statement Law Administration
PS LA (GA)	Practice Statement Law Administration (General Administration)
RoSA	Review of Aspects of Self Assessment
S&ME	Small and medium enterprises
SPR	Superannuation
TAA 1953	<i>Taxation Administration Act 1953</i>
TCN	Tax Counsel Network
TD	Taxation Determination
TLAB	Tax Law Amendment Bill
Tax Office	Australian Taxation Office
TR	Taxation Ruling