

**Review into the Australian Taxation  
Office's compliance approach to  
individual taxpayers —  
superannuation excess contributions tax**

A report to the Assistant Treasurer

Inspector-General of Taxation  
March 2014

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28 March 2014

Senator the Hon Mathias Cormann  
Acting Assistant Treasurer  
Parliament House  
Canberra ACT 2600

Dear Minister

**Review into the Australian Taxation Office's Compliance Approach to Individual Taxpayers –  
Superannuation Excess Contributions Tax**

I am pleased to present you with my report of the above review which is one of three concurrent reviews examining aspects of the Australian Taxation Office's (ATO) compliance approach to individual taxpayers.

I have made two recommendations for the Government to consider regarding the superannuation excess contributions tax (ECT) regime. One of these recommendations is aimed at situations where taxpayers exceed the concessional or non-concessional caps through matters beyond their control or a genuine mistake whilst the other recommendation targets excess non-concessional contributions more generally.

Nine other recommendations have been made which, in the main, seek to improve the administration of the ECT through further ATO assistance being provided to taxpayers in monitoring their contribution levels. The ATO has agreed in full, in part or in principle with eight of these nine recommendations. The ATO has disagreed with a specific recommendation directed at the *de minimis* concession.

I offer my thanks for the support and contribution of taxpayers, tax professionals and their representative bodies as well as superannuation funds and associations. I also thank the relevant ATO and Treasury officers for their professional cooperation and assistance in this review as well as officers of other Government agencies, such as the Commonwealth Ombudsman.

Yours faithfully

[SIGNED]

Ali Noroozi  
Inspector-General of Taxation



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## EXECUTIVE SUMMARY

The Inspector-General of Taxation's (IGT) review into the ATO's administration of the superannuation excess contributions tax (ECT) is one of three concurrent reviews examining aspects of the ATO's compliance approach to individual taxpayers.

The ECT regime commenced operation on 1 July 2007 and was intended to 'improve retirement income' and 'improve incentives to work and save'. The regime did so by 'capping' the amount of contributions which may be made by, or on behalf of, a taxpayer. Where the relevant caps were exceeded, the ECT would be imposed on the taxpayer.

Submissions to the IGT indicated a high degree of dissatisfaction with the regime, contending that it was not operating as intended and imposed a disproportionately adverse impact on taxpayers. Stakeholders noted that although the ECT regime was not originally intended to raise any revenue, ATO statistics show that over 100,000 taxpayers had received ECT assessments, raising more than \$550 million in revenue.

During the course of the review, the law was changed to treat excess concessional contributions as assessable income to be taxed at the taxpayer's marginal tax rate. This legislative change addressed certain stakeholder concerns. However, the corresponding law was not changed for excess non-concessional contributions. The IGT observed that while a smaller population of taxpayers exceeded the non-concessional contributions cap, the impact on these taxpayers was more severe. Moreover, the ATO's statistics showed that across all years, approximately half of taxpayers who exceeded their non-concessional contributions cap were within the lowest taxable income range.

Accordingly, the IGT has recommended that the Government consider whether the current treatment of excess non-concessional contributions should be aligned with that of excess concessional contributions to minimise adverse impacts on affected taxpayers.

The IGT has also observed that the ECT regime imposes a significant information monitoring burden on taxpayers and does not sufficiently accommodate particular instances of inadvertent breaches of the caps. Such breaches may be due to genuine mistake, not being able discharge the information monitoring burden despite reasonable efforts or otherwise as a result of third party or adviser error. The scope of the present Commissioner's discretion to disregard or reallocate excess contributions appears very narrow and does not provide relief in these situations. As a result, the IGT has also recommended that the Government consider whether the law accommodates taxpayers appropriately in these circumstances.

Taxpayers also raised concerns regarding the timeliness of the ATO's detection and notification of excess contributions as it affected their ability to take corrective action. Indeed, in certain instances, up to 45 months may elapse between the taxpayer making the contribution and the ATO informing them of an excess contribution. Such delays give rise to a higher risk of repeated excess contributions, compounding the adverse impacts on taxpayers. The IGT has recommended that the ATO improve the timeliness of excess contribution detection, ensure taxpayers are notified of excess contributions within six months of the ATO receiving all relevant information and ensure that taxpayers who trigger the 'bring forward' provision are notified earlier to minimise the risk of ECT liability in later years.

Given the onerous monitoring obligations and the consequences of failing to properly fulfil these obligations, the IGT has identified an opportunity for the ATO to assist taxpayers through its *de minimis* process whereby ECT assessments are not issued to taxpayers where the excess

contribution is below a certain pre-set threshold. While stakeholders were generally supportive of this ATO approach, the lack of public information gave rise to some perceptions of inconsistency.

As a result, the IGT has recommended that the ATO improve the transparency of its *de minimis* process and to ensure that taxpayer benefiting from this *de minimis* approach are aware of their contribution levels and the need to take more care in the future to avoid a breach. The ATO has disagreed with this specific recommendation but has indicated more broadly that it is committed to helping taxpayers avoid exceeding the caps inadvertently. Moreover, the ATO is of the view that other IGT recommendations in the report, once implemented, should assist to mitigate the risks of inadvertent excess contributions being made.

The IGT has also identified improvement opportunities in other areas of ECT administration and has made recommendations directed at:

- improving publicly available advice and guidance by reviewing and updating materials on the ATO website;
- promoting the use of administratively binding advice where private rulings are not available;
- assisting taxpayers and superannuation funds to address potential errors in reported superannuation fund data; and
- user-testing the effectiveness of the ATO's standardised correspondence to taxpayers and encouraging direct engagement between ATO staff and taxpayers.

The IGT has made a total of 11 recommendations. Two are directed to the Government and nine are directed to the ATO. The ATO has agreed in full, in part or in principle with eight recommendations and disagreed with one. Whilst there is one point of disagreement, the effective implementation of the agreed recommendations should result in significant and enduring benefits.

# CHAPTER 1 — BACKGROUND

## CONDUCT OF THE REVIEW

1.1 This is the report of the Inspector-General of Taxation's (IGT) review into the Australian Taxation Office's (ATO) administration of the superannuation excess contributions tax (ECT). The report is produced pursuant to section 10 of the *Inspector-General of Taxation Act 2003* (IGT Act 2003).

1.2 This review is one of three concurrent reviews examining aspects of the ATO's compliance approaches to individual taxpayers. The other reviews look at the ATO's income tax refund integrity program<sup>1</sup> and its use of data matching.<sup>2</sup>

1.3 During public consultation for the IGT's 2012-13 work program, a large number of stakeholders raised concerns with the ATO's administration of the ECT. The IGT commenced this review in response to those concerns and pursuant to section 8(1) of the IGT Act 2003. The IGT undertook further community consultation to better understand these stakeholder concerns, which are reflected in the terms of reference issued on 20 November 2012 and reproduced in Appendix 1.

1.4 The IGT received a large number of submissions, many of which were from taxpayers affected by the ECT. Submissions were also received from tax agents and their respective representative bodies, legal practitioners, superannuation funds and their respective industry associations. The IGT also met with interested stakeholders to better understand their experience in dealing with the ATO on different aspects of the ECT. The main concerns which emerged through submissions and meetings with stakeholders were that:

- the ECT disproportionately penalises taxpayers for genuine mistakes or matters beyond their control;
- there are difficulties associated with determining the accuracy of information relied on by the ATO to identify excess contributions and the channels through which such information could be corrected where taxpayers felt there were errors or inaccuracies;
- the ATO is adopting an inconsistent and narrower approach in relation to the Commissioner's discretion to disregard or reallocate excess contributions than is warranted by the legislation;
- there is insufficient communication by ATO officers and limited opportunities to engage with ATO officers in relation to ECT issues; and
- there is insufficient public advice and guidance in respect of the ECT.

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<sup>1</sup> Inspector-General of Taxation (IGT), *Review into the Australian Taxation Office's compliance approach to individual taxpayers – Income tax refund integrity program*, 21 February 2014.

<sup>2</sup> IGT, *Review into the Australian Taxation Office's compliance approach to individual taxpayers – use of data matching*, 21 February 2014.

1.5 The IGT has liaised with ATO staff from the Superannuation business line who have primary responsibility for administering the ECT. In addition, the IGT examined case documents from the ATO's enterprise case management system, Siebel, to better understand taxpayer concerns in this area and analysed ATO statistics relating to performance and impact of the ECT.

1.6 The IGT has also worked progressively with ATO senior management to distil potential areas for examination and to agree on specific improvements.

1.7 In accordance with section 25 of the IGT Act 2003, the Commissioner of Taxation (Commissioner) was provided with an opportunity to make submissions on any implied or actual criticisms in this report.

## **THE SUPERANNUATION SYSTEM AND THE EXCESS CONTRIBUTIONS TAX**

1.8 The superannuation system is an integral aspect of Australia's retirement income system. It seeks to ensure that Australians save for their retirement throughout their working lives. This is achieved through a combination of superannuation contributions compulsorily made by employers which may be supplemented by taxpayers' own contributions. As part of the 2006–07 Federal Budget announcements, the Government announced significant changes to the superannuation system to 'improve retirement income' and 'improve incentives to work and save'.<sup>3</sup>

1.9 One such change was the enactment of the ECT regime,<sup>4</sup> which commenced operation on 1 July 2007, to replace the Reasonable Benefits Limit (RBL) approach which had preceded it. Whereas the RBL sought to limit the amount of concessional tax benefits which taxpayers could receive on retirement, the ECT regime limits the level of contributions made by, or for, a taxpayer which may receive concessional tax treatment. In order to manage the amount of contributions which may be made in any given year, the ECT imposes tax on contributions which exceed certain statutory limits or 'contributions caps'.

1.10 Accordingly, while the ECT does not render it unlawful for taxpayers to contribute amounts above the contributions caps, the tax imposed seeks to deter excess contributions being made in any particular financial year and provide incentive for taxpayers to save and contribute smaller sums over the course of their working lives.

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<sup>3</sup> Peter Costello MP, 'A Plan to Simplify and Streamline Superannuation' (Press Release, No. 042, 9 May 2006).

<sup>4</sup> *Tax Laws Amendment (Simplified Superannuation) Act 2007; Income Tax Assessment Act 1997 (ITAA 1997)*, div 292.

## WHAT IS A CONTRIBUTION?

1.11 As the ECT is applied to contributions made by or for an individual, it is important to understand what constitutes a ‘contribution’ for the purposes of the ECT. While the legislation does not define ‘contributions’, the ATO is of the view that:<sup>5</sup>

In the superannuation context, a contribution is anything of value that increases the capital of a superannuation fund provided by a person whose purpose is to benefit one or more particular members of the fund or all of the members in general.

1.12 The capital of a superannuation fund may be increased directly in a number of different ways, including:<sup>6</sup>

- transferring funds to the superannuation provider;
- rolling over a superannuation benefit from another superannuation fund;
- transferring an existing asset to the superannuation provider (an in specie contribution);
- creating rights in the superannuation provider (also an in specie contribution); or
- increasing the value of an existing asset held by the superannuation provider.

1.13 It is also possible to indirectly increase the capital of a superannuation fund by:<sup>7</sup>

- paying an amount to a third party for the benefit of the superannuation provider;
- forgiving a debt owed by the superannuation provider; or
- shifting value to an asset owned by the superannuation provider.

1.14 For taxpayers who are aged between 65 and 74, certain contributions may only be made where these taxpayers meet the ‘work test’. The work test is satisfied where the taxpayer works at least 40 hours during a consecutive 30-day period each financial year.<sup>8</sup>

1.15 For the purposes of the ECT, superannuation contributions are generally classified as either concessional or non-concessional contributions. Certain contributions are excluded from these classifications.<sup>9</sup> The level of concessional and non-concessional contributions which may be made by a taxpayer in a financial year is capped. Contributions above the relevant caps are subject to tax.<sup>10</sup> The nature and limits of the caps, as well as the taxation consequences for exceeding these caps are outlined below.

## Concessional contributions

1.16 Generally, concessional contributions are those made by or for taxpayers to a complying superannuation fund and forms a part of the fund’s assessable income.

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<sup>5</sup> Australian Taxation Office (ATO), *Income tax: superannuation contributions*, TR 2010/1, para [4].

<sup>6</sup> Above n 5, para [10].

<sup>7</sup> *ibid*, para [11].

<sup>8</sup> *Superannuation Industry (Supervision) Regulations 1994*, reg 7.01(3).

<sup>9</sup> For example, government co-contribution payments and contributions made to a constitutionally protected fund.

<sup>10</sup> ITAA 1997, ss 291-15, 292-15, 292-80.

1.17 Concessional contributions include:<sup>11</sup>

- compulsory superannuation guarantee (SG) payments made by employers for eligible employees;
- any additional pre-tax superannuation contributions made by employers;
- salary sacrifice payments made into superannuation funds;
- any other amounts made from a taxpayer's pre-tax income to their superannuation fund, such as administration fees or insurance premiums;
- deductible contributions made by self-employed taxpayers;
- notional contributions for members of defined benefit funds;
- some amounts allocated from superannuation fund reserves; and
- before-tax contributions which are split and given to the taxpayer's spouse.

1.18 The relevant contributions caps applicable to concessional contributions based upon the taxpayer's age for the financial years between 2007–08 and 2014–15 are set out in Table 1.

**Table 1: Concessional contributions caps**

Income Year	Amount of annual cap	Temporary increased cap for taxpayers aged 60 or over on 30 June 2013	Temporary increased cap for taxpayers aged 50 or over on 30 June 2014
2014–15	\$30,000	\$35,000	\$35,000
2013–14	\$25,000	\$35,000	\$25,000
2012–13	\$25,000	\$25,000	\$25,000
2011–12	\$25,000	\$50,000	\$50,000
2010–11	\$25,000	\$50,000	\$50,000
2009–10	\$25,000	\$50,000	\$50,000
2008–09	\$50,000	\$100,000	\$100,000
2007–08	\$50,000	\$100,000	\$100,000

Source: ATO, Key Superannuation Rates and Thresholds

1.19 The annual cap applies to taxpayers who are under 50 years of age. In 2007–08, the annual cap was \$50,000. It was subsequently halved in 2009–10 and has remained at \$25,000 since. From 1 July 2014, the level of the annual cap will be indexed in accordance with average weekly ordinary time earnings in increments of \$5,000.

1.20 Different caps applied to taxpayers who were 50 years of age or older. These taxpayers were entitled to contribute up to \$100,000 in 2007–08 and 2008–09. This cap was halved to \$50,000 in 2009–10 and then halved again to \$25,000 in 2012–13. On 5 April 2013, the then Treasurer and Minister for Financial Services and Superannuation jointly announced two temporary concessional contributions cap increases for taxpayers aged 50 and over and 60 and over.<sup>12</sup> The temporary cap increases enable taxpayers aged 60 and over

<sup>11</sup> ATO, *Super contributions – too much super can mean extra tax* (7 February 2014).

<<http://www.ato.gov.au/Individuals/Super/In-detail/Contributions/Super-contributions---too-much-super-can-mean-extra-tax/>>.

<sup>12</sup> Wayne Swan MP and Bill Shorten MP, 'Reforms to make the superannuation system fairer' (Joint Media Release, No. 020, 5 April 2013).

to contribute up to \$35,000 per year from 1 July 2013 and those aged 50 and over to contribute up to \$35,000 from 1 July 2014. The temporary cap increases will not be indexed and will cease once the annual cap reaches \$35,000.<sup>13</sup> Thereafter, all taxpayers will be subject to the annual cap which will continue to be indexed as discussed above, subject to any further legislative changes.<sup>14</sup>

1.21 Prior to 1 July 2013, a taxpayer who exceeded the relevant concessional cap outlined above was subject to a tax calculated at 31.5 per cent of the excess amount.<sup>15</sup> When combined with the 15 per cent income tax payable by the superannuation fund on these contributions, an effective rate of 46.5 per cent was imposed, which is the highest marginal rate of income tax for taxpayers.

1.22 Following the legislative changes which were enacted in June 2013, taxpayers who exceed their concessional contributions cap will not necessarily be subjected to this high rate of tax. Instead, any excess concessional contributions will be included in the taxpayer's assessable income and taxed at their marginal tax rate.<sup>16</sup>

## Non-concessional contributions

1.23 Generally, non-concessional contributions are contributions made by the taxpayer to a complying superannuation fund which does not form part of the fund's assessable income.<sup>17</sup> Moreover, taxpayers are generally not able to claim deductions for non-concessional contributions. Examples of non-concessional contributions include:<sup>18</sup>

- contributions made by an employer on behalf of a taxpayer from the taxpayer's after-tax income;
- contributions made by a taxpayer's spouse (including same-sex spouses) to the taxpayer's superannuation fund, save where the spouse is the taxpayer's employer;
- personal contributions made by the taxpayer and not claimed as a tax deduction;
- contributions in excess of the concessional contributions cap;<sup>19</sup>
- contributions in excess of a taxpayer's lifetime capital gains tax (CGT) cap which is a small business concession that enables certain contributions made from the disposal of small business assets to be excluded for the purposes of calculating non-concessional contributions;<sup>20</sup> and
- most transfers from foreign superannuation funds, except amounts which are included in the superannuation fund's assessable income.

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<sup>13</sup> ATO, *Key superannuation rates and thresholds* (21 February 2014) <<http://www.ato.gov.au/Rates/Key-superannuation-rates-and-thresholds/?anchor=Contributionscaps#Contributionscaps>>.

<sup>14</sup> ITAA 1997, ss 960-265, 960-285; above n 13.

<sup>15</sup> *Superannuation (Excess Concessional Contributions Tax) Act 2007*, s 5; ITAA 1997, div 292.

<sup>16</sup> Above n 12; ITAA 1997, div 291.

<sup>17</sup> ATO, *Non-concessional (after-tax) contributions* (2 August 2013) <[http://www.ato.gov.au/Individuals/Super/Other-contributions/Non-concessional-\(after-tax\)-contributions/](http://www.ato.gov.au/Individuals/Super/Other-contributions/Non-concessional-(after-tax)-contributions/)>.

<sup>18</sup> Above n 11.

<sup>19</sup> From 1 July 2013, only excess concessional contributions which are not refunded to the taxpayer will be included in the calculation of excess non-concessional contributions.

<sup>20</sup> Above n 13.

1.24 Excluded from non-concessional contributions are personal injury payments (subject to certain conditions) and contributions which the taxpayer has elected to count towards their CGT cap and which has not exceeded their lifetime limit.<sup>21</sup>

1.25 There are also caps placed on the amount of non-concessional contributions that may be made before the ECT is applied. As the earnings on assets within the superannuation system may attract concessional rates of income tax, these caps operate to limit the amount of assets that can be shifted into superannuation each year.<sup>22</sup>

1.26 Table 2 below sets out the non-concessional contributions cap and the CGT cap for the financial years between 2007–08 and 2014–15.

**Table 2: Non-concessional contribution caps and CGT caps**

Income Year	Non-concessional contributions cap	Lifetime CGT cap
2014–15	\$180,000	\$1,355,000
2013–14	\$150,000	\$1,315,000
2012–13	\$150,000	\$1,255,000
2011–12	\$150,000	\$1,205,000
2010–11	\$150,000	\$1,155,000
2009–10	\$150,000	\$1,100,000
2008–09	\$150,000	\$1,045,000
2007–08	\$150,000	\$1,000,000

Source: ATO website, Key Superannuation Rates and Thresholds

1.27 Between 10 May 2006 and 30 June 2007, a transitional non-concessional contribution cap enabled taxpayers to contribute up to \$1,000,000 in non-concessional contributions without incurring an ECT liability.<sup>23</sup>

### Bring-forward provision

1.28 A 'bring forward' provision is available to taxpayers who are 64 years old or under who exceed their non-concessional contributions cap in a particular financial year. Effectively, it allows them to 'bring forward' the following two years' contributions,<sup>24</sup> enabling them to contribute up to \$450,000 over a three year period, without incurring an ECT liability.

1.29 For example if, in 2009–10, a taxpayer makes non-concessional contributions of \$160,000 (thereby exceeding their non-concessional cap by \$10,000), then in the following two years, the taxpayer may contribute up to a total of \$290,000 without attracting an ECT

<sup>21</sup> ITAA 1997, ss 292-95, 292-100 and 292-105; above n 11; for these contributions to be exempt from the non-concessional contributions caps, certain conditions must be met including the lodgement of relevant election forms by the taxpayer.

<sup>22</sup> ITAA 1997, s 292-5.

<sup>23</sup> ATO, *Key superannuation rates and thresholds* (9 January 2014)

<<http://www.ato.gov.au/Rates/Key-superannuation-rates-and-thresholds/>>.

<sup>24</sup> ITAA 1997, s 292-85.

liability. If the taxpayer contributes more than \$450,000 over this three year period, the excess will be taxed at 46.5 per cent.<sup>25</sup>

1.30 The 'bring forward' provision is not available to taxpayers who are aged 65 or older.<sup>26</sup>

## LEGISLATIVE AMENDMENTS AND REFORMS

### Once-only refund offer (2011)

1.31 In May 2011, the Government announced it would enact new laws to provide a once-only option for an eligible taxpayer, who has excess concessional contributions of \$10,000 or less in a financial year, to effectively have their excess concessional contributions refunded to them. Under this measure, the individual would be eligible to include 85 per cent of their excess concessional contributions in their assessable income for the corresponding financial year.<sup>27</sup> In addition, the taxpayer would also receive a refundable tax offset equal to 15 per cent of the excess contribution which is equivalent to the amount of tax paid by their superannuation fund. It is important to note that such an offer may only be made once, regardless of whether a taxpayer accepts the offer or not.

1.32 Legislation was enacted to give effect to this option and applies to excess concessional contributions for the 2011–12 and 2012–13 financial years.

1.33 To be eligible for this option, in summary, taxpayers must meet the following conditions:<sup>28</sup>

- the Commissioner determines that the taxpayer has concessional contributions in excess of the cap for the relevant financial year;
- the excess amount is \$10,000 or less;
- the taxpayer has not previously made excess concessional contributions from 1 July 2011 onwards; and
- the taxpayer has lodged their income tax return for the relevant financial year within 12 months or such longer period as the Commissioner has allowed for lodgement.

1.34 Where the taxpayer is eligible for the refund, the Commissioner will make the refund offer in writing accompanied by an information sheet which outlines the options available to the taxpayer. The letter of offer and accompanying sheet outlines the two options:

- accept the offer by authorising the superannuation fund to release the excess amounts to the Commissioner; or
- not accept the offer and pay the relevant ECT.

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<sup>25</sup> Above n 11.

<sup>26</sup> ITAA 1997, para 292-85(3)(b).

<sup>27</sup> ITAA 1997, s 292-467; Bill Shorten MP, 'Superannuation — Reform of Excess Contribution Regime Gives Australians New Powers to Request Refunds' (Media Release, 10 May 2011).

<sup>28</sup> ITAA 1997, paras 292-467(1)(a)-(d).

1.35 Offers for refunds commenced issuing to eligible taxpayers in 2012–13 and will continue to be offered in later years until an offer has been made to all eligible taxpayers. The ATO's most recent statistics in this regard are set out in Table 3 below.<sup>29</sup>

**Table 3: Rate of acceptance of once-only refund offer**

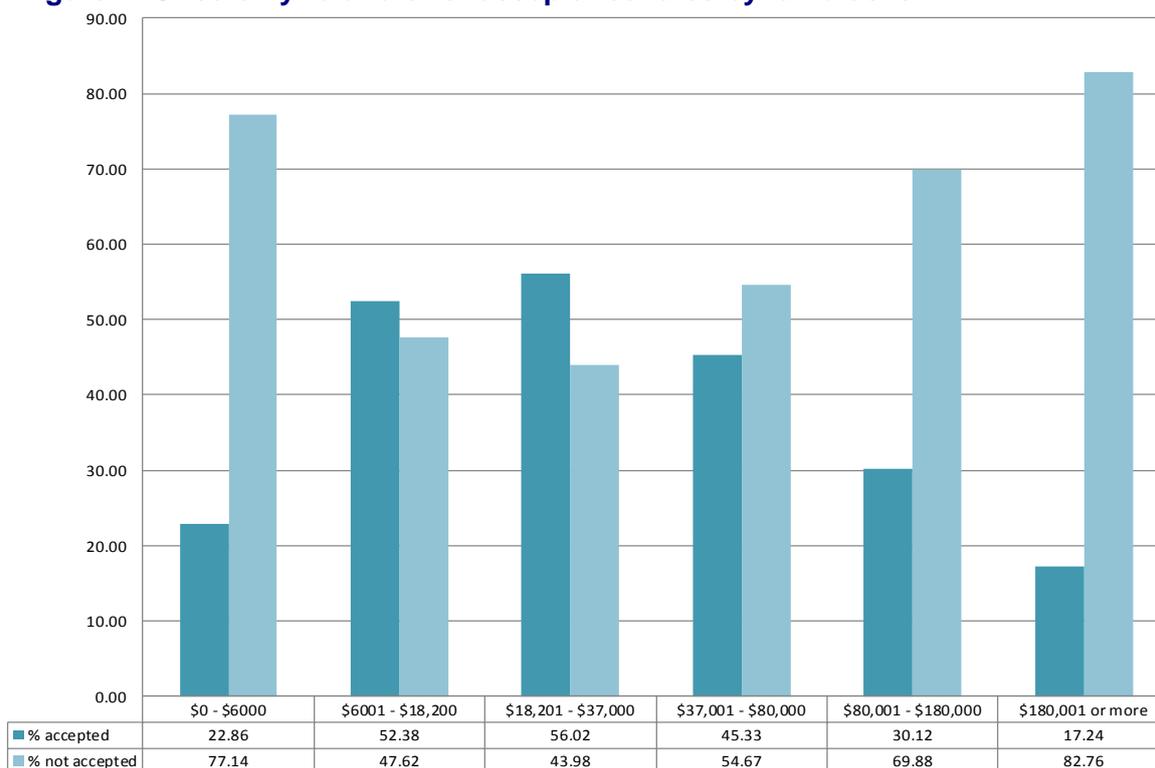
	Offers made in 2012–13 for 2011–12 breaches	Offers made in 2013–14 (YTD) for 2011–12 breaches	Offers made in 2013–14 (YTD) for 2012–13 breaches
<b>Offers made</b>	11,508	16,891	5,448
<b>Offers accepted</b>	3,400	3,211	25
<b>Rate of acceptance</b>	29.5%	19%	0.46%

Source: ATO<sup>30</sup>

1.36 These ATO statistics indicate a low rate of acceptance of the refund offers (less than 30 per cent), noting that not all offers have been issued in 2013–14 and that of those offered, the period for election for a large portion have not yet expired.<sup>31</sup>

1.37 To provide further insight into which taxpayers are more likely to accept the refund offer, the ATO has also provided statistics (as at 8 December 2012) which show the rates of acceptance and rejection stratified by taxpayer income brackets.<sup>32</sup> These stratified statistics comprise 9,327 taxpayers with an acceptance rate of 26.94 per cent (or 2,513). The stratified statistics are illustrated in Figure 1 below.

**Figure 1: Once-only refund offer acceptance rates by tax bracket**



Source: ATO<sup>33</sup>

<sup>29</sup> ATO communication to the IGT, 1 November 2013.

<sup>30</sup> ATO communication to the IGT, 1 November 2013.

<sup>31</sup> *ibid.*

<sup>32</sup> As annual return lodgements for SMSFs are not yet due, it is not yet possible for the ATO to identify all taxpayers eligible for this refund option.

<sup>33</sup> ATO communication to the IGT, 25 February 2013.

1.38 The data suggests that the highest rates of acceptance are for taxpayers in the lower marginal tax brackets (52.38 per cent and 56.02 per cent for taxpayers with taxable income between \$6,000 and \$37,000) with taxpayers in the higher marginal tax brackets accepting the offer in fewer instances (17.24 per cent for those with taxable income of more than \$180,000). One reason posited for this behaviour may be that those on the highest marginal tax rate would see little or no difference between paying the ECT and having the funds taxed at their marginal rates.

1.39 While this may explain some of the lower acceptance rates, other possible reasons include that those on lower tax rates may be concerned about the impact on their access to other tax concessions if assessable income was increased as a result of this refund. Taxpayers may also not appreciate the nature of the offer, mistakenly believing that they are able to defer it or that it would be offered again if unused in the current year.

1.40 Critically, this refund initiative is only available to the taxpayer for their first excess concessional contribution. Through consultation, it has emerged that some stakeholders are unaware of the once only operation of the refund offer or that it was not possible for the taxpayer to choose the relevant year in which this offer would be accepted.

1.41 While industry associations offered some support for this refund option, there have been ongoing calls for a broadening of the regime.<sup>34</sup> Similar sentiments were also echoed in submissions to the IGT's current review.

1.42 The once-only refund option has since been superseded by more extensive reforms enacted by the Government in 2013. However, as the 2013 legislative changes only apply to contributions made on or after 1 July 2013, the once-only refund offer still applies to contributions made between 1 July 2011 and 30 June 2013 (inclusive).

### **Legislative changes to the treatment of excess concessional contributions (2013)**

1.43 On 5 April 2013, the Government announced reforms to the treatment of concessional contributions in excess of the annual cap 'to make it fairer and give individuals greater choice.'<sup>35</sup> In announcing the reforms, the then Treasurer and Minister for Financial Services and Superannuation jointly noted:<sup>36</sup>

Under the current arrangements, concessional contributions that are in excess of the annual cap are effectively taxed at the top marginal tax rate (46.5 per cent) rather than the normal rate of 15 per cent. This outcome is achieved through the imposition of ECT. This is a severe penalty for individuals with income below the top marginal tax rate.

The Government will allow all individuals to withdraw any excess concessional contributions made from 1 July 2013 from their superannuation fund. In addition, the Government will tax excess concessional contributions at the individual's marginal tax rate, plus an interest charge to recognise that the tax on excess contributions is collected later than normal income tax.

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<sup>34</sup> SMSF Professionals' Association of Australia, 'Excess concessional contributions refunding not enough, says SPAA', (Media release, 22 December 2011); Australian Institute of Superannuation Trustees, Submission to the Treasury, *Refund of excess concessional contributions*, January 2012, p 2.

<sup>35</sup> Above n 12.

<sup>36</sup> *ibid.*

These rules will ensure that individuals are taxed on excess concessional contributions in the same way as if they had received that money as salary or wages and had chosen to make a non-concessional contribution.

1.44 Legislation giving effect to these announced reforms applies to contributions made on or after 1 July 2013. For these contributions, where the Commissioner has determined that a taxpayer has exceeded their concessional contributions cap, the taxpayer is notified by receiving an excess concessional contribution determination.<sup>37</sup> A taxpayer may object against the determination<sup>38</sup> or elect to have up to 85 per cent of their excess concessional contribution released from the superannuation fund (or funds).<sup>39</sup>

1.45 Where an election is made, the quantum and source of funds to be released is solely at the discretion of the taxpayer<sup>40</sup> and those amounts released are treated as non-assessable and non-exempt income.<sup>41</sup> However, where an amount less than 85 per cent is elected to be released, the balance of excess concessional contributions will be included in the calculation of excess non-concessional contributions.<sup>42</sup> This may, in turn, cause the taxpayer to trigger the 'bring forward' provision discussed earlier and may result in the ECT being raised in respect of excess non-concessional contributions.

1.46 Such an election must be made in an approved form, given to the Commissioner within 21 days of receiving the excess concessional contributions determination or an amended excess concessional contributions determination.<sup>43</sup> Taxpayers may seek an extension of time from the Commissioner to make this election.<sup>44</sup>

### Excess concessional contributions charge

1.47 The making of excess concessional contributions, even when fully refunded, may still provide an advantage for taxpayers in two ways. First, unlike salary and wages, excess concessional contributions are not subject to Pay as you go withholding tax. Therefore, the taxpayer is effectively deferring payment of tax due and payable until the ATO identifies that a cap has been exceeded and issues a notice of assessment. Secondly, any earnings from the excess contributions are retained within the superannuation fund and concessional tax. <sup>45</sup>

1.48 Therefore, the excess concessional contributions charge (ECCC) was introduced to:<sup>46</sup>

...neutralise benefits that taxpayers could otherwise receive from excess concessional contributions, so that they do not receive an advantage in the form of:

(a) the later time at which tax is collected, as compared to tax that is collected through the Pay as you go system; and

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<sup>37</sup> *Taxation Administration Act 1953* (TAA 1953), sch 1 div 97.

<sup>38</sup> TAA 1953, sch 1 s 97-10; TAA 1953, pt IVC.

<sup>39</sup> TAA 1953, sch 1 div 96.

<sup>40</sup> Explanatory Memorandum, House of Representatives, Tax Laws Amendment (Fairer Taxation of Excess Concessional Contributions) Bill 2013, p 16-17.

<sup>41</sup> *ibid*, p 16.

<sup>42</sup> *ibid*, p 20.

<sup>43</sup> TAA 1953, sch 1 para 96-5(4)(a) and sub-para 96-5(4)(b)(i).

<sup>44</sup> TAA 1953, sch 1 sub-para 96-5(4)(b)(ii).

<sup>45</sup> Above n 40, p 11.

<sup>46</sup> Above n 40; TAA 1953, sch 1 s 95-5.

(b) the earnings on the contributions, which receive a concessional tax rate and remain in superannuation even if the contributions are released under Division 96.

1.49 The ECCC is payable on the amount of tax liability arising from the taxpayer having excess concessional contributions<sup>47</sup> and operates similarly to the shortfall interest charge (SIC). Although the Commissioner may exercise discretion to remit SIC, no such discretion exists in relation to ECCC as, unlike SIC or the general interest charge, the ECCC ‘applies over a largely fixed period and the actions of the Commissioner do not affect the period over which the [ECCC] is payable or the amount to which the [ECCC] applies.’<sup>48</sup>

1.50 As the ATO has not yet commenced identifying excess contributions for the 2013–14 year, no ECCC has been applied. As such, the IGT has not reviewed the impact of the charge or the ATO’s approach in this regard.

## ATO ADVICE AND GUIDANCE

1.51 As with other areas of tax law, the ATO provides assistance to taxpayers in relation to the ECT through issuing advice and guidance.<sup>49</sup> ‘Advice’ is a statement of the Commissioner’s opinion of the law which he administers. It is generally issued in the form of a ruling<sup>50</sup> and may also include other products such as administratively binding advice.<sup>51</sup> ‘Advice’ is binding on the Commissioner and provides the highest level of protection for taxpayers against having to pay additional tax, penalties or interest.<sup>52</sup>

1.52 ‘Guidance’ encompasses a broader range of materials which provide more general information to taxpayers and may include published speeches, consultation forum minutes and media releases.<sup>53</sup> ‘Guidance’ is not binding on the Commissioner and may provide protection only against penalties and interest where taxpayers have relied in good faith on ‘guidance’ which is ultimately found to be incorrect.<sup>54</sup>

1.53 There are currently a number of sources of ATO guidance in relation to the ECT. These include:

- the ATO’s website pages which it promotes through the use of social media on Twitter and Facebook;<sup>55</sup>
- guides;<sup>56</sup>
- factsheets;<sup>57</sup> and
- media releases.<sup>58</sup>

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<sup>47</sup> Explanatory Memorandum, House of Representatives, Superannuation (Excess Concessional Contributions Charge) Bill 2013, p 12; Sections 4 and 5 of the *Superannuation (Excess Concessional Contributions Charge) Act 2013*.

<sup>48</sup> Explanatory Memorandum, above n 47, p 13.

<sup>49</sup> ATO, *Provision of advice and guidance by the Australian Taxation Office*, PSLA 2008/3, 20 February 2014.

<sup>50</sup> TAA 1953, sch 1 divs 357, 358 and 359.

<sup>51</sup> Above n 49, para [12].

<sup>52</sup> *ibid*, para [16].

<sup>53</sup> *ibid*, paras [205], [218] and [221].

<sup>54</sup> *ibid*, paras [214] and [215].

<sup>55</sup> Above n 11.

<sup>56</sup> ATO, *NAT11032: Running a self-managed super fund*, November 2013.

<sup>57</sup> ATO, *Super: your money your future* (21 February 2013) < <http://www.ato.gov.au/Print-publications/Super--Your-money,-your-future/>>.

1.54 The ATO has also, on occasion, undertaken large targeted mail campaigns to alert potentially affected taxpayers of the changes in the law and the mitigating action they may take. Over the life of the ECT to date, the ATO has undertaken three such campaigns.

1.55 The first occurred in May 2009 when the ATO identified approximately 30,000 taxpayers who made excess contributions in 2007–08 and mailed information to those taxpayers encouraging them to check their data and review any future planned contributions in 2008–09.<sup>59</sup>

1.56 The second campaign occurred between September and November 2009 when the ATO mailed approximately 287,000 taxpayers who were identified as being at risk of exceeding their concessional contributions cap by reason of the annual cap being halved in the 2009–10 year. The ATO notes that approximately 87 per cent of people contacted by the mail campaign did not exceed their caps.<sup>60</sup>

1.57 The third campaign focused on some 367,000 taxpayers aged over 50 who were at risk of exceeding their concessional contributions cap by reason of the halving of the contributions cap applicable to them from \$50,000 to \$25,000 in the 2012–13 year.<sup>61</sup>

1.58 Furthermore, publications such as the *TAXAGENT* magazine,<sup>62</sup> *eLink*,<sup>63</sup> *SuperUpdate*<sup>64</sup> and *SMSF News*<sup>65</sup> also provide ECT guidance on developments for tax practitioners and SMSF trustees. The ATO has also published an ECT learner's guide to help train financial advisers on various aspects of the ECT regime. This guide was last updated in April 2013 and, as at the date of this report, the IGT notes that the guide had not been further updated to reflect changes to the ECT regime announced in May 2013 and enacted in June 2013.<sup>66</sup>

1.59 Following the passage of the new law concerning excess concessional contributions, the ATO is currently reviewing its suite of public guidance in relation to the ECT. As at the date of this report, the ATO has advised that these updates are still in draft form pending approval for publication by relevant senior ATO officers.<sup>67</sup>

## HOW THE ATO IDENTIFIES EXCESS CONTRIBUTIONS

1.60 The ATO identifies excess contributions by aggregating all contributions data from superannuation funds and first home owners saver account providers for a particular taxpayer and examining deductions claimed in the taxpayer's income tax return to

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<sup>58</sup> See for example, ATO, 'Contributions to superannuation funds under scrutiny' (Media Release, 2008/30, 13 June 2008).

<sup>59</sup> ATO communication to the IGT, 6 March 2013, p 1.

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> For example, Edition 54, March 2012, Edition 55, June 2012, Edition 56, September 2012.

<sup>63</sup> For example, September 2011, November 2011, January 2012, July 2012 and September 2012 editions.

<sup>64</sup> For example, September 2011, December 2011 and September 2012 editions.

<sup>65</sup> For example, June 2012 and August 2012 editions.

<sup>66</sup> ATO, *ECT Learner's Guide* (22 November 2013) <<http://www.ato.gov.au/Tax-professionals/Training/In-detail/Advanced/Excess-Contributions-Tax---Learner-Guide/>>.

<sup>67</sup> ATO communication to the IGT, 23 October 2013.

determine whether the taxpayer exceeded either the concessional or non-concessional contributions caps or both.

1.61 The ATO receives contributions data directly from a range of superannuation funds including industry funds, corporate funds and public sector funds as well as those which are regulated by the Australian Prudential Regulations Authority (sometimes referred to as APRA-funds) and Self-Managed Superannuation Funds (SMSFs).

1.62 APRA-funds are required to lodge Member Contribution Statements (MCS) to the Commissioner on an annual basis.<sup>68</sup> The MCS is due to be lodged by APRA-funds on 31 October following the end of the financial year.<sup>69</sup> Amongst other things, the MCS reports the amount of contributions received in respect of each of the fund's members. Therefore, there may be a 4 to 16 month delay between a contribution being made to an APRA-fund and the ATO being advised of that contribution.

1.63 Similarly, SMSFs are required to lodge with the ATO an Annual Return which, amongst other things, reports to the ATO the amount of contributions received in respect of each of the SMSF's members. SMSF Annual Returns may be required to be lodged by 31 October or up to early June of the following year for certain SMSFs, subject to various conditions.<sup>70</sup> Accordingly, there may be a delay of between 4 to 23 months between a contribution being made to an SMSF and the ATO being informed of the contribution.

1.64 Given the law changes outlined earlier, the ATO has adopted a number of different processes for identifying excess contributions and communicating with taxpayers. These are outlined below, and are distinguished between processes for contributions made prior to and those made after 1 July 2013 as well as for taxpayers who are eligible for the once-only refund offer and those who are not.

### **The ECT end-to-end process — prior to 1 July 2013**

1.65 The ATO's broad end-to-end process in relation to excess contributions made before 1 July 2013 is outlined in Figure 2 below. The process differs depending on whether the taxpayer is eligible for the once-only refund offer discussed above.

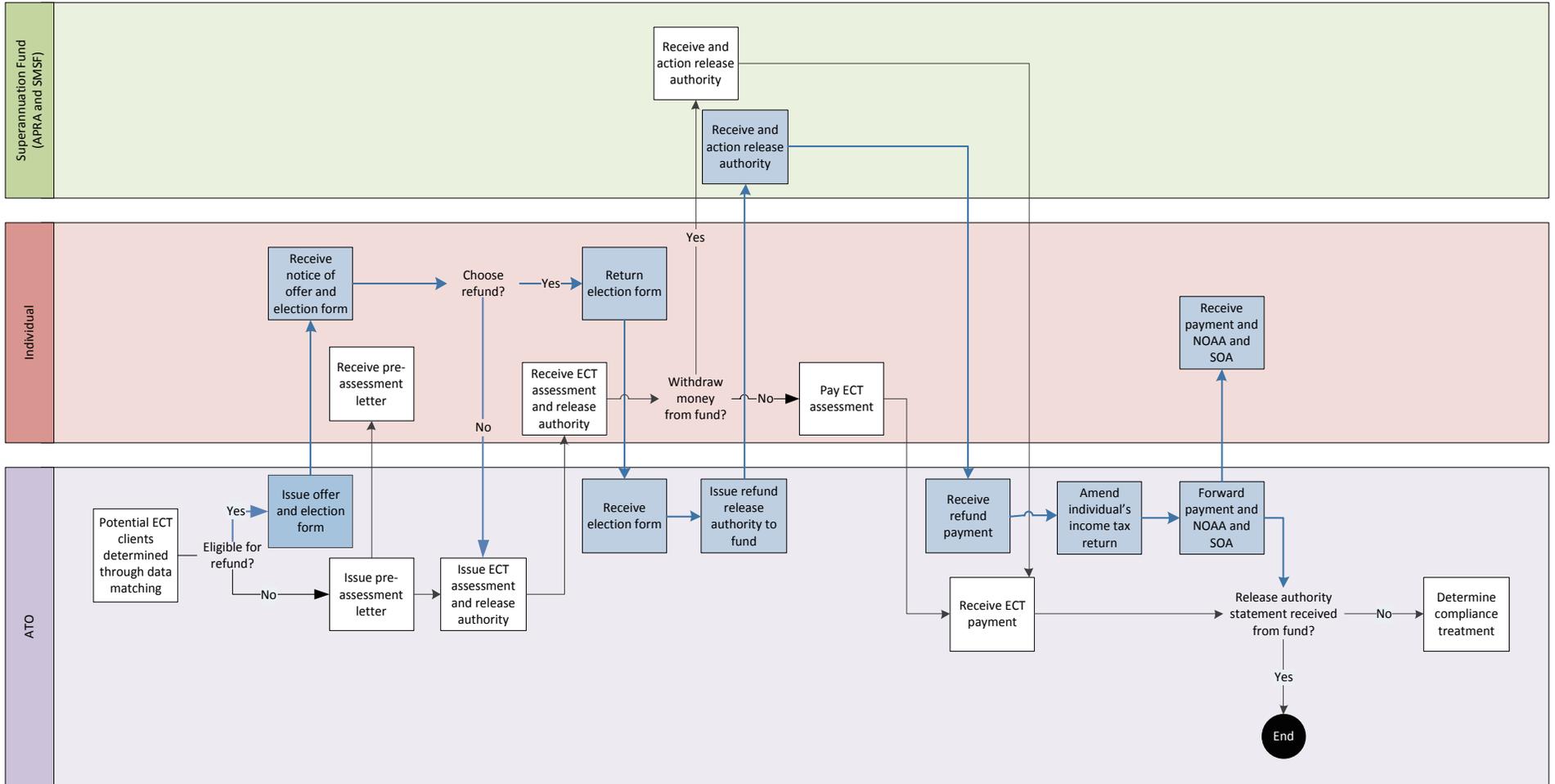
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<sup>68</sup> TAA 1953, sch 1 sub-div 390A.

<sup>69</sup> ATO, *APRA-regulated funds reporting and lodgment dates* (4 October 2012) <[http://www.ato.gov.au/Super/APRA-regulated-funds/Reporting-and-lodgment-dates/?anchor=P1270\\_81274#P1270\\_81274](http://www.ato.gov.au/Super/APRA-regulated-funds/Reporting-and-lodgment-dates/?anchor=P1270_81274#P1270_81274)>.

<sup>70</sup> ATO, *Key lodgment dates for SMSFs* (5 March 2014) <<http://www.ato.gov.au/General/Enquiry-hot-topics/In-detail/Super-funds/Key-lodgment-dates-for-SMSFs/>>.

Figure 2: Excess contributions tax end-to-end process — prior to 1 July 2013



Source: Adapted from ATO information.

## Taxpayer is ineligible for once-only refund offer

1.66 If a taxpayer is determined to be ineligible for a refund, a pre-assessment letter is issued to the taxpayer. The pre-assessment letter states that:<sup>71</sup>

We're writing to let you know that based on our current information you have exceeded at least one of the super contributions caps and you may have to pay excess contributions tax for the <20xx> financial year.

We've determined you've exceeded a cap by using:

- the information sent to us by your super fund/s and first home saver account provider if relevant
- any personal super deduction amount you were allowed in your income tax return, and
- your date of birth.

1.67 The letter also outlines the total amount of concessional and non-concessional contributions made by the taxpayer, the contributions caps applicable to the taxpayer and the corresponding quantum of any excess contributions. Although totals are provided, these are not broken up by the superannuation funds to which they relate.<sup>72</sup>

1.68 The pre-assessment letter also gives the taxpayer an opportunity to provide the ATO with information to correct the contribution details presented in the letter. The pre-assessment letter notes:<sup>73</sup>

### What you need to do

If the information in this letter is incorrect, you will need to phone us within 28 days of the date of this letter and let us know what action you will be taking.

To correct the information, you'll need to:

- Contact your super fund/s or first home saver account provider if you believe that the contributions reported are wrong so they can provide us with corrected information
- Lodge your income tax return if you intend to claim a personal super deduction
- Amend your income tax return if it has the wrong personal super deduction amount.

1.69 If the taxpayer does not make contact with the ATO to verify the information in the pre-assessment letter within 28 days, the ATO will automatically assess their ECT tax liability and issue the taxpayer with a Notice of Assessment (NOA) for the amount of ECT payable.

1.70 The NOA is issued together with a Release Authority (RA). The RA enables taxpayers to withdraw monies from the superannuation fund for the purposes of paying the ECT. If the taxpayer elects to withdraw money from their superannuation fund to pay their ECT, they are required to send the RA to their superannuation fund so that it may forward the ECT payment to the ATO. The taxpayer may elect to either have the withdrawn amount paid to them or paid directly to the ATO.<sup>74</sup>

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<sup>71</sup> ATO, Template pre-assessment letter, December 2012.

<sup>72</sup> *ibid.*

<sup>73</sup> *ibid.*

<sup>74</sup> ATO, NAT71777: *Voluntary Release Authority* (8 January 2013) <<http://www.ato.gov.au/Forms/Voluntary-release-authority---statement-instructions/>>.

1.71 If the assessment relates only to excess concessional contributions, then a voluntary RA is issued. The voluntary RA is valid for 90 days after the issue date and cannot be reissued after this time. If the authority is not sent within 90 days, the fund will not be able to withdraw the requested amount. It is compulsory for the superannuation fund to complete and return the RA statement to the ATO as it confirms that the superannuation fund has released the taxpayer's money according to the RA.

1.72 However, if the assessment relates to, or includes, excess non-concessional contributions then the taxpayer is issued with a compulsory RA. The compulsory RA must be returned by the taxpayer to the superannuation fund within 21 days. As such, and unlike excess concessional contributions, the taxpayer must withdraw part of their excess non-concessional contribution to pay the ECT. Where the taxpayer fails to return a compulsory RA, the ATO may impose penalties on the taxpayer.<sup>75</sup>

### **Taxpayer is eligible for once-only refund offer**

1.73 As stated earlier, where the ATO has determined that the taxpayer is eligible for the once-only refund offer, the ATO will issue a refund offer and the taxpayer may elect to either accept or refuse that offer.

1.74 If the refund offer is refused or there is no response to the offer after 28 days, the ATO will issue an assessment for ECT liability together with a voluntary RA, and thereon follow the same process as discussed above.

1.75 However, if the taxpayer elects to accept the refund offer, the taxpayer must return the election form to the ATO. The ATO then directs the relevant superannuation fund or funds to pay to it 85 per cent of the amount of the excess concessional contribution.

1.76 The ATO will then amend the taxpayer's individual income tax assessment to include the excess concessional contributions as assessable income which is taxed at the taxpayer's marginal tax rate. The taxpayer is also afforded a 15 per cent refundable tax offset to account for the tax already paid by the superannuation fund.

1.77 Lastly, the ATO will forward the residual payment, Notice of Amended Assessment (NOAA) and Statement of Account (SOA) to the taxpayer. The amount released by the taxpayer's superannuation fund, or funds, is treated as a non-assessable, non-exempt benefit to the taxpayer.

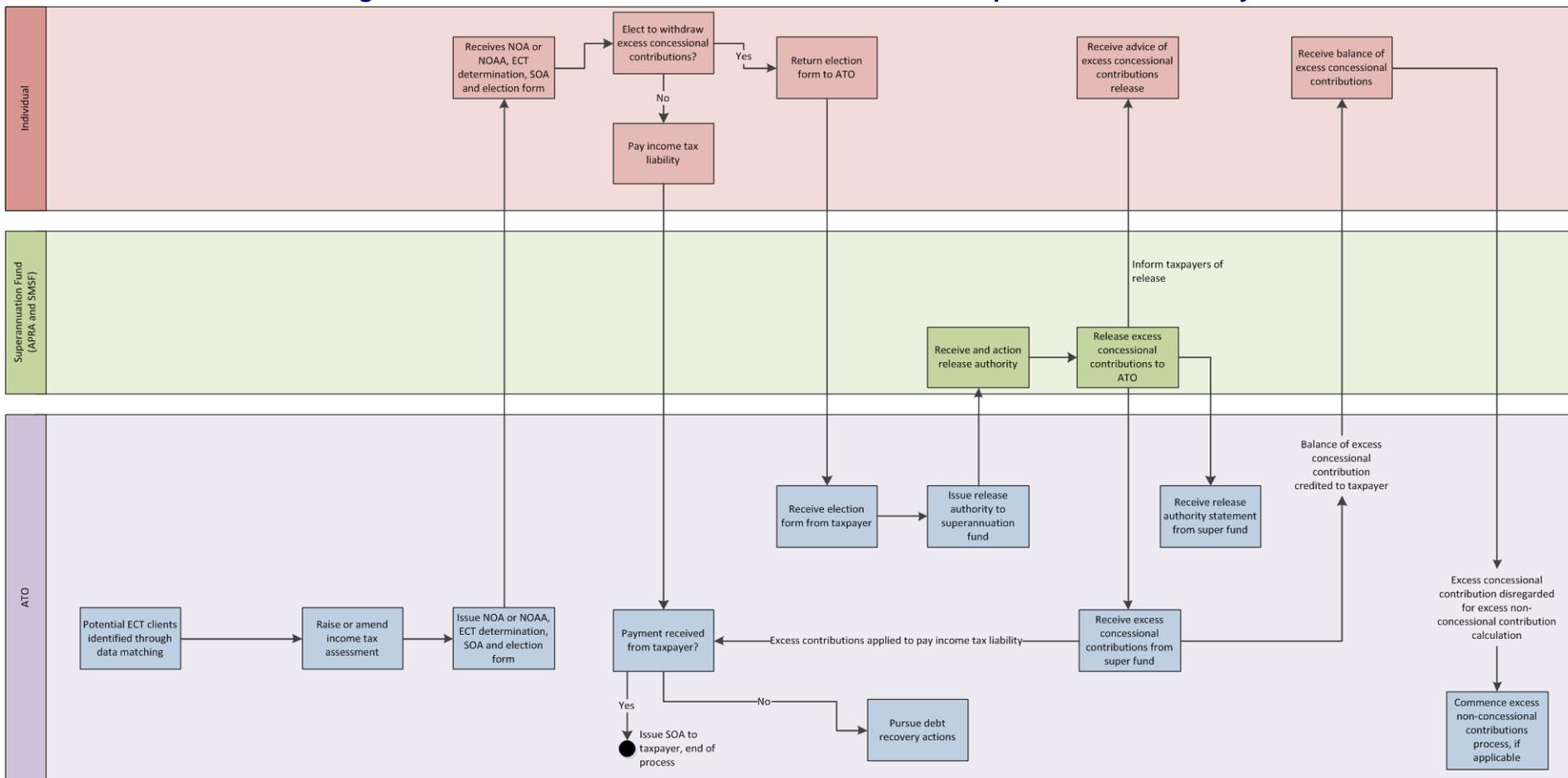
### **The ECT end-to-end process — after 1 July 2013**

1.78 Following the enactment of legislation on the treatment of excess concessional contributions made on or after 1 July 2013 as well as the introduction of the ECCC, the ATO has updated its end-to-end process. This new process is outlined in Figure 3 below.

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<sup>75</sup> ATO, NAT71429: *Compulsory Release Authority* (8 January 2013) <<http://www.ato.gov.au/Forms/Compulsory-release-authority---statement-instructions/>>.

**Figure 3: Excess concessional contributions end-to-end process — after 1 July 2013**



Source: Adapted from ATO information.

1.79 Under the new law, where taxpayers are identified to have made excess concessional contributions, the amount of the excess is included in the taxpayer's assessable income and taxed at their marginal tax rate. The taxpayer also receives a 15 per cent non-refundable tax offset. The ATO then issues the taxpayer with an NOA (or an NOAA if the taxpayer had been previously assessed for income tax for that financial year), an ECT determination and an SOA. An ECT determination letter which accompanies these documents includes information in relation to:<sup>76</sup>

- the quantum of their excess concessional contribution;
- the amount of tax payable as a result of its inclusion in assessable income;
- the amount of the excess concessional contributions charge that is payable;
- the option to withdraw the excess concessional contribution; and
- the consequences of not choosing to withdraw, being its inclusion in non-concessional contributions cap which may result in excess non-concessional contributions and tax of 46.5 per cent.

1.80 The taxpayer is also provided with an election form which enables them to elect to withdraw up to 85 per cent of their excess concessional contribution from their superannuation fund. If the taxpayer does not wish to withdraw that amount, then the taxpayer is required to make payment of the assessed income tax liability.

1.81 If the taxpayer elects to withdraw any amount of their excess concessional contribution, the superannuation fund forwards the sum to the ATO. That sum is credited against the assessed income tax liability and any other liabilities to the Commonwealth and the balance is refunded to the taxpayer.

1.82 If the taxpayer elects to withdraw any amount of their excess concessional contributions, this amount is disregarded for the purposes of calculating any excess non-concessional contributions. If the taxpayer elects not to withdraw any of their excess concessional contribution, then it is taken into account when calculating any excess non-concessional contributions and may trigger the 'bring forward' provision.

1.83 The legislation enacted in 2013 does not impact the ATO's current processes where the taxpayer only has excess non-concessional contributions. Where this is the case, the ATO will issue a pre-assessment letter to the taxpayer and follow the process outlined earlier in Figure 2.

## **CHALLENGING ECT ASSESSMENTS AND DETERMINATIONS**

1.84 Taxpayers may seek to challenge ECT assessments or determinations in a number of ways. ECT assessments are issued to taxpayers who have an ECT liability arising from either excess concessional or non-concessional contributions prior to 1 July 2013. From 1 July 2013 onwards, taxpayers will be issued with an ECT determination where they have made excess concessional contributions. ECT assessments will continue to be used in respect of ECT liabilities arising from excess non-concessional contributions after 1 July 2013.

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<sup>76</sup> ATO communication to the IGT, 23 October 2013.

1.85 Outlined below are each of the avenues which may be pursued by taxpayers. As the ATO has not yet commenced issuing ECT determinations, references below are to ECT assessments only. However, for practical purposes, the avenues are equally applicable to ECT determinations.

### **Where taxpayers disagree with reported fund information**

1.86 Where the taxpayer considers that the information reported by their superannuation fund, and on which the ATO has relied, is incorrect, the taxpayer may seek to address the error directly with the fund. In doing so, the taxpayer will generally seek to have the fund correct the error and re-report the information to the ATO.<sup>77</sup>

1.87 The ATO notes that where the fund corrects such information, the ATO will consider this updated information in either amending the taxpayer's ECT assessment or reconsider whether the taxpayer may be entitled to the once-only refund offer discussed earlier.<sup>78</sup>

1.88 If a taxpayer is dissatisfied with the fund's management of their matter, they may formally complain to the trustee of the superannuation fund or the Superannuation Complaints Tribunal if the fund is APRA-regulated, in certain circumstances.<sup>79</sup>

### **Where taxpayers disagree with income tax information**

1.89 In some cases, income tax lodgement and assessment information may also result in an ECT assessment. One such example is where taxpayers make personal contributions, intending to claim these as deductions on their income tax return which would therefore render the contributions concessional. If the taxpayer in this situation claims an incorrect amount by way of deduction, or claims the deduction at the wrong label, the contribution may be considered non-concessional, leading to the taxpayer exceeding the relevant cap and an ECT assessment being issued.

1.90 Where this occurs, it is open to the taxpayer to request an amendment to their income tax return to claim the correct deduction amount at the right label. This amended information is considered by the ATO and the ECT assessment is amended accordingly, or the taxpayer's entitlement to the once-only refund offer is reassessed.<sup>80</sup>

### **Objections and litigation in relation to ECT assessments**

1.91 An ECT assessment or determination may also be challenged through the usual processes of objection, followed by review or appeal to the Administrative Appeals Tribunal (AAT, including the Small Taxation Claims Tribunal (SCTC)) or the Federal Court of Australia (Federal Court), as set out in Part IVC of the TAA 1953.<sup>81</sup>

1.92 While taxpayers may choose to challenge the substantive basis of an ECT assessment, this right is not often exercised. Statistics provided to the IGT indicate that, as at

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<sup>77</sup> Above n 11.

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> ITAA 1997, ss 291-245 and 292-245.

March 2013, the ATO had only received and finalised 176 such objections.<sup>82</sup> Of these, 77 were allowed in full (43.75 per cent), 5 were allowed in part (2.84 per cent) and 94 were disallowed (53.41 per cent).<sup>83</sup>

1.93 The proportion of objections to ECT assessments which proceed to the AAT or the Federal Court represent a relatively small fraction of all disputes concerning the ECT. Since the inception of the ECT regime, the ATO records show that there have only been 31 such matters.<sup>84</sup> Of these:

- five were heard and determined by the AAT in favour of the Commissioner;<sup>85</sup>
- eight were withdrawn or conceded by either or both the Commissioner and the taxpayer;
- five were in progress at the time the ATO provided the information;
- twelve were settled by agreement between the taxpayer and the Commissioner;<sup>86</sup> and
- one matter was an appeal to the Federal Court of an AAT decision which was ultimately decided in the Commissioner's favour.<sup>87</sup>

1.94 Table 4 sets out the original amount in dispute, the outcome of the matter and the quantum and percentage of any variance in these 31 cases.<sup>88</sup>

**Table 4: Outcomes and variance of quantum in AAT cases 2009 — 2013**

Case	Amount in Dispute	Outcome	Quantum of reversal	Proportion of reversal
1	\$82,230.35	Withdrawn	N/A	N/A
2	\$69,448.40	Agreement	\$69,448.40	100.00%
3	\$48,772.45	Withdrawn	N/A	N/A
4	\$117,691.50	Favourable to ATO	N/A	N/A
5	\$86,867.30	Favourable to ATO	N/A	N/A
6	\$150,000.00	Favourable to ATO	N/A	N/A
7	\$244,590.45	Withdrawn	N/A	N/A
8	\$46,500.00	Agreement	\$46,500 + \$1,681.72	103.62%
9	\$48,877.50	Withdrawn	N/A	N/A
10	\$48,877.50	Withdrawn	N/A	N/A
11	\$86,867.30	Favourable to ATO	N/A	N/A
12	\$31,500.00	Withdrawn	N/A	N/A
13	\$116,270.90	Agreement	\$116,270.90	100.00%
14	\$45,634.35	Agreement	\$45,631.35	99.99%

<sup>82</sup> ATO communication to the IGT, 14 February 2014.

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> *Player and Commissioner of Taxation* [2011] AATA 35; *The Taxpayer and Commissioner of Taxation* [2011] AATA 168; *Rinaldo and Commissioner of Taxation* [2011] AATA 839; *Strasser and Commissioner of Taxation* [2012] AATA 33; *Colless and Commissioner of Taxation* [2012] AATA 441.

<sup>86</sup> An agreement pursuant to section 42C of the *Administrative Appeals Tribunal Act 1975*.

<sup>87</sup> *Player v Commissioner of Taxation* [2011] FCA 869.

<sup>88</sup> In addition to these 31 cases, the ATO's records show one further litigated matter in which the taxpayer disputed a penalty which was imposed for failure to return a compulsory RA. This matter was resolved by agreement.

**Table 4 (continued)**

Case	Amount in Dispute	Outcome	Quantum of reversal	Proportion of reversal
15	\$20,925.00	Agreement	\$13,990.50	66.86%
16	\$79,050.00	Agreement	\$79,505.00	100.58%
17	\$70,240.15	Agreement	\$46,772.93	66.59%
18	\$2,659.98	Favourable to ATO	N/A	N/A
19	\$29,806.15	Agreement	\$29,609.10	99.34%
20	\$1,222.00	Agreement	\$1,222.90	100.07%
21	\$12,826.63	Favourable to ATO	N/A	N/A
22	\$37,227.50	Agreement	\$32,550.00	87.44%
23	\$15,750.00	Withdrawn	N/A	N/A
24	\$173,956.65	Agreement	\$32,724.80	18.81%
25	\$320,515.85	In progress	N/A	N/A
26	\$27,900.00	Agreement	\$16,502.85	59.15%
27	\$48,877.50	In progress	N/A	N/A
28	\$179,963.00	Withdrawn	N/A	N/A
29	\$80,212.50	in progress	N/A	N/A
30	\$80,212.50	in progress	N/A	N/A
31	\$280,770.55	in progress	N/A	N/A

Source: ATO<sup>89</sup>

1.95 As can be seen from Table 4, while many cases are either withdrawn by the taxpayer or found in favour of the Commissioner, where taxpayers and the ATO reach agreement, the variance of the original disputed amount can be significant. In all but one case (Case 24), the variance exceeded 50 per cent and was generally closer to 100 per cent which represents a complete reversal of the liability that was originally raised. The ATO has advised that the vast majority of these agreements involved either the taxpayer or their advisers providing the ATO with further information or the taxpayer's superannuation fund re-reporting updated contributions information.

### Seeking an exercise of the Commissioner's discretion

1.96 The law provides the Commissioner with a discretion to disregard or reallocate to another year all or part of a taxpayer's concessional or non-concessional contributions where there are special circumstances and where the exercise of such discretion is consistent with the objects of the relevant law.<sup>90</sup> This discretionary power is contained in section 291-465 of the ITAA 1997 in respect of excess concessional contributions and section 292-465 of the ITAA 1997 in relation to excess non-concessional contributions. Section 291-465 was enacted as part of the Government's 2013 reforms. The text of section 291-465 is materially similar, though not identical, to that of section 292-465.

1.97 All applications for the exercise of this discretion are initiated by an application by the taxpayer.<sup>91</sup> Each application is considered by an ATO officer who undertakes research and makes a recommendation to an approving officer regarding whether the Commissioner

<sup>89</sup> ATO communication to the IGT, 7 February 2014.

<sup>90</sup> ITAA 1997, ss 291-465 and 292-465.

<sup>91</sup> ITAA 1997, sub-ss 291-465(1) and 292-465(1).



1.102 ATO officers who are involved in managing discretion applications are required to adhere to Law Administration Practice Statement PSLA 2008/1 (PSLA 2008/1).<sup>92</sup> Relevantly, PSLA 2008/1 provides:<sup>93</sup>

4. It is not possible to anticipate all the circumstances in which the discretion may or may not be exercised. In each case the decision maker (that is, the Commissioner or a person delegated or authorised to exercise the Commissioner's discretion) must consider the particular circumstances of the case and the relevant individual. However, regard should be had to the principles and examples set out in the Explanation section of this practice statement and to guidance the ATO publishes to its website. In applying those principles to an individual's circumstances, a decision maker should be satisfied that the relevant circumstances are special in the sense that they are unusual or different that take the matter out of the ordinary course of events. In the context of this discretion, it is highly relevant whether imposing the excess contributions tax would therefore be unjust, unreasonable or otherwise inappropriate.

5. In addition, this discretion must be exercised consistently with the object of Division 292 which is to ensure that the amount of concessional taxed superannuation benefits a person receives results from contributions that have been made gradually over the course of the person's life. That object must be understood in light of the explanation in the Guide to the superannuation contributions phase provisions as a whole, explaining that there are limits on contributions that receive favourable tax treatment. Those limits seek to restrict concessional contributions made for a person each financial year and seek to restrict non-concessional contributions made for a person each financial year or over a three-year period.

6. The exercise of the discretion must not be approached in a rigid or inflexible way. In forming an opinion, administrative law principles must be observed. Each case has to be considered on its merits after having proper regard to all the relevant facts. Decision makers must not take into account irrelevant considerations and must exercise their own judgment in making an appropriate and reasoned decision. The decision to exercise the discretion should be made in good faith and without bias and must not be made at the direction of another person.

1.103 PSLA 2008/1 also outlines those factors which need to be considered by ATO officers exercising the discretion,<sup>94</sup> those circumstances which would not generally qualify for exercise of the discretion<sup>95</sup> and a series of illustrative examples.<sup>96</sup>

1.104 Taxpayers who are dissatisfied with the discretion decision may lodge a formal objection against the decision and exercise further review and appeal rights to the AAT or the Federal Court.<sup>97</sup> Further discussion on objections and litigation in relation to discretion decisions are set out in Chapter 2.

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<sup>92</sup> ATO, *The Commissioner's discretion to disregard or reallocate concessional and non-concessional contributions for a financial year*, PSLA 2008/1, 8 February 2012 (PSLA 2008/1); ATO, *Law Administration Practice Statements*, 1998/1, 19 December 2013, para [6].

<sup>93</sup> PSLA 2008/1, paras [4]-[6].

<sup>94</sup> *ibid*, paras [31]-[35].

<sup>95</sup> *ibid*, paras [36]-[37].

<sup>96</sup> *ibid*, paras [42]-[92].

<sup>97</sup> ITAA 1997, sub-s 291-465(7); ITAA 1997, s 292-245.



## CHAPTER 2 — STRUCTURE OF THE ECT

2.1 Stakeholders raised a number of concerns in relation to the structure of the ECT, including whether:

- the ECT regime is operating as intended;
- the ECT imposes a disproportionate impact on taxpayers; and
- clauses in superannuation fund trust deeds, which purport to limit the amount of contributions and to refund any excess contributions made (contribution limiting clauses), are effective.

### WHETHER THE ECT REGIME IS OPERATING AS INTENDED

2.2 Stakeholders argue that the ECT regime is:

- not operating as intended as far more taxpayers have been taxed under the ECT regime than was originally envisaged with the ATO issuing assessments totalling \$563m<sup>98</sup> for a regime that was not expected to raise any revenue;<sup>99</sup> and
- punitive in nature, as reflected in comments made by Government ministers,<sup>100</sup> the judiciary,<sup>101</sup> the media<sup>102</sup> as well as industry and professional bodies, particularly in instances where it can effectively levy taxes as high as 93 per cent.<sup>103</sup>

2.3 As a result, concerns have been expressed that the most significant and immediate impact of the ECT is on taxpayers who alone bear the risk of a large portion of their retirement savings being paid towards the tax imposed. For taxpayers who are nearing retirement, it is particularly stressful as such payments are not easily supplemented. They run the risk of having insufficient funds for retirement and need to draw on Government assistance for retirement income.

2.4 Stakeholders also observed that significant costs may be incurred by taxpayers in retaining advisers and legal representatives to assist them in making contributions decisions and dealing with the ATO where they may be liable for the ECT. Examples of the level of costs raised with the IGT range from \$15,000 to \$40,000, accounting for between a quarter to one-half of the total ECT which was being challenged in those particular cases. Stakeholders have also expressed concern that reliance on tax agent or other professional advice affords taxpayers no protection against the ECT where such advice ultimately is incorrect, incomplete or otherwise leads to an ECT liability.

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<sup>98</sup> ATO, *Excess Contributions Tax Statistical Report* (6 April 2013) <<http://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/General-statistics/Excess-contributions-tax-statistical-report/>>.

<sup>99</sup> Senate Standing Committee on Economics, *Answers to Questions on Notice*, BET 253, 31 May-2 June 2011.

<sup>100</sup> Above n 12.

<sup>101</sup> *Commissioner of Taxation v Administration Appeals Tribunal* [2011] FCAFC 37, at [1].

<sup>102</sup> See for example, Michael Bailey, 'Get in early to avoid excess super blooper,' *BRW*, 23 January 2013; Liz Westover, 'Unfair penalties for excess contributions,' *The Australian*, April 21 2012; Daryl Dixon, 'Taxation flaws need a remedy,' *The Australian*, 9 November 2013.

<sup>103</sup> *Vershuer and the Commissioner of Taxation* [2013] AATA 12.

## How many taxpayers affected?

2.5 Table 5 sets out the number of ECT assessments the ATO has issued since the ECT regime commenced operation on 1 July 2007. As with earlier statistics, the ATO has advised that in respect of 2010–11, the ATO has not finalised the relevant assessments and in relation to 2011–12, all assessments have not yet issued. As such, the data below should be taken to be indicative only and not determinative of figures for those years.

**Table 5: Number of ECT assessments issued as at 1 January 2013**

Type of Assessments	Transitional	2007–08	2008–09	2009–10	2010–11	2011–12
Excess concessional contributions only	N/A	18,246	15,868	50,049	35,999	10
Excess non-concessional contributions only	1,784	1,664	1,586	1,940	970	0
Both excess concessional and non-concessional contributions	N/A	427	421	709	206	0
<b>Total</b>	<b>1,784</b>	<b>20,337</b>	<b>17,875</b>	<b>52,698</b>	<b>37,175</b>	<b>10</b>

Source: ATO<sup>104</sup>

2.6 Table 5 above indicates that there was a significant increase in the number of taxpayers exceeding the concessional contributions cap in 2009–10 with 50,049 assessments issued compared with 15,868 issued in 2008–09. This increase is likely attributable to the reduction of the concessional contributions cap from \$50,000 to \$25,000 between these years. While the data for 2010–11 is incomplete, it is more than double the number of assessments issued in 2008–09. The difference between the numbers of taxpayers exceeding their concessional cap in 2009–10 and 2010–11 suggests that while more taxpayers were aware of the reduced concessional contributions cap, it was nonetheless a main cause of ECT assessments in 2010–11.

2.7 The numbers of excess non-concessional contributions remained relatively stable between 2007–08 (1,664 assessments) and 2009–10 (1,940 assessments). Over this period, no changes were made to the non-concessional contributions cap.

## Which taxpayers are affected?

2.8 The ATO has provided statistics on the demographics of taxpayers who have exceeded the concessional and non-concessional contributions caps and the impacts of the ECT stratified by income brackets over a three year period from 2007–08 to 2009–10. These statistics are set out in Table 6 and Table 7 below.

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<sup>104</sup> Above n 98.

**Table 6: Number of taxpayers exceeding caps by taxable income range**

Taxable income range (\$)	2007–08			2008–09			2009–10		
	Both	Con	Non-Con	Both	Con	Non-con	Both	Con	Non-con
ITR not lodged	8	513	246	12	904	348	117	17,403	1,184
under 0	7	255	348	11	247	348	8	236	93
0 — 50,000	180	4,715	2,106	160	4,259	2,626	78	4,610	1,480
50,001 — 100,000	157	8,024	588	219	7,103	844	44	9,291	182
100,001 — 150,000	92	4,650	225	91	4,205	253	28	6,224	107
150,001 — 200,000	48	3,177	87	67	3,068	188	78	10,638	490
over 200,000	280	9,151	245	289	8,802	426	101	12,801	239
<b>Total</b>	<b>772</b>	<b>30,485</b>	<b>3,845</b>	<b>849</b>	<b>28,588</b>	<b>5,033</b>	<b>454</b>	<b>61,203</b>	<b>3,775</b>

Source: ATO<sup>105</sup>

2.9 Table 6 shows that across three years, taxpayers who exceeded their concessional caps tended to be on higher taxable income ranges. Indeed, according to the above, those in the 'over \$200,000' category comprised the largest proportion of such taxpayers. In contrast, the largest proportion of taxpayers who exceeded their non-concessional caps were within the \$0 to \$50,000 taxable income range, i.e., 54.8, 52.2 and 39.2 per cent of such taxpayers exceeded the non-concessional cap in the 2007–08, 2008–09 and 2009–10 financial years, respectively. Statistics provided by the ATO for the 2010–11 and 2011–12 financial years also indicate that the largest proportion of taxpayers exceeding their non-concessional caps were those within the lowest taxable income range.<sup>106</sup>

2.10 It should be noted that the numbers of taxpayers exceeding their caps in Table 6 is not directly reconcilable with the numbers of ECT assessments issued in Table 5. This is due to the ATO not issuing ECT assessments to taxpayers whose excess contributions are below a certain pre-set threshold. The ATO's approach in this regard is discussed in detail in Chapter 3.

**Table 7: Percentage of annual ECT liability by type of cap exceeded and taxable income range**

Taxable income range (\$)	2007–08			2008–09			2009–10		
	Both	Con	Non-Con	Both	Con	Non-con	Both	Con	Non-con
ITR not lodged	1.22%	0.91%	4.04%	0.22%	1.05%	4.48%	1.76%	17.08%	10.33%
under 0	0.40%	0.60%	3.24%	0.36%	0.48%	2.62%	0.80%	0.33%	0.68%
0 — 50,000	7.10%	6.50%	22.40%	6.37%	6.90%	23.06%	1.62%	4.17%	12.42%
50,001 — 100,000	4.30%	8.78%	6.49%	0.57%	4.27%	2.37%	11.30%	6.66%	3.51%
100,001 — 150,000	1.50%	5.29%	2.65%	1.06%	3.14%	1.95%	0.17%	5.57%	1.45%
150,001 — 200,000	0.50%	3.75%	1.36%	5.40%	8.01%	8.81%	0.19%	4.24%	1.02%
over 200,000	3.80%	12.53%	2.52%	4.68%	9.88%	4.30%	1.22%	13.44%	2.04%
<b>Total</b>	<b>18.90%</b>	<b>38.40%</b>	<b>42.70%</b>	<b>18.70%</b>	<b>33.70%</b>	<b>47.60%</b>	<b>17.06%</b>	<b>51.49%</b>	<b>31.45%</b>

Source: ATO<sup>107</sup>

<sup>105</sup> ATO, 'ECT demographics data for 2008', internal ATO document, 19 August 2011, p 4; ATO, 'ECT demographics data for 2009', 19 August 2011, internal ATO document, p 4; ATO, 'ECT demographics data for 2008', internal ATO document, 19 August 2011, p 4.

<sup>106</sup> ATO communication to the IGT, 27 February 2014; for 2010–11 and 2011–12, these statistics showed that 45.75 and 57.4 per cent of taxpayers exceeding their non-concessional cap had taxable income of less than \$37,000.

<sup>107</sup> ATO, 'ECT demographic data for 2008, 2009 and 2010', internal ATO document, 19 August 2011, p 8.

2.11 Table 7 shows that for both the 2007–08 and 2008–09 financial years, the largest proportion of annual ECT liability was imposed in relation to the non-concessional cap, being exceeded, i.e., 42.7 and 47.6 per cent respectively. In 2009–10, the proportion of ECT liability imposed on excess non-concessional contributions reduced to 31.45 per cent.

2.12 It should be noted that, across all three years, taxpayers in the lowest taxable income range comprised the largest proportion of ECT liability for excess non-concessional contributions. In each of the 2007–08, 2008–09 and 2009–10 financial years the ATO's statistics show that 52.5, 48.4 and 39.5 per cent of ECT liabilities for exceeding the non-concessional cap were imposed on taxpayers who had less than \$50,000 of taxable income.

2.13 Relevantly, the ATO's statistics also indicate that in the 2007–08 and 2008–09 financial years, approximately half of total ECT liabilities were imposed on taxpayers who only contributed to APRA-funds.<sup>108</sup> The proportion for later years cannot be accurately determined due to extended timeframes for SMSFs to report contributions.

## How much revenue has the ECT raised?

2.14 Table 8 sets out the total value of assessments issued across a number of years where taxpayers exceed their concessional contributions, non-concessional contributions or both caps.

**Table 8: Value of ECT liabilities (\$m) as at 1 January 2013**

Type of Assessments	Transitional	2007–08	2008–09	2009–10	2010–11	2011–12
Excess concessional contributions only	N/A	72.0	57.2	141.8	96.1	0.1
Excess non-concessional contributions only	49.2	35.3	27.8	39.3	18.6	0
Both excess concessional and non-concessional contributions	N/A	6.8	5.8	8.3	2.2	0
<b>Total</b>	<b>49.2</b>	<b>114.1</b>	<b>90.8</b>	<b>189.4</b>	<b>116.9</b>	<b>0.1</b>

Source: ATO<sup>109</sup>

2.15 Similar to the trends observed in the numbers of ECT assessments issued, the total values of these assessments also increased between 2008–09 and 2009–10, presumably, as a result of the decreasing concessional contributions cap. Moreover, while the data for 2010–11 is incomplete, on the figures that are available, the value of assessments of \$96.1m for excess concessional contributions in that year were higher than those in 2007–08 and 2008–09.

2.16 The value of assessments in respect of excess non-concessional contributions remained largely consistent, with a small decrease in 2008–09 and a larger decrease in 2010–11 in line with the reduction in the number of assessments issued.

<sup>108</sup> *ibid*, p 10.

<sup>109</sup> Above n 98.

## Average ECT liability per taxpayer

2.17 Statistics published by the ATO in relation to the average and median values of ECT assessments provide some insight on the financial impacts which taxpayers may encounter when issued with ECT assessments. The average and median values are set out in Table 9 and Table 10. While the statistics are current as at 1 January 2013, the ATO has advised that it has not finalised the relevant assessments for 2010–11 and in relation to 2011–12, all assessments are yet to issue.

**Table 9: Average value of ECT assessments as at 1 January 2013**

Type of Assessments	Transitional	2007–08	2008–09	2009–10	2010–11	2011–12
Excess concessional contributions only	N/A	3,944	3,607	2,833	2,668	1,363
Excess non-concessional contributions only	27,606	21,192	17,502	20,268	19,223	N/A
Both excess concessional and non-concessional contributions	N/A	15,969	13,781	11,664	10,788	N/A

Source: ATO<sup>110</sup>

**Table 10: Median value of ECT assessments as at 1 January 2013**

Type of Assessments	Transitional	2007–08	2008–09	2009–10	2010–11	2011–12
Excess concessional contributions only	N/A	1,789	1,774	1,594	1,528	1,138
Excess non-concessional contributions only	9,300	5,439	5,087	4,760	5,876	N/A
Both excess concessional and non-concessional contributions	N/A	3,555	4,172	4,153	2,557	N/A

Source: ATO<sup>111</sup>

2.18 The data in Table 9 shows a steadily declining average for excess concessional contribution ECT assessments from \$3,944 in 2007–08 to \$2,838 in 2010–11, strongly suggesting that taxpayers have become more conscious of their obligations in respect of concessional contributions.

2.19 The median values for excess concessional contribution ECT assessments have remained relatively consistent ranging from \$1,789 in 2007–08 to \$1,528 in 2010–11. In contrast, the values for excess non-concessional contribution ECT assessments are consistently higher than the rates for excess concessional contribution ECT assessments by reason of the higher rate of tax applied and indicative of the higher amounts by which taxpayers exceed their non-concessional contributions caps.

2.20 As shown in Table 9, across all financial years between 2007–08 and 2010–11, the average excess non-concessional contribution ECT assessment was close to \$20,000 with a small reduction being observed (\$17,502) in 2008–09. During the transitional year, the average excess non-concessional contribution ECT assessment was \$27,606.

2.21 The median values for non-concessional contribution ECT assessments are much lower than the average values. In 2007–08, the median was \$5,439 which reduced to \$5,087 and \$4,760 in the following two financial years before increasing again to \$5,876 in 2010–11. The transitional median value for excess non-concessional contribution ECT assessments was \$9,300.

<sup>110</sup> *ibid.*

<sup>111</sup> Above n 98.

2.22 The large difference between the average and median values for ECT assessments relating to non-concessional contributions indicates that where taxpayers exceed their non-concessional contributions caps, they did so by wide-varying amounts which has resulted in a large spread of the amount of tax levied in these ECT assessments. It also illustrates that a large proportion of taxpayers exceed their non-concessional contributions by a low amount.

## IGT observations

2.23 The perceptions that the ECT is not operating as intended and not achieving the stated objectives of ensuring that taxpayers save for their retirement throughout the course of their working lives arise from the great number of taxpayers that have been liable for the ECT and the significant amounts of revenue that have been raised where none had been expected.<sup>112</sup> This view is exacerbated by reports of taxpayers being subject to taxes at rates of 93 per cent.<sup>113</sup>

2.24 In May 2008, following a pilot to determine the numbers of taxpayers who had potentially exceeded the transitional contributions cap, the ATO identified that the number of affected taxpayers was much higher than original estimates. Following this observation, the ATO provided relevant briefings to the Minister for Superannuation and Corporate Law.<sup>114</sup> The Minister noted the ATO's advice on this point.

2.25 The ATO has since provided further Minutes to both the Department of Treasury and the relevant Government Minister on different aspects of the ECT including effective tax rates, the exercise of the Commissioner's discretion and the numbers of assessments issued and expected to issue to taxpayers.<sup>115</sup> The IGT considers that the dialogue between the ATO, Treasury and Government highlights the importance of continuing to inform Government of the impact of policy measures so that any corrective measures may be quickly formulated.

2.26 In 2013 the law was changed to effectively tax excess concessional contributions at the taxpayer's marginal tax rate and provide taxpayers with an accompanying option to withdraw up to 85 per cent of their excess concessional contributions. External stakeholders have commented that this change better aligns the treatment of excess concessional contributions with the policy intent of the legislation,<sup>116</sup> as it effectively seeks to restore both the taxpayer and the revenue to the position they would be in if no excess concessional contribution had been made.

2.27 In the IGT's view, this law change should alleviate some of the concerns raised in this IGT review, particularly those relating to the treatment of excess concessional contributions. However, it does not address concerns that the treatment of excess non-concessional contributions disproportionately treats taxpayers, especially low income earners who are liable to pay the top marginal rate on those contributions. This is

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<sup>112</sup> SMSF Professional Association of Australia (SPAA), 'SPAA wants broken excess contributions tax system fixed' (Media release, 13 February 2013).

<sup>113</sup> See for example, Michael Bailey, 'Get in early to avoid super blooper,' *Australian Financial Review*, 23 January 2013; Terry Hayes, 'Super high tax on super contributions — changes needed,' *SmartCompany*, 24 January 2013.

<sup>114</sup> ATO communication to the IGT, 28 August 2013; ATO communication to the IGT, 3 December 2013.

<sup>115</sup> ATO communication to the IGT, 3 December 2013.

<sup>116</sup> SPAA, 'Super package gives clarity for SMSF industry: SPAA,' Media release, 5 April 2013; Financial Services Council, 'FSC welcomes super announcement before the Budget' (Media release, 5 April 2013).

exacerbated by the fact that non-concessional contributions are generally made from funds which have already been subject to income tax.<sup>117</sup>

2.28 An alternative, in Treasury's original proposal for the treatment of undeducted contributions (i.e., non-concessional contributions), was that 'contributions in excess of the cap would be returned to the individual' and 'any earnings on the excess would be effectively taxed at the top marginal tax rate.'<sup>118</sup> However, there were a number of practical difficulties associated with this alternative, including the additional compliance and administrative costs involved. In particular, stakeholders were concerned about difficulties associated with calculating actual superannuation funds' earnings on those excess contributions given the diversity of ways in which funds derive earnings as well as the difficulties in identifying appropriate liquid sources of funds from which refunds may be made.

2.29 Moreover, it was noted that any rule which sought to provide a proxy for actual earnings would likely result in some taxpayers gaining an advantage while others being unduly disadvantaged.

2.30 In the IGT's view, there is a need for a mechanism to discourage taxpayers from using the concessional treatment of superannuation earnings unduly. However, such a mechanism should not disproportionately penalise taxpayers.

2.31 In this respect, the IGT notes that according to the ATO's statistics set out above, low income taxpayers comprise approximately half of those who exceed the non-concessional contributions cap. This group of taxpayers may be the least able to absorb the ECT without it substantially affecting their future retirement income.

2.32 Accordingly, the IGT is of the view that the Government should consider whether the current ECT regime provides proportional treatment of excess non-concessional contributions. As the imposition of any resulting compliance and regulatory impacts should be minimised, the IGT considers that there would be significant benefit in undertaking broad community consultation in this respect.

## RECOMMENDATION 2.1

*The IGT recommends that the Government consider whether the ECT regime provides an appropriate treatment for excess non-concessional contributions, particularly in relation to low income taxpayers, with the aim of minimising the adverse impacts by such means as:*

- *refunding excess contributions;*

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<sup>117</sup> Above n 17.

## RECOMMENDATION 2.1 (CONTINUED)

- *a charge to neutralise any benefits on concessional-tax earnings from those contributions; and*
- *a deterrent factor that is commensurate with the targeted taxpayer action.*

### ATO response

This is a matter for Government.

## WHETHER THE ECT IMPOSES A DISPROPORTIONATE IMPACT ON TAXPAYERS

2.33 Stakeholders expressed concern that the ECT imposed a disproportionate impact due to a combination of:

- onerous monitoring burden placed on taxpayers;
- substantial delays in identifying when contribution caps have been exceeded;
- insufficient protection afforded to taxpayers for genuine mistakes, matters beyond their control or incorrect advice; and
- insufficient scope of discretion afforded to the Commissioner to address any disproportionate impact of the ECT.

### Monitoring burden imposed on taxpayers

#### Stakeholders concerns

2.34 Stakeholders observed that the ECT regime effectively imposes a burden solely on taxpayers to monitor and maintain their contributions below the contributions caps despite the fact that the process of contributing, receiving, allocating and reporting superannuation information rests with a number of other parties including employers, tax and financial advisers and superannuation funds.

2.35 This monitoring burden assumes that taxpayers and their advisers are able to easily and accurately obtain information to quantify the levels of contributions already made, how much more may be made and the potential for any ECT liability where the relevant contributions caps are exceeded. However, taxpayers and their advisers may not always have ready access to this information and issues may arise where:

- taxpayers who are members of multiple funds are not aware of the need to aggregate all contributions made to all funds;
- taxpayers are not aware of certain types of employer contributions which have been made on their behalf, such as insurance contributions;
- taxpayers and their advisers do not possess a reasonably sophisticated level of superannuation and ECT knowledge to ask the right questions in order to obtain accurate and complete information such as questions regarding timing, allocation and the nature and source of contributions; and

- employers and superannuation funds are not aware of other contributions which may have been made in respect of the taxpayer and as such, are unable to assist taxpayers to monitor their contribution levels.

2.36 Submissions from superannuation funds to the current review have indicated some difficulties and tensions which have arisen between the fund and their members where taxpayers who are levied ECT believe that it was incumbent on the superannuation fund to warn them of potential excess contributions. In this regard, some superannuation funds have sought to assist their members through specific mail out campaigns and active monitoring on behalf of their members. However, it was noted that such efforts can only go so far, as mail outs are costly and may take many months. Furthermore, where taxpayers have multiple funds, unilateral monitoring does not assist to inform taxpayers of their total contribution levels.

## Delays in identifying potential excess contributions

### Stakeholders concerns

2.37 Stakeholders have raised concerns that the ATO's pre-assessment letter is often the first indication to taxpayers that they have exceeded their contributions caps. However, given the inherent delays in superannuation funds and taxpayers providing information to the ATO, as well as the ATO's own internal processes for detecting instances of excess contributions, this notification is not timely. Stakeholders point to a number of examples in which much of the delay seemed to have been in relation to excess contributions made in the 2008–09 financial year, the year following the implementation of ECT. In some of these cases, it was alleged that delays of up to two years were reported between the taxpayer exceeding a relevant contributions cap and the ECT assessment issuing.

2.38 Stakeholders are concerned that these delays compound taxpayers' exposure to the ECT through ongoing contributions resulting in the amount of the excess increasing.

### Relevant materials

2.39 As the ATO must wait for all superannuation fund information to be received before accurate data matching can occur, some time delay is unavoidable, especially where taxpayers have multiple superannuation funds. As noted in Chapter 1, there are delays between a superannuation fund receiving a contribution and the ATO being advised of that contribution. For APRA-funds, these delays range from 4 to 16 months and for SMSFs, they range from 4 to 23 months.

2.40 Moreover, as superannuation fund information is matched against individual income tax lodgements, the ATO cannot identify excess contributions until taxpayers have lodged relevant returns.

2.41 Some taxpayers may also have access to extended lodgement timeframes up to June following the end of the financial year.<sup>119</sup> However, the ATO has advised that where 365 days have passed since the due date for lodgement of the income tax return, the ATO's

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<sup>119</sup> See for example, ATO, *Tax agent lodgement program 2013–14* (15 May 2013) <<http://www.ato.gov.au/Tax-professionals/Prepare-and-lodge/Tax-agent-lodgment-program-2013-14/>>.

system will automatically issue a pre-assessment letter based on information provided by the superannuation funds.<sup>120</sup>

### Timeframes between the ATO receiving information and notifying taxpayers

2.42 Once the ATO has in its possession all the relevant information, further delays may also be experienced.

2.43 Table 11 below outlines statistics on the amount of time elapsed between the end of the financial year and when taxpayers are informed of potential excess contributions.

**Table 11: Time elapsed between end of financial year and pre-assessment letter issuing to taxpayer**

Number of Cases How many Months between Case Period End and Letter Sent?	Financial Year: Based on Case Period End						Total
	2009–10	%	2010–11	%	2011–12	%	
5 < 6 months					2,738	100%	2,738
6 < 7 months			6,581	15.2%			6,581
7 < 8 months			6,762	15.6%			6,762
8 < 9 months	14,808	27.9%	13,460	31%			28,268
9 < 10 months	3,150	5.9%	34	0.1%			3,184
10 < 11 months	5,777	10.9%	7,184	16.6%			12,961
11 < 12 months	12,097	22.8%	6,036	13.9%			18,133
1 year < 18 months	16,127	30.4%	3,248	7.5%			19,375
18 months < 2 years	885	1.7%	50	0.1%			935
>= 2 years	210	0.4%					210
<b>Grand Total</b>	<b>53,054</b>	<b>100%</b>	<b>43,355</b>	<b>100%</b>	<b>2,738</b>	<b>100%</b>	<b>99,147</b>

Source: ATO<sup>121</sup>

2.44 Table 11 shows that over time, improvements in the ATO's processes have resulted in letters issuing to taxpayers sooner following the end of the financial year. In 2009–10, these letters did not commence issuing until 8 to 9 months following the financial year end. This was reduced to 6 to 7 months in 2010–11 and to less than six months in 2011–12.

2.45 While the end of the financial year may be used to calculate elapsed time, it does not take into account the time necessary for third party information to be provided before the ATO can commence its data matching. As such, it does not identify when the ATO actually became aware of the potential excess contributions.

2.46 The ATO has advised that on the Saturday immediately following receipt of such information, the ATO system compares information provided by taxpayers in their tax returns and data provided by superannuation funds. From this comparison, a 'cap exceeded form' (CEF) is generated which identifies all taxpayers who have exceeded one or both caps. On the following Wednesday, the ATO system assigns an appropriate treatment for these identified taxpayers.<sup>122</sup>

<sup>120</sup> ATO communication to the IGT, 25 February 2013.

<sup>121</sup> ATO communication to the IGT, 28 March 2013.

<sup>122</sup> ATO communication to the IGT, 25 February 2013.

2.47 The generation of the CEF is the earliest point at which the ATO may be taken to be aware that taxpayers have exceeded their contributions caps. However, the ATO does not maintain specific statistics regarding the time elapsed between the generation of the CEF and the issue of the pre-assessment letter.

2.48 At the IGT's request, the ATO provided a statistical sample of 1000 cases from its internal case management system. Of these 1000 cases, the IGT could only identify a sub-sample of 448 cases in which dates were provided for the CEF generation, the pre-assessment letter issuing and whether the ATO noted the taxpayer exceeded their cap again. This sub-sample of 448 cases illustrates that a significant period of time may elapse between the ATO becoming aware of the excess contribution and the taxpayer being notified. These statistics are outlined in Table 12, together with the number and proportion of cases where the taxpayer had repeated excess contributions.

**Table 12: Days elapsed between the CEF and pre-assessment letter issuing 2010–12**

Number of days elapsed	Number of cases	# of cases with repeat excess contributions	% of repeat
0 - 30	33	4	12.12
31 - 60	49	4	8.16
61 - 90	57	11	19.30
91 - 120	28	6	21.43
121 - 150	79	15	18.99
151 - 180	51	14	27.45
181 - 210	25	6	24.00
211 - 240	30	13	43.33
241 - 270	15	2	13.33
271 - 300	13	5	38.46
301 - 330	2	0	0.00
331 - 360	2	0	0.00
361 - 390	14	1	7.14
391 - 420	7	2	28.57
421 - 450	2	2	100.00
451 - 480	7	4	57.14
481 - 510	12	7	58.33
511 - 540	2	1	50.00
541 - 570	9	5	55.56
571 - 600	4	2	50.00
601 - 630	7	4	57.14

Source: ATO<sup>123</sup>

2.49 Table 12 shows that in 66.29 per cent of cases (297 out of 448), the ATO issued the taxpayer with a pre-assessment letter within six months of generating the CEF. Within a year following the generation of the CEF, the ATO had issued pre-assessment letters in 85.71 per cent of cases (384 out of 448). Only a relatively small fraction of cases resulted in pre-assessment letters that were issued more than a year after the CEF had been generated (14.29 per cent).

2.50 The data in Table 12 also shows the proportion of those cases within each elapsed time period where the taxpayer had repeated excess contributions. Those cases in which the taxpayer was notified of the original excess contribution within a year experienced generally

<sup>123</sup> IGT, constructed from ATO communication to the IGT, 25 February 2013.

lower rates of repeat excess contributions, less than 50 per cent. However, as the elapsed period increases, the proportion of repeat excess contribution cases also increases, being 50 per cent or more in all but two periods (cases taking 361 to 390 and 391 to 420 days).

2.51 The ATO recognises the importance of more efficient and timely data matching to identify excess contributions cases. As part of its Annual Work Plan for 2012–13, an internal management report, which outlines staffing, systems and other processes to administer the ECT for the coming year, the ATO notes amongst other things that:<sup>124</sup>

There are a number of principles behind the workplan including;

- ...Commencing cases as soon [as] possible so we influence the taxpayer's current year contributions and reduce unintended later year excess cases;...

2.52 The ATO recognises that extended time delays have occurred in issuing pre-assessment letters, particularly in the early years of the ECT regime when it was working to establish systems and processes. In discussions with the IGT, the ATO has advised that, in March 2013, it began implementing initiatives from its ECT Redesign Project. This project aimed to increase the level of automation within the ATO's ECT processes to provide a more timely and efficient means of identifying, and informing taxpayers of, excess contributions.

2.53 As the ECT Redesign Project has only recently been finalised and implemented, the new processes have not yet been active for a full financial year and the ATO has not yet undertaken an analysis of the improvements yielded.

## Insufficient protection

### Stakeholder concerns

2.54 Stakeholders have expressed concern that the ECT provides insufficient taxpayer protection for:

- genuine taxpayer mistakes;
- matters beyond their control such as delayed receipt or allocation of contributions<sup>125</sup> or employers making SG payments which lead to the taxpayer exceeding their contributions caps<sup>126</sup> or other third party errors; and
- relying on incorrect or incomplete professional advice.

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<sup>124</sup> ATO communication to the IGT, 13 March 2013.

<sup>125</sup> See for example, ATO, *Superannuation Excess Contributions Tax: concessional contribution – allocation of contributions*, ATO ID 2012/16, 5 March 2012.

<sup>126</sup> See for example, University of New South Wales, *Superannuation Guarantee* (17 May 2013) <[http://www.hr.unsw.edu.au/services/super/SG\\_changes.html](http://www.hr.unsw.edu.au/services/super/SG_changes.html)>.

## Genuine taxpayer mistakes

2.55 The ATO has outlined its view that mistakes, in and of themselves, will not be sufficient to warrant the exercise of discretion.<sup>127</sup> Specifically, the ATO states:<sup>128</sup>

### Mistake

In some circumstances, you can claim restitution (repayment) of an amount you paid to another person, if you paid it in circumstances that the law recognises as a relevant mistake. Even if you do have a right to be repaid, you may still have made a contribution that will count towards your concessional or non-concessional contributions cap.

Where we are satisfied a contribution was made, we will consider if it was reasonably foreseeable to you when that contribution was made that you'd have excess contributions. If there are no special circumstances, we won't disregard or reallocate the amount of the contribution. This will be so even if the amount has been returned.

2.56 Under the ATO's guidelines, absent any other factors, it is likely that the contribution would be counted for ECT purposes, and if the taxpayer exceeded a relevant cap, the taxpayer will be levied with the ECT.

2.57 In other forums, such as the Superannuation Complaints Tribunal (SCT), cases have successfully been brought for the return of contributions made in error. In one case, the taxpayer intended to make a payment for rent but inadvertently made an electronic payment to the superannuation fund. The SCT determined that in these circumstances, the fund must refund the contribution which was inadvertently made to it.<sup>129</sup>

2.58 As a result of the strictness with which the ATO treats mistaken contributions, some superannuation funds have made payments to their members in purported restitution of mistaken contributions. On this issue, the ATO has outlined its approach in ATO Interpretative Decision (ATO ID) 2010/104.<sup>130</sup> In that case, the Commissioner was asked to consider whether the full sum of a contribution (\$500,000) would be included for the purposes of determining ECT liability in circumstances where \$200,000 had been repaid to the taxpayer.

2.59 The Commissioner expressed the view that notwithstanding the return of a portion of the contribution, the entire sum would be included for the purposes of assessing the ECT. In support of this conclusion, the Commissioner had regard to a number of judicial decisions including the decision of the High Court in *David Securities Pty Ltd v Commonwealth Bank of Australia*<sup>131</sup> and the New South Wales Supreme Court decision in *Personalised Transport Services Pty Ltd v AMP Superannuation Ltd and Anor*.<sup>132</sup> The ATO also considered the aforementioned SCT case concerning a rent payment that was mistakenly paid to the superannuation fund.<sup>133</sup>

<sup>127</sup> See also, *Liwszyc v Commissioner of Taxation* [2014] FCA 112 at [77].

<sup>128</sup> ATO, *ECT – applying to have your excess contributions disregarded or reallocated* (24 September 2013) <<http://www.ato.gov.au/Individuals/Super/In-detail/Contributions/ECT---applying-to-have-your-contributions-disregarded-or-reallocated/>>.

<sup>129</sup> Superannuation Complaints Tribunal Determination D06-07\129 [2007] SCTA 33 (28 March 2007).

<sup>130</sup> ATO, *Superannuation excess contributions tax: restitution of a 'mistaken contribution'*, ATO ID 2010/104, 14 March 2014.

<sup>131</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

<sup>132</sup> *Personalised Transport Services Pty Ltd v AMP Superannuation Ltd and Anor* [2006] NSWSC 5.

<sup>133</sup> Above n 129.

2.60 In arriving at its view on the matter that was subject of the ATO ID, the ATO acknowledged that the laws of restitution and unjust enrichment applied to superannuation funds, but differentiated the case at hand in that the taxpayer was not under any mistaken belief regarding the contribution itself. Rather, the mistake in this instance related to the consequences of the contribution. In that case, the ATO did not consider that it was unjust for the superannuation fund to retain the whole of the contribution and, accordingly, its entire sum would be included for ECT purposes. The ATO view is consistent with observations that it made in 2008 to external stakeholders as part of its National Tax Liaison Group Super Technical Sub-group. At that forum, the ATO noted:<sup>134</sup>

A trustee may refund a contribution made to the fund in respect of a member, only in the circumstances set out in regulation 7.04 [of the *Superannuation Industry (Supervision) Regulations* 1994]. A payment in the nature of a genuine mistake which, at the time of making the payment was not intended to be a contribution, may be refunded to the payer. However a contribution which is later regretted due to the excess contributions tax or other consequences can not be refunded by the trustee.

2.61 The IGT is not aware of any other ATO material or any judicial determinations which considered the effect of restitutionary payments on taxpayers' liability to the ECT.

### **Matters beyond the taxpayer's control**

2.62 Taxpayers may also exceed their contributions caps as a result of matters beyond their control. These may include, for example, delayed receipt or allocation of contributions by superannuation funds,<sup>135</sup> payment of SG at a higher rate or employer or other third party errors.

#### **Delayed receipt or allocation of contributions**

2.63 Generally, a contribution will be made when the amount is received by the superannuation fund or credited to augment the relevant account.<sup>136</sup> Delayed receipt or allocation of contributions arise where a taxpayer contributes to their fund near the end of the financial year but for a number of reasons, such as the time taken for electronic processing, the superannuation fund does not receive or allocate the contribution until the following financial year.

2.64 An examination of the cases which have come before the AAT and the Federal Court indicate that 9 cases have involved such delays, which vary from as little as one business day to 19 business days. These cases are outlined briefly in Table 13.

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<sup>134</sup> ATO, National Tax Liaison Group (NTLG) Superannuation Technical Sub-group, Minutes of the 3 December 2008 meeting, item 6.2.

<sup>135</sup> See for example, above n 125.

<sup>136</sup> *Liwszyc v Commissioner of Taxation* [2014] FCA 112 at [63] and [69].

**Table 13: AAT and Federal Court decisions featuring delayed receipt or allocation of contributions**

Decision date	Case name	Case citation	Employer or personal contribution	Business Days late
6/03/2012	Peaker	[2012] AATA 140	Employer	5
23/03/2012	Chantrell	[2012] AATA 179	Personal	2
04/04/2012	Bernhardi	[2012] AATA 216	Employer	6
25/05/2012	Rawson	[2012] AATA 322	Employer	1
5/06/2012	Paget	[2012] AATA 334	Employer	1
13/07/2012	Colless	[2012] AATA 441	Employer	2
01/11/2012	Davenport	[2012] AATA 760	Employer	1
15/01/2013	Vershuer	[2013] AATA 12	Employer	19
20/02/2014	Liwszyc	[2014] FCA 112	Employer	1

Source: AAT

2.65 As outlined in Table 13, in all but one case the contributions involved were made by employers on behalf of their employees either in accordance with salary sacrifice arrangements or to pay the SG.

2.66 To an extent, the existing legislation recognises that in some instances, taxpayers may not have control over the actions leading to excess contributions being made. The legislation provides that, in the exercise of his discretion (which is discussed in more detail further below), the Commissioner may have regard to:<sup>137</sup>

(b) whether it was reasonably foreseeable, when a relevant contribution was made, that you would have excess concessional contributions or excess non-concessional contributions for the relevant financial year, and in particular:

(i) if the relevant contribution is made in respect of you by another individual--the terms of any agreement or arrangement between you and that individual as to the amount and timing of the contribution; and

(ii) the extent to which you had control over the making of the contribution...

2.67 The application of a 'reasonably foreseeable' test to these instances has resulted in a number of cases in which taxpayers were unsuccessful in compelling the exercise of discretion. No case in Table 13 resulted in a finding that discretion should be exercised in favour of the taxpayer.

### Superannuation Guarantee

2.68 Another situation in which taxpayers may attract the ECT for matters beyond their control relates to the interaction between the SG and the ECT regimes. The SG regime imposes an obligation on employers to make compulsory contributions of superannuation for eligible employees at a minimum rate of 9.25 per cent. In many cases, the rate of contributions to be made may be higher, such as in the case of some Australian Public Service enterprise agreements and certain awards in other industries.<sup>138</sup>

2.69 SG payments count towards a taxpayer's concessional contribution cap, though this is sometimes not understood by taxpayers. Moreover, many taxpayers may be unaware that

<sup>137</sup> ITAA 1997, para 291-465(3)(b) and sub-s 292-465(6).

<sup>138</sup> See for example, above n 126.

SG payments may be based on additional income such as bonuses and overtime, which could result in higher levels of SG payments being made in certain periods.

2.70 By reason of the SG and the ECT regimes operating together, and SG payments forming a large component of concessional contributions, taxpayers may find themselves exceeding the concessional cap by reason of their employers complying with obligations imposed by the SG regime. For example, a taxpayer may be a non-executive director on a number of boards and receive a salary as well as SG payments in respect of each of those roles. The total contributions for each of these roles may result in the taxpayer exceeding their concessional contributions cap.

2.71 Another situation which may arise is where the ATO undertakes compliance activities in relation to employers' SG compliance. As part of these activities, the ATO may determine that a taxpayer previously classified by their employer as a contractor (and therefore, no SG was paid and the contractor made their own personal superannuation contributions) should correctly be treated as an employee and assess the employer for unpaid SG which is passed on to the relevant funds. As a consequence, the combined effect of personal contributions already made and the SG payments may lead to excess contributions. The ATO is aware of one case in which this has occurred and the discretion was exercised to reallocate payments to avoid contributions caps being exceeded.

2.72 Finally, the timing of SG payments may also result in taxpayers exceeding their concessional contributions cap. One reason for this is that the current legislation allows employers up to 28 days following the end of a financial year to make the relevant SG payments relating to work undertaken in the final quarter of that year.<sup>139</sup> Where taxpayers are unaware of this fact or do not appreciate that the contribution, for ECT purposes, is taken to have been made in the financial year that it is received, they may exceed their contributions caps through subsequent contributions. Eight matters have come before the AAT on this issue. These cases are set out in Table 14 below.

**Table 14: AAT decisions featuring SG timing issues**

Decision date	Case name	Case citation	SG payment made	Year in which work undertaken
13/01/2012	Schuurmans-Stekhoven	[2012] AATA 62	10 July 2007	2006–07
28/02/2012	Naude	[2012] AATA 130	02 July 2007 16 July 2008	2006–07 2007–08
28/02/2012	Leckie	[2012] AATA 129	16 July 2008 8 July 2009	2007–08 2008–09
11/05/2012	Kuyper	[2012] AATA 282	8 July 2009	2008–09
06/07/2012	Bornstein	[2012] AATA 441	10 July 2007	2006–07
26/07/2012	Hamad	[2012] AATA 530	July 2009	2008–09
30/08/2012	Longcake	[2012] AATA 576	July 2009	2008–09
01/11/2012	Applicant 1659	[2012] AATA 754	1 July 2009	2008–09

Source: AAT

2.73 Of the eight cases in Table 14, three cases succeeded in the AAT to have their excess contributions either disregarded or reallocated to another financial year.<sup>140</sup> However, it is

<sup>139</sup> *Superannuation Guarantee (Administration) Act 1992*, sub-s 23(6).

<sup>140</sup> *Bornstein and Commissioner of Taxation* [2012] AATA 441; *Hamad and Commissioner of Taxation* [2012] AATA 530 and *Longcake and Commissioner of Taxation* [2012] AATA 576.

worth noting that in all three cases, the reasons for decision do not turn on the timing of the SG payments alone.

### Employer or other third party errors

2.74 Submissions to the IGT have indicated that in some cases, taxpayers have also exceeded their contributions caps by reason of employer errors. Typically, such errors occur where taxpayers have entered into salary sacrifice arrangements for contributions into superannuation funds and instructions on timing and quantum of the contributions have not been properly carried out.<sup>141</sup>

2.75 Other errors along similar lines include instances where employers or financial advisers, through simple transpositional errors, have inadvertently contributed more to superannuation funds than was intended.

### Taxpayer reliance on professional advice

2.76 It is generally accepted that taxpayers should seek independent tax or financial advice before entering into any transactions which may have taxation consequences. However, in practice, this may not always occur. Moreover, as a number of cases have demonstrated, reliance on financial advisers does not always result in correct decisions being made, nor does it afford any level of protection for taxpayers against the imposition of the ECT where such advice is later shown to be incomplete or inaccurate.<sup>142</sup>

2.77 The ATO has repeatedly reiterated its view that adviser error or ‘inadvertent poor advice’,<sup>143</sup> in itself, is not sufficient to warrant the exercise of the Commissioner’s discretion. PSLA 2008/1 states:<sup>144</sup>

Incorrect professional advice – as with ignorance of the law, this would not generally amount to special circumstances, unless there were other special factors leading to the mistake. For example, if the incorrect professional advice was based on a widely understood view of the law that was ultimately found by a court to be incorrect, the incorrect advice may constitute special circumstances. However, the mere fact that a particular mistake is of a type that is ‘not uncommon’ or results from an incorrect interpretation of a provision which some may find hard to apply, would not generally make the circumstances sufficiently special to warrant exercise of the Commissioner’s discretion.

### Insufficient scope of the Commissioner’s discretion

2.78 Taxpayers’ grievance at being levied the ECT for genuine mistakes, matters beyond their control and incorrect advice are exacerbated when they are unsuccessful in seeking the Commissioner’s discretion to disregard or reallocate the excess contributions. Such a situation arises owing to the strict tests which must be met before the discretion may be exercised. In addition, stakeholders also expressed concern regarding the consistency of the ATO’s exercise of the Commissioner’s discretion. The latter issue is discussed in detail in Chapter 3.

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<sup>141</sup> See for example, *Liwszyc v Commissioner of Taxation* [2014] FCA 112.

<sup>142</sup> See for example, *Dowling and the Commissioner of Taxation* [2013] AATA 49.

<sup>143</sup> ATO, Superannuation Consultative Committee, Minutes of the 7 June 2011 meeting, item 4.

<sup>144</sup> Above n 93, para [36].

2.79 A critical condition for the exercise of the Commissioner's discretion is the requirement that there be 'special circumstances'.

2.80 The legislation does not provide a definition of 'special circumstances'. On this issue, the explanatory memorandum notes:<sup>145</sup>

The courts have considered what 'special circumstances' means in many different contexts. It is clear from the case law that special circumstances are unusual circumstances, or circumstances out of the ordinary. Whether circumstances are special will vary from case-to-case as the context requires, but in this context they must make it unjust, unreasonable or inappropriate to impose the liability for excess contributions tax.

2.81 The explanatory memorandum further notes:<sup>146</sup>

1.118 However, in making the determination [on the discretion], the Commissioner may have regard to certain matters specified in the law. These are whether:

- the contributions made in a particular financial year would be allocated more appropriately to another year; and
- it was reasonably foreseeable a particular contribution would result in a person having an excess contribution when the contribution was made.

1.119 When considering whether an excess is reasonably foreseeable, the Commissioner may consider the terms of any agreement or arrangement between the individual and another person where those terms affect the amount or timing of the contribution. For example, where contributions are made by an employer under a workplace agreement, industrial award or an effective salary sacrifice agreement the Commissioner will need to consider the terms of those agreements. The Commissioner may also consider the extent to which the individual has control over the making of the contribution. For example, a person who is making a contribution towards the end of a financial year should ensure that the fund receives the contribution before the end of the financial year to ensure it is taken into account in that year and not the subsequent one.

2.82 The ATO has not outlined any specific interpretation of 'special circumstances' beyond adopting the text of the explanatory memorandum outlined above.<sup>147</sup> The ATO further notes that it is not possible to lay down precise rules in respect of 'special circumstances' but that the circumstances of the case must be 'unusual to take the case outside the ordinary course.'<sup>148</sup>

2.83 Only a relatively small proportion of applications for exercise of the discretion have succeeded, though this has steadily increased over time. The ATO's publicly issued statistics in relation to the numbers and outcomes of these applications are set out in Table 15.<sup>149</sup>

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<sup>145</sup> Explanatory Memorandum, House of Representatives, Tax Law Amendments (Simplified Superannuation) Bill 2006, p 36.

<sup>146</sup> *ibid*, pp 36-37.

<sup>147</sup> Above n 93, para [24].

<sup>148</sup> Above n 93, para [23]; on this point, the ATO drew support from such cases as: *Beadle v Director-General of Social Security* (1985) 60 ALR 225; *Drachnikov and Another v Centrelink and Another* (2003) 75 ALD 134 at [65] and [66] *Minister For Community Services and Health and Another v Chee Keong Thoo* (1988) 78 ALR 307; *Tefonu Pty Ltd v. Insurance And Superannuation Commissioner* (1993) 30 ALD 455.

<sup>149</sup> Above n 97.

**Table 15: Outcome of applications for exercise of the Commissioner's discretion for excess concessional contributions**

	Transitional	2007–08	2008–09	2009–10	2010–11	2011–12	Total
Applications received	645	1,327	1,129	2,580	1,396	187	7,264
In progress	0	1	5	13	21	24	64
No discretion exercised	561	829	875	1,879	901	73	5,118
Discretion exercised	84	497	249	688	474	90	2,082
<b>Percentage of discretion not exercised</b>	<b>87%</b>	<b>62.5%</b>	<b>77.5%</b>	<b>72.8%</b>	<b>64.5%</b>	<b>39%</b>	<b>70.45%</b>
<b>Percentage of discretion exercised</b>	<b>13%</b>	<b>37.5%</b>	<b>22%</b>	<b>26.7%</b>	<b>34%</b>	<b>48.1%</b>	<b>28.66%</b>

Source: ATO

2.84 Table 15 shows that in 2007–08, the ATO received 1,327 applications for the exercise of the discretion which decreased to 1,129 in 2008–09. In 2009–10, following a reduction in the concessional contributions thresholds, the ATO reported a significant increase in these applications with 2,580 having been received. In 2010–11, 1,396 applications were received. In 2011–12, the ATO reported significantly reduced numbers of discretion applications with only 187 having been received.<sup>150</sup>

2.85 While the level of discretion applications have largely remained consistent, with the exception of the 2009–10 and 2011–12 financial years, the proportion of such applications which resulted in the discretion being exercised have steadily increased since 2008–09. In 2007–08, 37.5 per cent of applications resulted in the discretion being exercised. This decreased to 22 per cent in 2008–09 but progressively increased to 26.7, 34 and 48.1 per cent in 2009–10, 2010–11 and 2011–12, respectively.<sup>151</sup>

2.86 These publicly issued statistics differ slightly from data provided by the ATO from its enterprise case management system, Siebel, which show that between the 2008–09 to 2012–13 financial years to date, the ATO received and actioned 7,734 applications for the exercise of the Commissioner's discretion. This represents a difference of 470 cases from the published statistics and may be attributable to record-keeping and reporting errors, duplicates in records and other data entry anomalies. The difference is negligible, representing only 6 per cent of the total discretion cases reported.<sup>152</sup>

2.87 Of the 7,264 cases reported by the ATO, the Commissioner exercised his discretion in 2,082 cases (28.66 per cent) and refused to do so in 5,118 case (70.45 per cent), with the remainder still being considered. In relation to taxpayer challenges of decisions not to exercise the Commissioner's discretion, the ATO's data shows that, to date, it has received and actioned 2,918 objection applications. This represents a 40 per cent objection rate against total discretion applications and a 57 per cent objection rate against total instances in which no discretion was exercised.

<sup>150</sup> *ibid.*<sup>151</sup> Above n 98.<sup>152</sup> ATO communication to the IGT, 18 October 2013.

2.88 The outcomes of objections against discretion decisions are outlined in Table 16 below.

**Table 16: Outcomes of objections to discretion decisions**

Outcomes	Quantity
Allowed in Full	273
Allowed in Part	56
Disallowed	730
Advice Provided	37
Invalid/NFA	547
Withdrawn	959
Other/No Outcome Recorded	316
<b>Total</b>	<b>2918</b>

Source: ATO<sup>153</sup>

2.89 Table 16 shows that 11.3 per cent of cases resulted in the objection being allowed in full or in part, while 25 per cent were disallowed. The majority of cases, representing more than half of all applications (51.6 per cent), were reported to be invalid, withdrawn by the taxpayer or otherwise resulted in no further action being undertaken.

### Challenging the discretion decision in the AAT and the Federal Court

2.90 Though originally not a reviewable decision,<sup>154</sup> since 2010 taxpayers have been able to seek review of the exercise of the Commissioner's discretion through either the AAT or the Federal Court.<sup>155</sup>

2.91 Statistics provided by the ATO indicate that to date, 121 applications have been lodged to seek review of or appeal the ATO's discretion decision. Of these, 115 applications were lodged in the AAT and the remaining 6 were lodged in the Federal Court.

2.92 Despite the high number of applications lodged in the AAT and the Federal Court, only 25 were heard and determined by the AAT. The remaining matters were withdrawn, disposed of by consent or otherwise dismissed by the AAT. Two matters have been heard and determined by the Federal Court. In one case, judgment has been handed down in favour of the Commissioner<sup>156</sup> while in the other, the Commissioner's appeal from a decision of the AAT has been allowed and the matter remitted to the Tribunal to be heard and determined according to law.<sup>157</sup>

2.93 In the Federal Court case in which ATO recently succeeded, two payments of superannuation contributions made on behalf of the taxpayer were mistimed. In particular, the company bookkeeper initiated these payments on 30 June 2009 and the superannuation fund applied them to the taxpayer's account on 1 July 2009. As a result, these payments were treated as superannuation contributions for the 2009–10 financial year and together with other payments gave rise to an ECT liability. The Commissioner refused to exercise his

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<sup>153</sup> ATO communication to the IGT, 22 October 2013.

<sup>154</sup> *Re McMennemin and Federal Commissioner of Taxation* [2010] AATA 573; *Commissioner of Taxation v Administrative Appeals Tribunal* (2011) 91 FCR 400.

<sup>155</sup> ITAA 1997, sub-ss 291-465(9) and 292-465(9).

<sup>156</sup> *Livszyc v Commissioner of Taxation* [2014] FCA 112.

<sup>157</sup> *Dowling v Commissioner of Taxation* [2013] AATA 49; *Commissioner of Taxation v Dowling* [2014] FCA 252.

discretion to reallocate these contributions to another year and the taxpayer appealed to the Federal Court. In his reasons for dismissing the taxpayer's appeal, Justice McKerracher concluded that 'while it may be accepted that it is entirely commonplace to delegate tasks of this nature and that entirely innocent errors were made, the legislation does not enable the errors to be corrected.'<sup>158</sup>

2.94 Of the 25 matters heard and determined by the AAT, all but four (84 per cent) were decided in favour of the Commissioner. The ATO considers that this high proportion of ATO success demonstrates that its exercise of the discretion is consistent with the legislation.

2.95 Stakeholders have acknowledged that the ATO has enjoyed high levels of favourable decisions in the AAT. However, they have also asserted that the ATO is often well-represented by litigation officers or counsel while taxpayers in these matters are often self-represented particularly in the AAT. As a result, these stakeholders consider that taxpayers are at an immediate disadvantage when seeking to argue legal merits of why 'special circumstances' applied to their case.

## IGT observations

### Monitoring burden imposed on taxpayers

2.96 The information burden imposed on taxpayers is onerous and, in some cases, difficult to discharge as it requires time and effort to collect and collate all relevant information.

2.97 While it is possible for taxpayers to determine aggregate levels of superannuation contributions, such a task requires the taxpayer or their adviser to be aware of a number of matters including:

- all superannuation funds of which the taxpayer is a member;
- all sources of contributions to each of those superannuation funds;
- the timing and processes that each of the contributors adopts when remitting superannuation contributions to the funds;
- whether any special provisions apply to contributions made to defined benefit plans;
- the levels of contributions for prior years to assess whether the 'bring forward' provision has been previously triggered;
- whether any exemptions or deductions were claimable by the taxpayer which may alter the character of the contribution and, if so, whether these have been correctly claimed; and
- the timing and processes of each of the superannuation funds to receive and allocate contributions.

2.98 Where taxpayers and their advisers are not aware of, or do not consider these issues, there is the potential for the information obtained to be incomplete or inaccurate. Even where taxpayers and their advisers request details of the above, it is possible that record-keeping or other errors caused by contributors or the superannuation funds may hinder the taxpayer's

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<sup>158</sup> *Liwszyc v Commissioner of Taxation* [2014] FCA 112 at [87].

access to complete, accurate and timely information regarding contribution levels. The result may be that taxpayers exceed their contributions cap despite reasonable attempts to identify the amount of relevant contributions.

2.99 The monitoring burden on taxpayers could be relieved through a centralised repository of all contributions information on which the taxpayer may rely in determining whether they have exceeded, or are close to exceeding, a contributions cap for a particular year. However, providing such a repository would require substantial action and investment, including:

- appropriate information technology platforms to host the relevant data;
- legislative amendments to alter the timing and frequency of contributions data reporting;
- appropriate monitoring by the administrator to ensure the data integrity and accuracy; and
- sufficient legislative provisions to protect taxpayers who reasonably rely on such data where it proves to be incomplete or inaccurate.

2.100 Accordingly, any central repository would need to be considered in the longer term as information technology systems and administrative arrangements evolve. Notwithstanding these challenges, the IGT considers that, in the short term, taxpayer difficulties in monitoring contributions may be ameliorated by reducing the impact of the ECT through improved ATO identification and notification of excess contributions and taxpayer protections, which are discussed below.

### **Delays in identifying potential excess contributions**

2.101 The timely and efficient identification of ECT cases serves a number of different purposes. First, it ensures that taxpayers are notified at the earliest point of the excess contributions to assist them to better manage future period contributions. Secondly, where the ATO requires additional information from these taxpayers or their superannuation funds, timely contact makes it easier for the information to be obtained and provided. Thirdly, early identification ensures that the ATO's compliance action is timely and the risks of not being able to recover unpaid tax are reduced.

2.102 As discussed earlier, due to superannuation fund reporting and income tax return lodgement dates, there may be a delay of between 4 to 23 months while the ATO waits for third party data to identify excess contributions. When combined with the time taken for the ATO to effect its internal work processes (as illustrated in Table 11 and Table 12), 4 to 45 months may elapse between relevant contributions being made and the ATO alerting taxpayers of the excess contribution.

2.103 The ATO may receive all relevant information concerning taxpayers with simple tax affairs and their APRA-regulated superannuation funds within four months of the end of the financial year. Long periods are experienced where taxpayers may delay their income tax lodgements (often, legitimately through tax agent lodgement concessions) and have SMSF funds to which contributions are made. Such delays may be mitigated by the ATO encouraging taxpayers, tax agents and superannuation funds to lodge sooner. However, the ATO cannot unilaterally require earlier lodgement dates. These dates are prescribed by

statute and any proposal to reduce lodgement timeframes would need to consider the additional compliance costs that may be imposed on superannuation funds.

2.104 Notwithstanding the lodgement timeframes, the IGT considers that there is benefit in the ATO reducing the time it takes to notify taxpayers of excess contributions. In this respect, the IGT notes that where the ATO had received all relevant information but had taken longer than twelve months to issue the pre-assessment letter, there appeared to be a higher incidence of taxpayers repeatedly exceeding contribution caps. Accordingly, as part of its ECT Redesign Project discussed earlier, the IGT is of the view that the ATO should ensure that it notifies taxpayers of any excess contributions within six months of receiving all relevant information to minimise the risk of taxpayers further exceeding their contributions caps.

2.105 In addition to reducing the time the ATO takes to notify taxpayers of an ECT liability, the IGT also considers that there is opportunity to alert taxpayers to potential excess non-concessional contributions. Such early notification is particularly important due to the large ECT liabilities that may arise from these contributions which have already been subject to income tax. Moreover, as the 'bring forward' provision is triggered in the first year in which taxpayers make more than \$150,000 in non-concessional contributions, taxpayers may have an additional two years to regulate their contributions so as to avoid contributing more than \$450,000 over the relevant three year period. However, the ATO does not notify taxpayers where they have triggered the 'bring forward' provision. The ATO only notifies taxpayers after taxpayers have contributed more than \$450,000 over the relevant three year period as the ATO considers that there is limited utility in any earlier notification due to:

- the time delays (discussed earlier) which may hamper the ATO's ability to identify and issue notifications on excess contributions for up to two years after the first contribution is made;
- the 'bring forward' provision not applying to approximately half of the taxpayers who exceed the non-concessional contributions cap as they are aged 65 or older;<sup>159</sup> and
- the cap being exceeded due to large lump sum contributions, such as those a result of windfall gains, sales of property or inheritances.

2.106 Notwithstanding these potential limitations, the IGT considers that promptly advising taxpayers that they have exceeded the \$150,000 annual non-concessional cap would provide at least some taxpayers with an opportunity to mitigate the risk of becoming liable to the ECT. This would also encourage appropriate taxpayer behaviour in the future.

## RECOMMENDATION 2.2

*The IGT recommends that the ATO:*

- (a) ensure that pre-assessment letters are issued to taxpayers within six months of the ATO receiving all relevant information;*

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<sup>159</sup> The ATO's statistics indicate that in 2008, 2009 and 2010, 62.88, 42.92 and 40.54 per cent of all taxpayers who exceeded their non-concessional contributions cap were older than 65; above n 107, p 10.

## RECOMMENDATION 2.2 (CONTINUED)

- (b) periodically assess the efficiency and effectiveness of the systems and processes in identifying and communicating instances of excess contributions to improve their timeliness and efficiency; and*
- (c) promptly notify taxpayers when they have triggered the 'bring forward' provision.*

### ATO response

Agree with recommendation 2.2 (a).

Agree with recommendation 2.2 (b).

Agree in principle with recommendation 2.2 (c).

The ATO agrees to explore options for promptly notifying taxpayers when they have triggered the 'bring forward'. This will include an assessment of whether any such options would allow us to inform taxpayers in a timely and cost effective manner (i.e. before a liability is triggered).

### Insufficient protection

2.107 The notifications discussed above may not benefit all taxpayers who exceed the non-concessional contributions cap. Accordingly, the IGT is of the view that appropriate taxpayer protections should operate to mitigate any disproportionate effect that the ECT may have in cases where taxpayers, or their advisers, have made genuine mistakes.

2.108 Stakeholders have argued that the current level of protection is insufficient as taxpayers may be levied with the ECT in circumstances where they have taken reasonable steps to comply with their obligations but have nonetheless exceeded their contributions caps by reason of genuine mistakes they, or their advisers, have made. These concerns are well known to the ATO, with a number of questions being put to it on this point by Parliamentary committees.<sup>160</sup> In particular, stakeholders have noted that unlike other areas of tax law, taxpayers are unable to effectively take action to correct or amend mistakes in the ECT regime.

2.109 The ATO's view is that a mistake of fact leading to the contribution being made, for example the taxpayer intended to pay rent but inadvertently transferred the payment to the superannuation fund, may be refunded. However, the ATO considers that superannuation funds cannot refund contributions which the taxpayer has intentionally made but later regrets once they appreciate that ECT would become payable.<sup>161</sup> At its ATO Tax Practitioner Forum meeting in August 2009, the ATO indicated that it would issue additional guidance on the issue of mistake to reflect its view that mistakes causing the contribution may be rectified but mistakes as to consequence may not.<sup>162</sup>

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<sup>160</sup> Senate Standing Committee on Economics, Question SBT 61; Senate Standing Committee on Economics, Question AET 17.

<sup>161</sup> Above n 134, item 6.2.

<sup>162</sup> ATO, ATO Tax Practitioner Forum, Minutes of the 7 August 2009 meeting.

2.110 In the IGT's view, the ATO's guidance on issues of genuine mistake is ambiguous. On the one hand it notes that restitution may be possible but on the other states that the contribution may nonetheless be counted for the purposes of the ECT.<sup>163</sup> In addition, examples on the ATO's website concerning whether the Commissioner may exercise his discretion in circumstances of mistakes only provide examples where no discretion is exercised. This may give the impression to taxpayers and tax advisers that the ATO is reluctant to entertain the idea of exercising the discretion for any mistake.

2.111 The issues affecting the doctrine of mistake and the laws of restitution are complex. At present, the ATO's public guidance material does not appear to address the different issues in this area and, as such, may lead to uncertainty and confusion for those seeking to better understand the ATO's approach. Accordingly, the IGT considers that the ATO should update its public guidance materials, such as its website and issue additional guidance, to reflect both situations where rectification of mistakes may be effective in excluding contributions for the purposes of the ECT and those in which it may not.

2.112 In respect of matters which are outside of the taxpayer's control, there may be some additional remedies available to the taxpayer. For example, in relation to delayed receipt or allocation of contributions, the IGT notes that the introduction of the SuperStream reforms which require APRA-regulated superannuation funds, from 1 July 2014, to allocate contributions within three business days should assist to alleviate time delays in superannuation funds allocating contributions.<sup>164</sup> The IGT notes, however, that this requirement is only applicable to APRA funds and not SMSFs.

2.113 Where third parties such as employers or financial advisers have made errors, some suggested avenues of recourse for taxpayers include litigation for breach of contract or professional negligence. However, these avenues are undesirable as they are time consuming and costly. They may also lead to damaged professional or employer/employee relationships and increased indemnity insurance premiums for advisers which are likely to be passed on to taxpayers through professional fees.

### Scope of Commissioner's discretion

2.114 Given the limitations and consequences of the above remedies, effectively, the only alternative in the majority of cases is for taxpayers to seek an exercise of the Commissioner's discretion to disregard or reallocate the relevant excess contribution.

2.115 However, the ATO has indicated that incorrect professional advice will not necessarily result in a finding of special circumstances warranting exercise of the discretion.<sup>165</sup> Therefore, taxpayers may feel they have been unduly penalised despite seeking to obtain assistance in complying with the law. In the AAT, the case of *Dowling v Commissioner of Taxation* (the *Dowling* case)<sup>166</sup> has shown that in some circumstances, reliance on professional advice may be sufficient for the exercise of the discretion. However, as that

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<sup>163</sup> Above n 128.

<sup>164</sup> ATO, *Superannuation Data and Payment Standards 2012*, Legislative Instrument.

<sup>165</sup> Above n 128.

<sup>166</sup> [2013] AATA 49.

decision was recently set aside by the Federal Court and the matter remitted to the AAT for rehearing,<sup>167</sup> the final position on this point is unclear.

2.116 Similarly, mistakes, whether occasioned by the taxpayer or some other third party will not necessarily, in the ATO's view, meet the criteria to warrant an exercise of the Commissioner's discretion. The limited application of the Commissioner's discretion is highlighted in the statistics presented earlier on the proportions of successful applications.

2.117 As detailed earlier, while the proportion of successful applications for the exercise of the Commissioner's discretion has steadily increased over the years following 2008–09, it has also generated high levels of disputes through the objections process. The IGT notes that the rates of objection against decisions not to exercise the discretion are very high when compared with the enterprise objections rates across all compliance activities which was reported to be 4.7 per cent in 2011–12.<sup>168</sup>

2.118 The high objection rates may be as a result of a number of driving factors including the risk of losing significant portions of retirement income and feelings that taxpayers have been unfairly penalised for genuine mistakes or for matters beyond their control.

2.119 In contrast, however, the IGT notes that notwithstanding the high number of ECT objections, only a small fraction of objection applications (11.3 per cent) were allowed in full or in part which is well short of the allowance rates for objections generally.<sup>169</sup> Furthermore, only 8.1 per cent of cases in which the objection was not allowed in full or in part proceeded further through applications for review or appeal in the AAT or the Federal Court.<sup>170</sup> This is not surprising as one of the reasons for this decline may be the costs, time and added formality of external reviews and appeals which may serve to deter taxpayers from proceeding further to dispute the ATO's decision.<sup>171</sup> In the ECT context, this is especially true as some of the taxpayers affected are individuals who may be ill-equipped to effectively challenge ATO decisions.

2.120 The IGT notes the intent of the Commissioner's discretion to prevent instances where the ECT may be imposed which would be unjust, unreasonable or inappropriate. Having regard to this policy intent, the heavy monitoring burden imposed on taxpayers, the likelihood of mistakes being made and the high rates of disputes arising out of discretion decisions, it is arguable that the discretion does not provide adequate protection for taxpayers who are generally seeking to comply with their obligations.

2.121 The issue may be, as some stakeholders have suggested, that the ATO is adopting a narrower interpretation of the 'special circumstances' requirement within the discretion than is warranted by the legislation. However, the high proportion of cases in which the Commissioner's decision has been affirmed suggests that the ATO has correctly applied the discretion, albeit that the interpretation may appear narrow. In this respect, the Federal

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<sup>167</sup> *Commissioner of Taxation v Dowling* [2014] FCA 252.

<sup>168</sup> ATO, *Your Case Matters* (3<sup>rd</sup> edition, 2013) p 2. The ATO's enterprise objection statistics do not differentiate between those involving discretionary decisions and those that do not.

<sup>169</sup> See for example, IGT, *Review into the underlying causes and the management of objections to Tax Office decisions*, 11 August 2009, p 41.

<sup>170</sup> 210 review cases out of 2,589 objections which were not allowed in full or in part.

<sup>171</sup> Binh Tran-Nam and Michael Walpole, 'Access to tax justice: How costs influence dispute resolution choices,' (2012) 22 JJA 3, p 4.

Court case of *Liwszyc v Commissioner of Taxation* (the *Liwszyc* case)<sup>172</sup> has provided judicial clarification of the application of the term ‘special circumstances’ to employee errors and the rehearing of the *Dowling* case in the AAT may also provide greater clarification in relation to adviser errors. Moreover, the scope of this term may also be further considered in any subsequent appeals to the Full Federal Court.

2.122 Ultimately, the IGT considers that, having regard to the burden imposed on taxpayers and the severe impacts of excess non-concessional contributions, the corresponding protections should be broadened to accommodate a wider range of circumstances to protect those who have acted reasonably and in good faith. This may be achieved in a number of ways.

2.123 First, while the ATO may be constrained in adopting a broader application of the Commissioner’s discretion, the rehearing of the *Dowling* case and any subsequent appeals in that case as well as the *Liwszyc* case may clarify the limits of the discretion and provide a basis on which the Commissioner may broaden the application of the discretion.

2.124 Secondly, where the decisions of the Court do not provide a basis for the Commissioner to adopt a broader interpretation, the Government may wish to consider whether the current protections for taxpayers sufficiently take into account circumstances of genuine mistake and matters beyond their control. In this respect, the IGT is of the view that there would be significant benefits in the Government considering legislative changes to provide further protections for taxpayers who have acted reasonably and in good faith.

2.125 The IGT recognises that such legislative change may not be effected immediately, and that further consultation may be necessary to ensure that an appropriate balance is struck between achieving the policy intent of the ECT regime while minimising undue impacts on taxpayers. In this regard, the Government should consider recommendation 5.3 in the IGT’s *Review into improving the self assessment system*.<sup>173</sup> In that report, the IGT recommended that where unintended, anomalous, inequitable or impractical consequences of the tax laws were identified, the Commissioner be given a power to not take compliance action for a period of three years to enable the Government to take corrective action.<sup>174</sup>

### RECOMMENDATION 2.3

*(1) The IGT recommends that the ATO update its public guidance on genuine mistakes leading to excess contributions to reflect those circumstances in which mistakes may be effectively corrected and those in which it may not.*

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<sup>172</sup> [2014] FCA 112.

<sup>173</sup> IGT, *Review into improving the self assessment system*, 13 February 2013, recommendation 5.3(a), p 140.

<sup>174</sup> *ibid.*

## RECOMMENDATION 2.3 (CONTINUED)

(2) *In the event that Court decisions do not provide a basis on which the Commissioner may broaden the scope of his discretion in the ECT context, the IGT recommends that the Government consider whether the current protections afforded to taxpayers sufficiently take into account circumstances of genuine mistake or matters beyond their control and if legislative change is required to provide further taxpayer protection.*

### ATO response

Agree with recommendation 2.3 (1). Recommendation 2.3 (2) is a matter for Government.

## CONTRIBUTIONS LIMITING CLAUSES

2.126 In an ancillary issue to taxpayer mistakes and matters beyond the taxpayer's control leading to excess contributions, some superannuation funds have sought to minimise the risk of their members being exposed to the ECT by including clauses in their trust deeds purporting to cap the amount of contributions able to be made and to return any excess contributions to the member (contributions limiting clauses).

2.127 The ATO had previously issued Taxpayer Alert TA 2010/2 (TA 2010/2)<sup>175</sup> in which it outlined its view that such clauses are ineffective, that their use could have the effect of avoiding the ECT and that those entities involved may be considered promoters of tax exploitation schemes.<sup>176</sup>

2.128 At the time of its release, a number of external stakeholders expressed concern with TA 2010/2 and the ATO's characterisation of such clauses as tax exploitation schemes.<sup>177</sup> On 29 November 2011, the ATO withdrew TA 2010/2 and replaced it with a fact sheet entitled *Fund rules intended to prevent excess contributions tax*.<sup>178</sup>

2.129 The fact sheet is not binding and intended only as a guide. It relevantly states:<sup>179</sup>

A governing rule of the fund may be designed to prevent certain payments from being a contribution to the fund. For example, a rule may provide that a trustee is not to accept a payment as a contribution if doing so would cause a member to exceed the member's contributions cap for the purposes of ECT. Or a rule may provide that such amounts are to be held subject to a separate trust for the payer or returned to the payer.

Whether such a rule actually prevents a payment from being a contribution, and whether it applies to all or only some categories of such payments (for example, whether it applies to payments by a member's employer), depends on its effect as a matter of trust law. In particular, it depends on whether the rule prevents the payment from increasing the capital of the super fund.

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<sup>175</sup> ATO, *Circumvention of Excess Contributions Tax*, TA 2010/2, 29 November 2011, (Withdrawn).

<sup>176</sup> *ibid*; TAA 1953, sch 1 div 290.

<sup>177</sup> ATO, NTLG Superannuation Technical Sub-group, Minutes of the 15 June 2010 meeting, Item 7.

<sup>178</sup> ATO, *Fund rules intended to prevent excess contributions tax* (29 November 2011) <<http://www.ato.gov.au/Super/Self-managed-super-funds/In-detail/Contributions-and-benefits/Fund-rules-intended-to-prevent-excess-contributions-tax/>>.

<sup>179</sup> *ibid*.

The effect of such a rule must be assessed having regard to its particular terms, interpreted in the context of the surrounding provisions and the governing rules of the fund as a whole.

A governing rule will not prevent a payment from being a contribution where, on its proper construction, it merely empowers the trustee to return or otherwise deal with a payment which is already a contribution to the fund – that is, which has become part of the capital of the fund.

2.130 Stakeholders have expressed a view that this fact sheet has the potential to confuse and mislead taxpayers, advisers and superannuation fund trustees. In particular, stakeholders are concerned that the fact sheet still characterises contributions limiting clauses as a means of preventing the imposition of the ECT rather than a mechanism through which superannuation funds and taxpayers are operating within the intended spirit of the law in regards to contributions levels.<sup>180</sup>

2.131 The issue was also known to the previous Government and as part of its Revenue Measures in the Mid-Year Economic Fiscal Outlook 2011–12 it was announced that:<sup>181</sup>

The Government will ensure the integrity of the annual superannuation contribution caps by ensuring that certain trust deed clauses cannot be used to avoid what would otherwise be excess contributions from being counted against the caps.

The Government is aware of situations where a fund may include a clause in its trust deed that is designed to treat amounts that would otherwise have been considered contributions to the fund (for example, as they have been accepted by the fund and intermingled with other fund assets and investments) as not having been accepted by the fund if those contributions would lead to a breach of the contributions caps.

Under this measure, the fund will be deemed to have accepted such contributions, notwithstanding the trust deed clause, if the contributions have not been returned promptly and have in effect been intermingled with assets of the fund.

This revenue protection measure will have an unquantifiable but small revenue impact over the forward estimates period.

2.132 On 14 December 2013, the Assistant Treasurer announced that the Government will not proceed with this measure.<sup>182</sup>

## IGT observations

2.133 Contributions limiting clauses present a difficult legal issue for the ATO and for tax advisers as they involve the interaction of superannuation laws, trust law and the ECT. Moreover, the operation of these clauses may have implications for other tax and superannuation laws including that:

- employers may be found to have not complied with their SG obligations where superannuation fund trustees do not accept SG payments; or
- where contributions are later refunded to taxpayers, the ATO may find it difficult to identify such contributions to bring them into account under income tax law and

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<sup>180</sup> Law Council of Australia, Submission to the ATO (16 December 2011) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2400-2499/2494%20fact%20sheet%20on%20deed%20clauses.pdf>>.

<sup>181</sup> Australian Government, *Mid-Year Economic Fiscal Outlook 2011–12*, p 174-175.

<sup>182</sup> Arthur Sinodinos AO, 'Integrity restored to Australia's taxation system' (Media release, 14 December 2013), item 35.

ensure that any deductions previously allowed to the taxpayer are reversed (where they are not outside statutory time limits).

2.134 Stakeholder submissions to the IGT are unequivocal in their view that such clauses are valid, legal and effective in both mitigating the risk for members exceeding their contributions and realising the Government's policy intent.

2.135 For the ATO's part, it considers that the effectiveness of such clauses depends upon the particular text of the trust deed in question and that the issue may warrant judicial consideration.

2.136 As the Government has decided not to proceed with legislative measures to clarify the issue, the IGT considers that there are two options open to the ATO. First, the ATO may continue to assess attempts by superannuation trustees to invoke contributions limiting clauses to return excess contributions to their members. Such a strategy may result in protracted disputes and litigation which would take a number of years before judicial clarification is obtained. This time delay may adversely impact a greater proportion of the industry who have relied on such clauses.

2.137 The better option, in the IGT's view, would be for the ATO to actively identify, through industry consultation, an appropriate test case vehicle through which the issue may be progressed quickly on an agreed set of facts for judicial declaration. In this way, both the ATO and the industry would be able to obtain judicial clarification in a timely manner, while minimising disputes. Moreover, the timely outcome of such test litigation would provide Government with greater insight as to whether any future legislative clarification is necessary to address the issue. Such an approach to obtaining judicial clarification on interpretative issues is in line with recommendations made by the IGT in the *Review into the ATO's use of early and alternative dispute resolution*.<sup>183</sup>

2.138 The IGT notes that the ATO had also previously considered that judicial clarification on this issue was important. To facilitate this outcome, the ATO noted at an NTLG meeting that the Test Case Litigation Panel had provided in principle support to fund appropriate cases which may be advanced to the Federal Court.<sup>184</sup> While the ATO has advised the IGT that the issue may not be as prevalent as it originally thought, the IGT considers that any ongoing uncertainty in this area is undesirable and that the ATO should again consider identifying an appropriate test case to clarify the law in this regard.

## RECOMMENDATION 2.4

*The IGT recommends that the ATO seek an appropriate test case vehicle to obtain a judicial declaration on the effectiveness of contributions limiting clauses to cap the amount of contributions made to superannuation funds.*

### ATO response

Agree.

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<sup>183</sup> IGT, *Review into the ATO's use of early and alternative dispute resolution*, 31 July 2012, pp 61-63.

<sup>184</sup> ATO, NTLG, Minutes of the 31 March 2010 meeting,

<[http://www.ato.gov.au/Tax-professionals/Consultation--Tax-practitioners/In-detail/NTLG-documents/Minutes-\(previous-years\)/2010/NTLG-minutes,-June-2010/?page=35](http://www.ato.gov.au/Tax-professionals/Consultation--Tax-practitioners/In-detail/NTLG-documents/Minutes-(previous-years)/2010/NTLG-minutes,-June-2010/?page=35)>, item 21.

## CHAPTER 3 — THE ATO'S ECT END-TO-END PROCESS

3.1 Stakeholders have expressed a number of concerns with the ATO's end-to-end process for identifying and communicating potential excess contributions to taxpayers. In particular, these concerns include:

- the lack of information regarding the ATO's approach to disregarding small excess contributions (*de minimis* approach) leading to some uncertainty and perceptions of inconsistency regarding the ATO's approach;
- the initial contact by the ATO to inform taxpayers of potential excess contributions through its pre-assessment and ECT determination letters does not provide taxpayers with enough information to confirm the accuracy of information used by the ATO or to address any issues in relation to the contribution information;
- there are inherent difficulties with correcting superannuation fund information on which the ATO relies;
- the ATO is not, or is not seen to be, exercising the Commissioner's discretion consistently; and
- when considering discretion applications, the ATO is not adequately engaging with taxpayers and their advisers.

### **DE MINIMIS APPROACH**

3.2 In identifying excess contributions and determining assessments which should issue, the Commissioner adopts the view that it is appropriate to not issue an ECT assessment where the excess contribution is below a certain pre-set threshold.<sup>185</sup> This is generally referred to as a *de minimis* approach and which the Commissioner adopts pursuant to his power of general administration under section 8 of the *Income Tax Assessment Act 1936*.

3.3 In practice, there are two separate steps in the ATO's *de minimis* approach. First, where the ATO detects contributions above either the concessional or non-concessional cap but under a particular pre-set threshold (the *de minimis* threshold), the ATO will disregard the excess contributions and no correspondence or assessment will be issued to the taxpayer.<sup>186</sup>

3.4 Secondly, as excess concessional contributions are also classified as non-concessional contributions, 'a small breach of the concessional contributions cap [may] cause a breach of the non-concessional cap'<sup>187</sup>. In these circumstances, where the concessional cap is exceeded by an amount less than the *de minimis* threshold, this amount is disregarded for the purposes of calculating excess non-concessional contributions and the

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<sup>185</sup> ATO communication to the IGT, 22 March 2013.

<sup>186</sup> *ibid.*

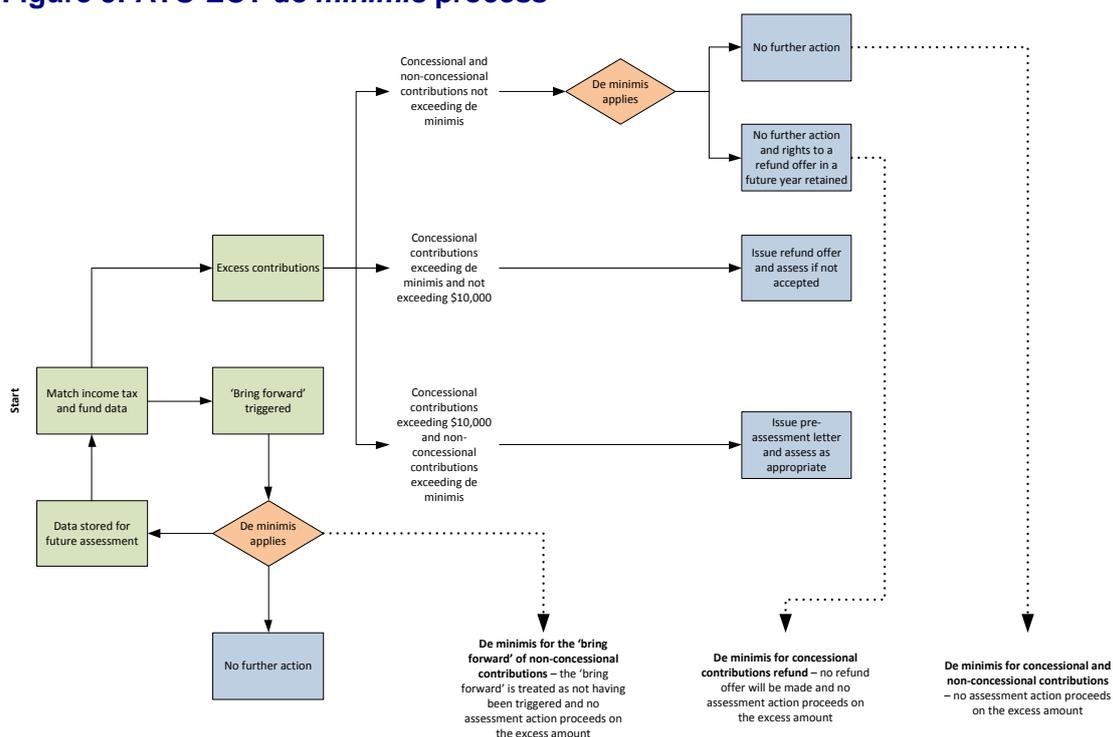
<sup>187</sup> ATO, Superannuation Consultative Committee, Minutes of the March 2012 meeting, Item 6.

ATO will also take no action to assess the taxpayer for ECT in relation to the excess non-concessional contributions.<sup>188</sup>

3.5 The ATO has indicated at its external consultation forum, the Superannuation Consultative Committee (SCC)<sup>189</sup>, that it would apply the *de minimis* approach to all cases, including past cases.<sup>190</sup> However, the ATO has not confirmed whether it will continue to apply the *de minimis* approach to excess concessional contributions as a result of the legislative changes in 2013.

3.6 The general process through which the ATO identifies and applies its *de minimis* approach is outlined in Figure 5.

**Figure 5: ATO ECT *de minimis* process**



Source: Adapted from ATO information. An A4 version of this diagram is provided in Appendix 3.

3.7 The ATO has advised that the *de minimis* threshold is reviewed and updated annually to reflect material economic, financial or legislative changes. The basis for calculating the *de minimis* may differ from year to year.

3.8 Statistics from the ATO indicate that between the 2009–10 and 2011–12 financial years (inclusive) a large number of taxpayers who have exceeded either or both of the contributions caps have benefited from the *de minimis* approach. Table 17 sets out the number of cases between 2009–10 and 2011–12 in which the ATO identified taxpayers who have exceeded their contributions cap by an amount less than the *de minimis* threshold and did not take action to impose the ECT.

<sup>188</sup> Above n 185.

<sup>189</sup> The SCC has since been merged into the Superannuation Industry Advisory Group.

<sup>190</sup> Above n 187.

**Table 17: Number of cases in which *de minimis* approach taken**

Type of cap exceeded	Number of excess contributions under <i>de minimis</i> threshold		
	2009–10 <sup>191</sup>	2010–11	2011–12
Concessional cap	28,552	28,828	23,161
Non-concessional cap	1,543	1,302	694
Both caps	259	222	84

Source: ATO<sup>192</sup>

3.9 The data in Table 17 illustrates that during 2009–10 and 2010–11, the numbers of taxpayers who exceeded their contributions caps by amounts under the *de minimis* threshold remained relatively constant. For 2011–12, however, there was a clear decrease. In respect of excess concessional contributions, there was a 20 per cent reduction of such cases from 28,828 to 23,161. This reduction was more pronounced in relation to excess non-concessional contributions which decreased by 47 per cent (from 1,302 to 694) and in cases where taxpayers exceeded both caps (a 63 per cent reduction from 222 to 84).

## IGT observations

3.10 During consultation for the current review, stakeholders indicated that they welcomed the ATO's *de minimis* approach when informed that such an approach was being adopted. However, it is evident that there is a clear lack of information regarding the ATO's practice in this regard and stakeholders either were unaware of the ATO's *de minimis* approach or were only able to draw very general information from the minutes of the SCC meeting at which the issue was discussed.

3.11 The ATO has advised that by disclosing the amount of the *de minimis* threshold itself taxpayers could unfairly obtain a benefit by making excess contributions up to the threshold on an ongoing basis. The ATO is also concerned that this threshold could be reasonably estimated if the ATO notified taxpayers that the *de minimis* approach had been applied in their case.

3.12 In the IGT's view, a greater level of public information in relation to the ATO's processes may assist to manage perceptions that the ATO may be acting inconsistently, for example, not applying the *de minimis* approach to materially similar cases. Such transparency instils greater confidence in the ATO as a fair administrator.

3.13 Therefore, the IGT considers that the ATO should publish more details about its *de minimis* approach. Such information could include the ATO's management of these cases more generally and, importantly, what taxpayers can do if they consider that they are within these limits but have nonetheless been issued with a notice of assessment for the ECT.

3.14 The IGT acknowledges that publishing the *de minimis* thresholds may increase the risk that benefits may be unfairly obtained by some taxpayers. However, an important educative opportunity may be lost if taxpayers are not alerted to the fact that they have made excess contributions but that no action will be taken by the ATO because the excess

<sup>191</sup> This represents the year in which the ATO received all relevant information and identified that the taxpayer had exceeded their contributions caps. It is not the year in which the contributions were made.

<sup>192</sup> ATO communication to the IGT, 22 March 2013.

contribution was small and that they should take more care in future years. In the IGT's view, such ATO communication would influence taxpayer behaviours towards voluntary compliance and promote confidence in the ATO as a fair and transparent administrator.

### **RECOMMENDATION 3.1**

*The IGT recommends that the ATO:*

- (a) publish further information on its ECT de minimis approach, including, how the ATO identifies and treats such cases and what taxpayers can do if they consider that their case qualifies for 'de minimis' consideration but have nonetheless received an ECT assessment; and*
- (b) inform taxpayers when the de minimis approach has been taken in relation to their excess contributions.*

### **ATO response**

Disagree

3.1(a) The ATO does not agree with this recommendation as it may lead to the de minimis threshold being known or reasonably estimated. This may give rise to individuals unfairly obtaining a benefit by making excess contributions up to the threshold on an ongoing basis. However, the ATO agrees to publish on its website general information on the de minimis approach. The ATO is of the view that taxpayers already have appropriate avenues to seek review of their particular circumstances if they have concerns. It should be noted that the operation of the de minimis does not disadvantage any taxpayer and we have no evidence of any individual receiving an assessment when they 'qualify' for the de minimis.

3.1(b) As per response to Recommendation 3.1(a) the ATO does not agree with this recommendation as it may lead to the de minimis threshold being known or reasonably estimated and may give rise to individuals unfairly obtaining a benefit by making excess contributions up to the threshold on an ongoing basis. In addition, part of the basis for a de minimis approach is to minimise costs of compliance for taxpayers and their advisers as well as ATO administration costs. Informing taxpayers when they are under the de minimis would increase administration and compliance costs. However, consistent with other recommendations in the report not directly linked to the de minimis (for example Recommendation 2.2(c)), the ATO agrees to explore options to assist taxpayers understand and monitor their contributions, including those individuals who may be getting close to exceeding their caps.

It should be noted that under legislative changes made to ECT from 1 July 2013 all individuals will have the opportunity to withdraw from their fund up to 85% of their excess concessional contributions (ECC). In addition, if a person has ECC, these will be at their marginal tax rate rather than the previous rate which was equivalent to the top marginal tax rate. These changes will largely negate any adverse tax impacts previously experienced by some individuals.

### **CONTENT OF PRE-ASSESSMENT AND DETERMINATION LETTERS**

3.15 Stakeholders have expressed concern that the ATO's pre-assessment letter, although quantifying the total excess contributions, does not identify the specific superannuation

funds which have reported the contributions information to the ATO.<sup>193</sup> This letter is the ATO's first notification to taxpayers of any identified excess contribution and taxpayers feel frustrated and anxious that they cannot determine if the reported figures are correct, especially where contributions have been made some time ago and/or to a number of different funds.

3.16 It should be noted that as a result of the recent legislative change in relation to the treatment of excess concessional contributions, from 1 July 2013, the ATO will no longer be relying on the pre-assessment letter to advise taxpayers of excess concessional contributions. Instead, the ATO has developed an ECT determination letter to issue to taxpayers. Like the ECT pre-assessment letter, the ECT determination letter only provides the amount of excess contributions as a global figure and does not specifically identify the amount of contributions reported by each fund. Furthermore, stakeholders have also observed that the ATO has in some cases, denied access to that specific information when requested. In respect of this latter point, the ATO has advised that its general policy is to provide taxpayers with information upon request where such requests are made in writing.

3.17 The ECT determination letter has recently been subjected to user-testing through the ATO's simulation centre. A report of the simulation centre noted that participants, both taxpayers and tax agents, had 'difficulty understanding the concepts and terminology associated with excess super contributions'<sup>194</sup> and that 'the whole process confused participants (especially individual taxpayers). All individuals stated they would call the ATO for more information at least once.'<sup>195</sup>

3.18 Taking into account both general and specific feedback from the simulation centre, the ATO is presently updating the proposed ECT determination letter before implementing it for use as part of the ECT process.

3.19 In addition to the ECT determination letter, the ATO has also developed a suite of other correspondence and documents to be used when interacting with taxpayers in relation to the ECT. These letters and information sheets may be used where there are changes in the levels of taxpayer excess concessional contributions or to provide further information to taxpayers of the election to withdraw excess concessional contributions from relevant superannuation funds and the consequences of not doing so. As at the date of this report, this additional suite of correspondence has not been user-tested through the simulation centre.

## **IGT observations**

3.20 Where the ATO relies upon third party data, it is imperative that correspondence issued to taxpayers, such as pre-assessment, assessment or determination letters, provides them with sufficient information to enable them to address any inaccuracies at the source. Where taxpayers request further information, the ATO should respond to such requests regardless of the means by which they are made. This is particularly important in the context of the ECT where one of the main means of challenging perceived excess contributions is to correct information reported to the ATO by superannuation funds.

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<sup>193</sup> Above n 71.

<sup>194</sup> ATO, 'Excess Concessional Contributions usability test report', internal ATO document, 2013, p 4.

<sup>195</sup> *ibid.*

3.21 To this end, the provision of global concessional and non-concessional figures may not be sufficient to assist taxpayers to determine whether the amounts are accurate and, if not, identify where errors may have occurred. Identifying the total contributions purportedly made to each superannuation fund by, or for, the taxpayer would better assist taxpayers in this regard.

3.22 The IGT notes that the ATO currently provides this level of detail in respect of a number of its data matching projects, including bank interest and dividend data matching. In those letters, which were examined by the IGT in his review of the ATO's use of data matching,<sup>196</sup> a schedule accompanies the letter which outlines the amount of interest or dividend and other details, such as the relevant accounts from which these amounts originated.

3.23 The IGT has recently examined the ATO's use of standardised correspondence to individual taxpayers in his review into the ATO's Income Tax Refund Integrity Program<sup>197</sup> and the ATO's use of data matching.<sup>198</sup> In those reviews, the IGT noted the observations made by the Commonwealth Ombudsman regarding the ATO's communication with individual taxpayers and the opportunities which exist for the ATO to enhance its understanding of the 'behavioural' responses to its communications.<sup>199</sup> Moreover, the IGT noted that applied research supports such an approach where randomised control trials are used to test the effectiveness of such communications.<sup>200</sup>

3.24 The IGT supports the user-testing of ATO correspondence. Such testing ensures that the ATO receives feedback directly from taxpayers and tax agents regarding the effectiveness of proposed correspondence to generate intended responses and reduce unnecessary action.

3.25 Given the complexity of superannuation and the ECT regime, the IGT considers that there are benefits in the ATO also conducting such research in its design of new correspondence for the ECT. Such a process should specifically consider whether the proposed letters will generate the intended taxpayer response by reference to matters including the level of content, detail and direction to taxpayers. It should also seek to minimise compliance costs arising for taxpayers, tax agents and the ATO by reducing unnecessary action.

## RECOMMENDATION 3.2

*The IGT recommends that the ATO improve its correspondence with taxpayers on ECT matters by:*

- (a) updating the pre-assessment and determination letters to include the quantum of contributions reported by each superannuation fund; and*

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<sup>196</sup> Above n 2.

<sup>197</sup> Above n 1.

<sup>198</sup> Above n 2.

<sup>199</sup> Joint Parliamentary Committee of Public Accounts and Audit, *Ninth Biannual Hearing with the Commissioner of Taxation, Official Committee*, Hansard, 23 September 2011, p 15.

<sup>200</sup> UK Cabinet Office Behavioural Insights Team, *Applying behavioural insights to reduce fraud, error and debt*, 2012, p 21.

**RECOMMENDATION 3.2 (CONTINUED)**

- (b) *user-testing all new standardised correspondence to evaluate their effectiveness in generating the intended taxpayer response.*

**ATO response**

Agree in principle with recommendation 3.2 (a).

We could not commit to implementing any systems changes of this nature in the foreseeable future due to other legislative and administrative priorities.

However, the ATO is supportive of the objective to make information available to taxpayers to assist in understanding their superannuation affairs. Accordingly, should the opportunity arise, the ATO will consider options to provide easier access to contributions data reported to the ATO by superannuation funds.

Agree with recommendation 3.2 (b).

**ADDRESSING INCORRECT INFORMATION WITH SUPERANNUATION FUNDS**

3.26 While it is open for taxpayers to approach their superannuation funds to seek a correction of any inaccurate or incomplete contributions information which may have been reported to the ATO, taxpayers and their advisers have complained that it is sometimes difficult to engage with superannuation funds to discuss and rectify what taxpayers consider to be errors. Similarly, superannuation funds have noted difficulties in assisting taxpayers where mistakes have occurred.

3.27 Stakeholders submit that in such a situation the taxpayer is effectively 'stalemated' between the ATO and the fund and is unable to correct the information underlying the ECT assessment.

3.28 For example, in one case, the taxpayer made a very large contribution intending it to be exempt from the ECT regime. However, in making the contribution, a relevant accompanying form to claim the exempt status was not provided by the taxpayer. The superannuation fund administrator therefore processed the contribution as a concessional contribution which in turn led to an ECT assessment being issued to the taxpayer. The taxpayer was unsuccessful in persuading the fund to make corrections as the fund considered that the ATO would apply penalties against it if it assisted the taxpayer to correct his error retrospectively. The fund considered that the best outcome would be to obtain ATO approval to process the correction. However, it was unclear how to engage with the ATO in this regard.

**IGT observations**

3.29 The ATO is aware of occasions where difficulties have been experienced by taxpayers in seeking to address perceived inaccuracies directly with their superannuation funds. In certain cases, the ATO has intervened to assist taxpayers to address informational errors reported by funds. However, the ATO has advised that due to the infrequency of such occurrences, the process is presently ad hoc.

3.30 The IGT considers that such ATO assistance appears largely reliant upon taxpayers or their advisers having access to appropriate ATO contact personnel.<sup>201</sup> Accordingly, there would be considerable benefit in the ATO establishing appropriate channels of escalation for taxpayers, their advisers and superannuation funds to seek assistance in correcting superannuation fund errors. Such assistance may take a number of different forms including the ATO resolving superannuation funds' concerns with whether information may be corrected, providing more detailed information to taxpayers or, in appropriate cases, intervening in discussions with the superannuation fund.

### RECOMMENDATION 3.3

*The IGT recommends that the ATO:*

- (a) provide taxpayers, their representatives and superannuation funds with assistance to correct superannuation fund data errors relating to taxpayer contributions; and*
- (b) widely communicate, for example through its website, newsletters or industry consultation forums, the availability of this assistance.*

#### ATO response

Agree.

### CONSISTENCY OF THE COMMISSIONER'S DISCRETION DECISIONS

3.31 In addition to the concerns with the scope of the Commissioner's discretion, which is discussed in Chapter 2 of this report, stakeholders raised concerns regarding the consistency of the exercise of that discretion.

3.32 Some stakeholders considered that the ATO was exercising the discretion in certain cases and not in others with similar circumstances. Other stakeholders considered that the ATO was exercising the discretion consistently, however, suggested that perceptions of inconsistency arise because the ATO's guidance on the exercise of discretion is not easily understood, does not take into account recent cases and does not accord with individual perceptions of 'special circumstances' especially where cases involve serious injury or bereavement.<sup>202</sup> In some cases, stakeholders considered the guidance insensitive and dismissive, such as that in an ATO example which noted, without any empathy 'It isn't unusual for a person to experience stress, illness or bereavement ... Therefore, we won't exercise the discretion just because you were ... experiencing a difficult time – for example, ... grieving for a deceased relative or friend'.<sup>203</sup>

3.33 As outlined earlier, all discretion decisions recommended by an ATO officer are approved by another before being issued to taxpayers and recorded in the ATO's enterprise case management system, Siebel. Moreover, complex or novel applications for exercise of the

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<sup>201</sup> ATO communication to the IGT, 16 January 2013.

<sup>202</sup> See for example, ATO, *Excess contributions tax: non-concessional contributions - contribution to fund within 90 days of receiving a court ordered personal injury payment*, ATO ID 2007/224, 14 December 2007 and ATO, *Excess contributions tax: non-concessional contributions - personal injury payment - contribution to fund within 90 days of receiving a payment from Public Trustee (NSW)*, ATO ID 2008/142, 31 October 2008.

<sup>203</sup> Above n 128.

discretion are escalated to either a complex advice team or the 'ECT dedicated workshop' for actioning and advice. The ATO considers that these escalation processes help to ensure consistency of discretion decisions. In addition, those decisions which contain novel elements are circulated to relevant ATO staff for future reference. Such decisions are also made available in an excel spreadsheet that is updated periodically.

3.34 The ATO has also advised that another way in which it seeks to assure itself of the consistency and accuracy of its discretion decisions is through the Integrated Quality Framework (IQF) which rates sampled cases against a series of nine criteria, including correctness, consistency and timeliness. The ATO reviews both pre-issue IQF assessments, in which sampled cases are assessed before final letters are issued to taxpayers, and post-issue IQF assessments in which internal and external assessors examine and evaluate finalised cases.<sup>204</sup>

3.35 In IQF data provided by the ATO, the main issues in relation to the management of ECT discretion cases appear to arise from issues of timeliness and efficiency. In the 2012–13 year, two cases were identified as having been incorrectly determined. In the first of these, the excess contribution arose from SG payments properly attributable to another year and not disregarded. In the second, the ATO identified that the discretion should have been exercised in the taxpayer's favour and amended its decision to reflect this conclusion.<sup>205</sup>

3.36 In addition, McKerracher J had opined in the *Liwszyc* case that 'the approach taken by the Commissioner does accord with numerous decisions of the AAT and conforms with the particular Division of the Act.'<sup>206</sup>

## IGT observations

3.37 It is imperative that decisions made in respect of similar facts are consistent. Where this does not occur it can lead to reduced confidence in the administrator and increased instances of disputes.

3.38 The ATO's efforts to ensure consistency of its discretion decision making are through its escalation channels, approval processes and advisory panels, as described earlier. Moreover, the circulation of cases with novel elements and updating of the aforementioned excel spreadsheet should assist ATO officers to apprise themselves of relevant approaches in new or unique cases. While the Siebel system does enable case officers to undertake specific keyword and phrase searches of the reasons for ECT discretion decisions, the number of search results makes it impractical for ATO officers to review each one for relevance. For example, a search for 'illness' in relation to the ECT discretion yields 216 case results. The ATO therefore uses the excel spreadsheet to highlight cases it considers contains novel elements or which bear precedential value.

3.39 In these circumstances, it appears that consistent decision making relies on the officer in question having acquainted themselves with the available information and undertaken appropriate searches of Siebel and the excel spreadsheet to identify past decisions which may assist these officers when making discretion decisions. The IGT notes

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<sup>204</sup> ATO communication to the IGT, 13 February 2013.

<sup>205</sup> ATO communication to the IGT, 25 February 2013.

<sup>206</sup> [2014] FCA 112 at [80].

that the ATO's internal instructions for the management of ECT discretion cases do not expressly require ATO officers to undertake such searches.<sup>207</sup>

3.40 Accordingly, the IGT considers that there would be benefits in the ATO improving the search functionality for ECT discretion decisions and expressly requiring those officers exercising the Commissioner's discretion to identify and consider earlier decisions on similar facts as part of their decision making. Such a requirement would assist ATO officers in their decision making and would allow approving officers to double check the correctness and consistency of decisions made by ATO officers against earlier decisions.

3.41 Notwithstanding the measures to ensure the consistency of ATO decisions, taxpayers may nonetheless perceive that the ATO is acting inconsistently. Such perceptions appear to arise from differing opinions on what circumstances would warrant the exercise of the discretion. The ATO's guidance on this issue was published a number of years ago and, since that time, a large number of cases have been considered by the ATO and the AAT.

3.42 The IGT considers that it is timely for the ATO to review and update that guidance to address perceptions of inconsistency and insensitivity. As part of this review, the ATO could analyse and review trends of ATO and AAT decisions to determine frequently occurring factual scenarios and issue public guidance based on those scenarios through such channels as ATO IDs, fact sheets and updated examples on the ATO's website.

### **RECOMMENDATION 3.4**

*The IGT recommends that the ATO:*

- (a) improve the search functionality for ECT discretion decisions and require relevant ATO officers to search and have regard to all relevant decisions when considering whether to exercise the Commissioner's ECT discretion;*
- (b) update its public guidance to include guidance on commonly occurring factual scenarios in discretion applications; and*
- (c) review existing public guidance to ensure that wording used, particularly in examples of the exercise of the Commissioner's discretion, does not create perceptions of insensitivity.*

### **ATO response**

Agree in part with recommendation 3.4 (a).

The ATO is of the view that the current search functionality of the databases holding ECT discretion decisions is appropriate and cannot commit to IT improvements. However, we agree to review our training products and procedures to ensure staff can locate and have regard to all relevant decisions when considering the exercise of the Commissioner's discretion.

Agree with recommendation 3.4 (b). Agree with recommendation 3.4 (c).

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<sup>207</sup> ATO, 'IA reference guide, excess contributions tax discretion', 25 October 2013, internal ATO document.

## TAXPAYER ENGAGEMENT AND FURTHER INFORMATION

3.43 In relation to the exercise of the Commissioner's discretion, stakeholders have raised concerns regarding the ATO's requests for information and its consideration of information provided by taxpayers. These concerns include that:

- ATO information requests are not easily understood;
- information requested by the ATO may be aged or difficult to obtain, especially in certain cases of adviser fraud where steps have been taken to keep the information out of reach;
- there are only limited opportunities to engage with the ATO on ECT matters, particularly in relation to the possibility of conducting face-to-face meetings to enable taxpayers to provide and discuss relevant information to assist the ATO in its decision making; and
- the ATO does not always explain how the information provided by the taxpayer was used in arriving at the ATO's final decision.

3.44 The ATO has provided the IGT a copy of standardised correspondence which it uses to request information from taxpayers. While the correspondence is succinct in its approach, the IGT notes that the letter does not appear to prompt ATO officers to explain why the information is requested and how it will assist in making the decision.

3.45 The ATO's internal guidance to its staff on the exercise of the discretion does not specifically contemplate opportunities for meetings between the ATO and taxpayers. Instead, in relation to requesting further information, the instruction states:<sup>208</sup>

Where the applicant has not provided enough information to enable you to make a decision, you must request the information required. You can request the necessary information by telephone or by letter.

In accordance with the service standards, if you need further information from the applicant, you should try to request this within **14 days of the case being received by the ATO**.

However, for complex cases, where a request for further information is unable to issue within 14 days of original receipt, the applicant must be contacted within 14 days to discuss an appropriate timeframe for issue of the request for further information.

**Telephoning** the applicant is the preferred method of contact for further information requests where the taxpayer can provide further information you need over the telephone.

If the applicant cannot provide further information over the telephone, a date for supply of that information may be negotiated within a limit of 28 days. You should generate a letter detailing what additional information is required and the due date. A shorter timeframe should be negotiated whenever possible to allow a fast turnaround time for your case.

3.46 The ATO's internal guidance also requires ATO officers to consider facts and additional information before arriving at their decision.<sup>209</sup>

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<sup>208</sup> Above n 207, stage 2.2.

<sup>209</sup> *ibid*, Task 3.1.1.

## IGT observations

3.47 The IGT has also examined and commented on the ATO's approach to requesting information in earlier reviews, including the alternative dispute resolution and large business reviews.<sup>210</sup> A persistent theme in these reviews is the need to engage with taxpayers to sufficiently outline the reasons why information is sought and work with taxpayers to identify alternate sources of information which may assist the ATO's inquiry where specific documents are not available.

3.48 More recently in the reviews into the ATO's Income Tax Refund Integrity Program and its use of data matching, the IGT has noted that when dealing with individual taxpayers, the ATO must ensure that its communication and engagement enables these taxpayers who may possess varying degrees of tax proficiency, to fully understand the ATO's position, any actions required of them and the consequences for failing to take the required actions.<sup>211</sup>

3.49 Moreover, it is equally important that the reasons for any decisions which may have an impact on the tax liability of taxpayers are easily comprehensible and are communicated concisely. Where taxpayers have provided information which could reasonably support an alternative decision, it is critical that the reasons explain how such information was considered.

3.50 The IGT notes that the ATO's internal instructions are precise in relation to the steps which ATO officers must take throughout the discretion process, including requesting information and considering such information before arriving at a final decision. The ATO also encourages its officers to directly engage with taxpayers and their advisers, preferably through telephone discussions, and notes the benefit of such engagement in building a professional working relationship, instilling taxpayer confidence and minimising the risk of disputes.<sup>212</sup>

3.51 While the ATO may encourage such engagement, it is not made clear on the face of the instructions which relate specifically to ECT. In the absence of such instructions, ATO officers may feel constrained in what they may or may not do.

3.52 The IGT acknowledges the difficulties and resource constraints faced by the ATO when dealing with large numbers of taxpayers. In this regard, the IGT notes that, in line with recommendation 3.2 in this report, where the ATO's suite of correspondence is appropriately designed and user-tested, it should improve the ATO's written explanations and therefore improve taxpayer understanding. Notwithstanding such improvements, however, there will always be instances in which taxpayers will need further assistance from the ATO to understand matters before them or actions they may need to take. Where this occurs, the IGT considers that the ATO's processes should allow for engagement, appropriately tailored, to assist such taxpayers. These may include opportunities to better focus and narrow the scope of information requested through discussions and seeking feedback from taxpayers as to whether any further relevant information may be available before proposed decisions are finalised.

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<sup>210</sup> Above n 183; IGT, *Report into the Australian Taxation Office's large business risk review and audit policies, procedures and practices*, 7 September 2011.

<sup>211</sup> Above n 1; above n 2.

<sup>212</sup> ATO, 'Online Resource Centre for Law Administration — engaging with the taxpayer', 10 October 2013, internal ATO document.

### **RECOMMENDATION 3.5**

*The IGT recommends that the ATO update its internal instructions to encourage direct engagement with taxpayers and their advisers, particularly:*

- (a) where the ATO is requesting information which may be aged or complex;*
- (b) to discuss how information provided has been considered and how it will impact any proposed decisions; or*
- (c) where taxpayers specifically request meetings with ATO officers to discuss their circumstances or any information which has been provided.*

#### **ATO response**

Agree.

With regard to Recommendation 3.5(c), it should be noted that meetings requested by taxpayers would generally be via phone not face to face.



## CHAPTER 4 — ATO ADVICE AND GUIDANCE

4.1 Stakeholders raised concern that the present level of ATO advice and guidance given on the ECT regime was insufficient. Specifically, these concerns include:

- a lack of publicly available guidance on different aspects of the ECT, such as the nature of contributions; and
- the inability to obtain legally binding advice from the ATO.

### AVAILABILITY OF PUBLIC GUIDANCE ON THE ECT

4.2 Stakeholders have raised concern with the availability of public guidance on the ECT regime as it is often difficult to access or difficult to comprehend. Notwithstanding the information presently available on the ATO website, and other channels as discussed in Chapter 1, stakeholder submissions raise concern that given the complexity of the regime, and its interactions with SG and income tax, many taxpayers and advisers are still unlikely to appreciate the nuances of their obligations within this area. This is especially so in relation to taxpayers from non-English speaking backgrounds who may face difficulties identifying relevant material and understanding the material as it applies to their own situation.

4.3 Specifically, submissions note that confusion may arise in areas such as:

- the definition of what constitutes a contribution, what are concessional and non-concessional contributions and how these are made;
- the start and end dates for calculating the years in which the 'bring forward' is active;
- when and how the 'bring forward' provision may have been triggered;
- interactions between the ECT and the *Superannuation Industry (Supervision) Regulations 1994* (SIS regulations);<sup>213</sup>
- provisions dealing with defined benefit funds and SMSFs;
- rules governing rollovers to complying superannuation funds; and
- eligibility and processes to claim deductions for personal contributions.

4.4 Stakeholders also raised concerns regarding the availability of public guidance on the ATO's *de minimis* approach and exercise of the Commissioner's discretion. These issues have been discussed earlier in Chapter 3.

### IGT observations

4.5 Given the complexity of the superannuation system and having regard to the recent legislative changes, it is imperative that the ATO's public guidance is clear, concise and up to

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<sup>213</sup> For example, the interaction between section 292-85 of the ITAA 1997 and regulation 7.04 of the *Superannuation Industry (Supervision) Regulations 1994*.

date. It should enable taxpayers and their agents to easily discern the impacts and consequences of any proposed actions they wish to take.

4.6 Overall, the IGT notes that there is a large amount of publicly available guidance in relation to aspects of the ECT such as the nature of contributions, the different classes of contributions and how these are made.<sup>214</sup> Material relating to defined benefit funds,<sup>215</sup> SMSFs,<sup>216</sup> rollovers<sup>217</sup> and deductions for personal contributions<sup>218</sup> were also available through searches on the ATO's website. Material relating to more niche topics such as the interaction between the ECT regime and SIS regulations has also been published, albeit more difficult to locate.<sup>219</sup>

4.7 However, the IGT has identified some instances of out-of-date information on the ATO website, such as the ECT learner's guide.<sup>220</sup> There is a risk that taxpayers or tax professionals may unwittingly rely on out-of-date information to their detriment, notwithstanding ATO caveats for taxpayers and advisers to undertake independent research to obtain the latest information.

4.8 Furthermore, the ATO's guidance in some areas seeks to inform taxpayers of relevant matters, rather than provide specific practical guidance or roadmaps to assist them to comply with their obligations. For example, despite the details provided in relation to the nature of contributions, there appears to be ongoing confusion regarding what is and isn't a contribution for the purposes of ECT as illustrated in recent litigation.<sup>221</sup>

4.9 Similarly, while the ATO has provided information on the 'bring forward' provision,<sup>222</sup> a critical area of the ECT concerning non-concessional contributions, there were no details which assisted taxpayers or provided practical guidance on how to identify whether the 'bring forward' provision has been triggered. As stakeholders noted in submissions, determining whether the 'bring forward' provision has been triggered in any one year, may require taxpayers looking back on their contributions history for up to three years prior.

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<sup>214</sup> Above n 11; ATO, *Excess contributions tax and how funds report your contributions* (14 June 2012) <<http://www.ato.gov.au/Individuals/Super/In-detail/Contributions/Excess-contributions-tax-and-how-funds-report-your-contributions/>>.

<sup>215</sup> ATO, *Super contributions - for defined benefit funds and constitutionally protected funds* (15 May 2013) <<http://www.ato.gov.au/Individuals/Super/In-detail/Contributions/Super-contributions---for-defined-benefit-funds-and-untaxed-funds/>>.

<sup>216</sup> ATO, *Understanding tax and SMSFs* (16 December 2013) <<http://www.ato.gov.au/Super/Self-managed-super-funds/Understanding-tax-and-SMSFs/>>; ATO, *Running a self-managed super fund* (12 February 2014) <<http://www.ato.gov.au/Print-publications/Running-a-self-managed-super-fund/>>.

<sup>217</sup> ATO, *Accepting contributions and rollovers* (6 March 2014) <<http://www.ato.gov.au/Super/Self-managed-super-funds/Accepting-contributions-and-rollovers/>>; ATO, *Rollovers and transfers* (3 March 2014) <<http://www.ato.gov.au/Super/Self-managed-super-funds/Accepting-contributions-and-rollovers/Rollovers-and-transfers/>>.

<sup>218</sup> ATO, *Claiming deductions for personal super contributions* (6 March 2014) <<http://www.ato.gov.au/Individuals/Income-and-deductions/In-detail/Super-contributions/Claiming-deductions-for-personal-super-contributions/>>.

<sup>219</sup> ATO, NTLG Superannuation Technical Sub-group, Minutes of the 5 June 2007 meeting, item 5.7(f), <<http://www.ato.gov.au/Tax-professionals/TP/Super-Technical-Sub-committee-minutes---5-June-2007/?page=19>>.

<sup>220</sup> Above n 66.

<sup>221</sup> See for example, *McLennan and Commissioner of Taxation* [2013] AATA 311.

<sup>222</sup> ATO, *Bring forward provision for people under 65 years old* (7 February 2014) <<http://www.ato.gov.au/Individuals/Super/In-detail/Contributions/Super-contributions---too-much-super-can-mean-extra-tax/?anchor=bringforward#bringforward>>.

4.10 The IGT notes that while ATO guidance on ECT matters should serve to inform taxpayers and practitioners, it should also, where appropriate, be practical so as to assist taxpayers to comply with their obligations. Such practical guidance may include, for example, a checklist of questions or a calculator for taxpayers to use when determining their contribution levels. The IGT notes that such practical applications are already provided in relation to other areas of tax on the ATO's website.<sup>223</sup>

4.11 Moreover, for the guidance to be relevant, it must also be topical and timely. To this end, the IGT considers that the ATO could draw upon its observations of taxpayer behaviour through litigated cases, applications for exercise of the discretion or through telephone contacts to discern areas most of in need of guidance and to update and bring these to more prominent attention on its website and other publications.

4.12 The ATO has consolidated general guidance on the ECT and superannuation contributions caps on a single page on its website with links to relevant material elsewhere (the supercaps page).<sup>224</sup> Importantly, such consolidation promotes greater taxpayer certainty as existing materials are easier to access. The ATO's correspondence to taxpayers in relation to the ECT provides a reference to the supercaps page. However, taxpayers who seek general guidance without having first being contacted by the ATO may find the ATO's website difficult to navigate. As the supercaps page is not clearly marked through the Individuals Super tab, it is not easily reachable where taxpayers do not have the precise hyperlink.

4.13 While taxpayers may be able to use the ATO's website search function to find the relevant information, the IGT's tests of the search function revealed that the supercaps page was only brought up as one of the first three results where the search term 'excess contributions tax' was entered. Other variations of the search term yielded some relevant results but did not highlight the supercaps page.

4.14 Notwithstanding the level of information currently published, where ATO information is not readily accessible, taxpayers may seek to rely on other sources such as word of mouth, financial advisory websites, superannuation fund websites and media commentators. Taxpayer reliance on media reports and commentary may be common and, in some circumstances, problematic. This may be due to a number of different reasons including that information communicated to the media outlet is incomplete or inaccurate, the media outlet misinterprets or misreports such information or the taxpayer misunderstands the nature of the report.<sup>225</sup>

4.15 To assist taxpayers access the most complete and accurate information, the IGT considers that the ATO should review its website information on the ECT to ensure that this information is readily apparent, accessible and comprehensible.

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<sup>223</sup> See for example, ATO, *Simple tax calculator* (accessed on 7 March 2014) <<http://calculators.ato.gov.au/scripts/asp/simpletaxcalc/main.asp>>.

<sup>224</sup> Above n 11.

<sup>225</sup> See for example, *Tran and Commissioner of Taxation* [2012] AATA 123.

## RECOMMENDATION 4.1

*The IGT recommends that the ATO:*

- (a) review, update and consolidate information on the ECT on its website and seek to tailor these to developments, trends or issues that taxpayers may experience;*
- (b) ensure that this information is comprehensible and easily accessible through clearly labelled links and flexible search terms; and*
- (c) where possible, develop practical tools to assist taxpayers to comply with their ECT obligations.*

### ATO response

Agree.

## INABILITY TO OBTAIN LEGALLY BINDING ADVICE

4.16 Taxpayers were concerned that they were, generally, unable to request a private ruling from the Commissioner in respect of the ECT or contributions on which it was calculated. This is because the ECT, despite falling within the ITAA 1997, is not an income tax, nor is it one of the other taxes on which the Commissioner may rule.<sup>226</sup>

4.17 During the review, however, the law was changed to treat excess concessional contributions as assessable income and, therefore, these types of contributions were effectively brought within the ambit of the rulings regime.<sup>227</sup> The same is not true of excess non-concessional contributions. In these circumstances, the Commissioner may provide taxpayers with Administratively Binding Advice (ABA) where private rulings are not available.<sup>228</sup>

4.18 In practical terms, an ABA would likely have the same effect as a private ruling. However, on some occasions, the Commissioner will have no choice but to depart from the earlier advice and taxpayers who have relied upon it will not have the legal protection afforded to private rulings.<sup>229</sup> In such cases, taxpayers who have relied upon the ABA will only be protected against false and misleading statement penalties and interest. In the context of the ECT this level of protection may not be sufficient as their primary concern relates to the imposition of additional tax.

4.19 Moreover, as ABAs are not legally binding, taxpayers who disagree with the ABA may seek internal review of the decision but cannot otherwise avail themselves of the review and appeal rights afforded under Part IVC of the TAA 1953.<sup>230</sup>

4.20 The use of ABAs within the ECT context has not been extensive, though in 2011–12 the numbers of requests has increased from the prior two years. Statistics provided by the

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<sup>226</sup> TAA 1953, sch 1 s 357-55.

<sup>227</sup> TAA 1953, sch 1 sub-s 357-55(a).

<sup>228</sup> Above n 49, paras [190] and [191].

<sup>229</sup> *ibid*, paras [198]-[200] and [203].

<sup>230</sup> *ibid*, para [204].

ATO to the IGT on the number of ABA applications lodged in the 2009–10, 2010–11 and 2011–12 financial years indicate that use of ABAs has generally been low, with each of the years reporting 32, 15 and 47 applications, respectively. It should be noted that a number of these involve multiple taxpayers requesting advice on the same issue (for example, an employer sought advice in circumstances where continued SG payments would result in ECT liabilities for the employees).<sup>231</sup>

4.21 A brief review of these requests show that taxpayers and employers have sought ATO assistance on a range of issues including rollovers, recontribution, the interaction between the SG and the ECT, the exercise of the Commissioner’s discretion, the ‘bring forward’ provision, personal injury structured settlement contributions and timing issues relating to contributions.<sup>232</sup> Having regard to the complex issues which may arise in respect of superannuation transactions and the ECT, the breadth of topics which are the subject of ABAs is not surprising.

### **IGT observations**

4.22 It is somewhat anomalous that a taxpayer may be able to seek legally binding advice in respect concessional contributions but not in respect of non-concessional contributions especially as the former may be counted when determining whether the latter are in excess of the relevant cap.

4.23 As a result, a taxpayer seeking advice on both aspects may lodge separate requests for a private ruling in respect of concessional contributions and an ABA in respect of non-concessional contributions. This may have time and cost consequences for taxpayers who may need to engage advisers to lodge multiple applications and later to review, analyse and advise on multiple ATO responses.

4.24 Alternatively, the burden may be shifted to the ATO where taxpayers may lodge one application and the reviewing ATO officer is required to determine what advice may be issued as a ruling and what needs to be provided in an ABA. This alternative increases the administrative time and cost on the ATO and its officers. It also carries with it an inherent risk that where the ATO officer does not correctly delineate between the private ruling content and the ABA content, both may contain information which cannot be readily relied upon by the taxpayer, resulting in further costs, disputes, time and uncertainty.

4.25 The IGT considers that, in order to assist taxpayers to comply with their taxation obligations, taxpayers should have access to binding advice that is timely, certain and cost-effective. As the ECT regime touches on transactions affecting retirement savings, the latter point is all the more important.

4.26 While it would appear desirable to bring excess non-concessional contributions within the private rulings regime, the IGT notes that the ATO’s ABA statistics have not demonstrated a material level of demand for binding advice in relation to the ECT. Accordingly, it is arguable that amending the law may not be warranted.

4.27 However, one reason for the low levels of ABA applications may be the lack of taxpayer and ATO officer awareness regarding their availability, particularly in the context

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<sup>231</sup> ATO communication to the IGT, 14 February 2013.

<sup>232</sup> *ibid.*

of the ECT. In reviewing publicly available information on ABAs, the IGT was only able to locate a small amount of information on the ATO's website<sup>233</sup> together with a link purporting to be instructions for the requesting ABAs but which redirects the taxpayer to instructions on applying for private rulings.<sup>234</sup> In addition to this, some further information is contained within PSLA 2008/3. However, the IGT was unable to locate any specific references to the availability of ABAs for ECT purposes.

4.28 To better understand the actual levels of demand for binding advice on the ECT, the IGT considers that the ATO should ensure that taxpayers and their advisers are informed of the availability of ABAs as a source of specific ATO advice in relation to the ECT. Moreover, the ATO should reaffirm the availability of ABAs with all relevant staff, including call centre staff, and ensure that appropriate advice and escalation channels are communicated to assist taxpayers.

4.29 If the increased promotion of ABAs leads to a greater demand of binding advice in respect of the ECT, the IGT considers that the ATO should provide appropriate advice to Government regarding the benefits of bringing non-concessional contributions within the rulings regime.

4.30 In addition to the above, the IGT also considers that there is scope for the ATO to provide public advice through the issue of taxation determinations or ATOIDs on those frequently raised issues in ABAs or private rulings. Such an approach to issuing greater public advice is consistent with the ATO's agreement to recommendation 2.4 of the IGT's *Review into improving the self assessment system*.<sup>235</sup>

## RECOMMENDATION 4.2

*The IGT recommends that the ATO:*

- (a) communicate the availability of ABAs for ECT issues through its website and its consultative forums;*
- (b) reaffirm the use of ABAs with relevant staff, including call centre staff, to ensure that queries are responded to and matters escalated in an appropriate and efficient manner;*
- (c) monitor and provide advice to Government regarding the demand for binding advice within the ECT regime and whether there are benefits in bringing non-concessional contributions within the rulings regime; and*
- (d) identify the ECT issues that are frequently raised and provide public advice on these issues to the extent permitted by law.*

### ATO response

Agree.

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<sup>233</sup> ATO, *Taxpayers' Charter – helping you to get things right* (30 June 2010) <<http://www.ato.gov.au/General/Your-rights/In-detail/Taxpayers--charter---helping-you-to-get-things-right/>>.

<sup>234</sup> ATO, *How to apply for a private ruling* (10 July 2013) <<http://www.ato.gov.au/General/Rulings-and-ATO-view/In-detail/Private-rulings--applying/How-to-apply/How-to-apply-for-a-private-ruling/?page=20>>.

<sup>235</sup> Above n 173, p 42.

## APPENDIX 1 — TERMS OF REFERENCE AND SUBMISSION GUIDELINES

### BACKGROUND

The superannuation system is an integral aspect of Australia's retirement income system. It seeks to ensure that Australians provide for their retirement throughout their working lives. This is achieved through a combination of superannuation contributions compulsorily made by employers which may be supplemented by taxpayers' own contributions. These contributions are given concessional tax treatment up to a certain limit. Where this limit, or 'cap', is exceeded, the Australian Taxation Office (ATO) may issue an excess contributions tax (ECT) assessment to the taxpayer, resulting in additional tax becoming payable depending on the type of contribution.<sup>236</sup>

With a view to making the concessional contributions cap fairer,<sup>237</sup> the government recently enacted legislation to grant taxpayers a one-off option to have the excess amount refunded and taxed at the taxpayer's marginal rate where they breach their contributions cap by up to \$10,000 in the 2011–12 financial year or thereafter.<sup>238</sup>

The ATO has also indicated that it would not raise ECT assessments where breaches of the concessional contributions cap are small – in some instances small breaches of the concessional contributions cap have resulted in large tax liabilities by reason of a subsequent breach of the non-concessional contributions cap.<sup>239</sup>

Notwithstanding the above ATO approach, submissions to the Inspector-General of Taxation's (IGT) work program continued to raise concerns regarding the ATO's administration of ECT. Stakeholder concerns included:

- a. difficulty in understanding the basis for ECT liability determinations and checking the accuracy of ECT assessments;
- b. inadequate consideration of taxpayer-provided information;
- c. ECT assessments effectively penalising taxpayers for breaching the contributions caps in circumstances beyond the taxpayer's control; and
- d. insufficient public guidance on ECT, particularly with respect to 'special circumstances' in which the Commissioner may exercise his discretion to disregard or reallocate the excess contributions, leading to a perception that there is a reluctance to or inconsistencies in the exercise of this discretion.

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<sup>236</sup> Australian Taxation Office, *Super contributions – too much super can mean extra tax* (3 July 2012) <<http://www.ato.gov.au>>.

<sup>237</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 21 May 2012, p 4913.

<sup>238</sup> *Tax and Superannuation Laws Amendment (2012 Measures No. 1) Act 2012*.

<sup>239</sup> ATO, Superannuation Consultative Committee, Minutes of the March 2012 meeting, Item 6.

This IGT review is one of three concurrent reviews examining the ATO's compliance approach to individual taxpayers. It aims to explore the underlying causes for these concerns with a view to identifying opportunities for improvement.

The other two reviews conducted in this area are the review of the ATO's income tax refund integrity program and the review of the ATO's use of data matching.

## TERMS OF REFERENCE

*In accordance with subsection 8(1) of the Inspector-General of Taxation Act 2003 (IGT Act 2003), the IGT will review the ATO's administration of the ECT with a specific focus on:*

1. *The clarity and comprehensiveness of ATO advice and guidance on the ECT, including those relating to the Commissioner's discretion to disregard or reallocate excess contributions.*
2. *The timeliness of the ATO's ECT assessment.*
3. *The ATO processes for making ECT assessments, including:*
  - a. *processes for verifying the accuracy of information upon which it relies;*
  - b. *procedures for requesting and considering information provided by taxpayers and tax practitioners; and*
  - c. *the consistency and appropriateness of the exercise of the Commissioner's discretion to disregard or reallocate breaches of the contributions caps.*
4. *The quality of the ATO's communications with taxpayers and tax practitioners on ECT matters, particularly the extent to which it enables the taxpayer to understand the case against them and actions they may take to address the ATO's concerns.*
5. *The adverse impacts that the ATO's administration of ECT can have on taxpayers and tax practitioners and the ATO's support to minimise these impacts.*

## SUBMISSION GUIDELINES

The IGT invites you to provide written submissions to assist with this review. The IGT envisages that your submission will be divided into two parts:

- your experience dealing with the ATO on the ECT; and
- opportunities for improvement.

## Your experience in dealing with the ATO

It is important to provide detailed accounts of your experiences in dealing with the ATO. It would be useful to provide a time line of events outlining your key interactions with the ATO including any correspondence, telephone communications, information requests and responses from the ATO (if applicable). It would also be helpful to understand the time taken to deal with the ATO and any costs you incurred, such as engaging a tax practitioner to assist in these dealings. Separately tax practitioners may wish to comment on and outline any irrecoverable costs incurred.

It is important to provide details of specific factors, including the ATO practices and behaviours that, in your view, delayed resolution of the issue at hand and resulted in increased costs and impact to your personal or business affairs. The IGT also seeks examples of positive factors in the ATO's compliance approach and management of the ECT.

The following questions are designed to assist you in setting out your experiences.

### Questions for Consideration — your experience

Q1. How did you become aware that your contributions cap had been exceeded? If the ATO contacted you first, how did they do that? Did the ATO provide you with sufficient information for you to understand the reasons for the breach?

Q2. What was the amount of the breach? What circumstances gave rise to the breach?

Q3. Did you consult the ATO website, or any other published ATO advice or guidance regarding ECT prior to making your contribution? If so, do you consider that this information was easily accessible and sufficiently informative?

Q4. Did you seek independent advice prior to making the contribution which may have resulted in the breach? Was the advice easily accessible and easy to understand, and did this assist you in making your decision regarding the contribution?

Q5. What action did you (or your adviser) take to address the ATO's concerns regarding ECT and what was the ATO's response? When engaging with the ATO, what opportunities were you afforded to state your case? How did the ATO show that it considered the information you provided? Do you consider this ATO engagement was sufficient? If not, why not?

Q6. If an ECT assessment was issued to you after your engagement with the ATO, did you request the Commissioner to exercise his discretion to disregard or reallocate the excess contribution to another financial year? If so, what was the outcome? Did the ATO determine that you had 'special circumstances' and exercised the discretion in your favour? If not, what reasons did the ATO provide for not exercising the discretion? Did you consider that the ATO fully considered your matter? If not, why not?

Q7. Prior to lodging your request for an exercise of the Commissioner's discretion, did you consult the ATO website or other published ATO advice or guidance regarding the circumstances in which the Commissioner would exercise his discretion? Did you find this information informative and useful for the purpose of your application? If not, why not?

Q8. Were you aware that the Commissioner adopts a de minimis approach to ECT in which the ATO won't issue an assessment for small breaches of the concessional contributions cap? Are you aware of what the Commissioner considers to be a 'small breach' or in what circumstances this approach may apply?

Q9. What impact has dealing with this matter had on you? For example, did you incur additional costs such as seeking assistance from a tax practitioner? Please quantify these costs. How could these have been minimised?

Q10. If you are a tax practitioner who has engaged with the ATO in relation to ECT matters, what impact did this have on you or your practice? Were you satisfied with the level and quality of information and support provided by the ATO?

## Opportunities for improvement

The IGT invites you to identify opportunities to improve the ATO's administration of the ECT and its dealings with individual taxpayers and tax practitioners in this area.

Your submission may outline alternative frameworks, actions, practices or behaviours which, in your view, could minimise costs or adverse impacts arising from the current system and its operation.

Set out below are questions to help you outline any improvements which you believe could be made in this area.

## Questions for Consideration — improvement

Q1. What improvements do you believe could be made to the ATO's administration of the ECT regime?

Q2. Do you think the requirements of the ECT regime are easy to understand? Does the existing guidance provided by the ATO assist you to better understand its requirements and what you need to do to avoid breaching the caps? If not, how could the ATO better assist taxpayers to understand their obligations in relation to ECT?

Q3. Could any other parties assist taxpayers to understand their ECT obligations to minimise the risk of cap breaches? If so, which parties and how could they assist?

Q4. Could the monitoring of superannuation contribution levels be improved to minimise the risk of taxpayers exceeding their contributions caps? If so, how? Who do you think is best placed to monitor levels of superannuation contributions? Please explain your views.

Q5. Is the ATO's current approach and guidance on 'special circumstances' warranting the exercise of the Commissioner's discretion appropriate? If not, please specify the change in approach that the ATO should adopt and the type of further guidance that it should provide.

Q6. Do you believe the Commissioner's discretion is sufficiently broad to provide an exception from the ECT regime in all appropriate cases? If not, what factors do you believe should be considered for the exercise of the discretion?

Q7. Are there other specific improvements you would like to raise?

## Submission lodgement

Submissions should address the terms of reference and submission guidelines set out above. It is not expected that each submission will necessarily address all of the issues and questions raised.

The closing date for submissions is 18 December 2012. Submissions may be sent by:

post to: Inspector-General of Taxation  
GPO Box 551  
SYDNEY NSW 2001

fax to: 02 8239 2100

email to: [for enquiries regarding this review, please email  
enquiries@igt.gov.au]

## Confidentiality

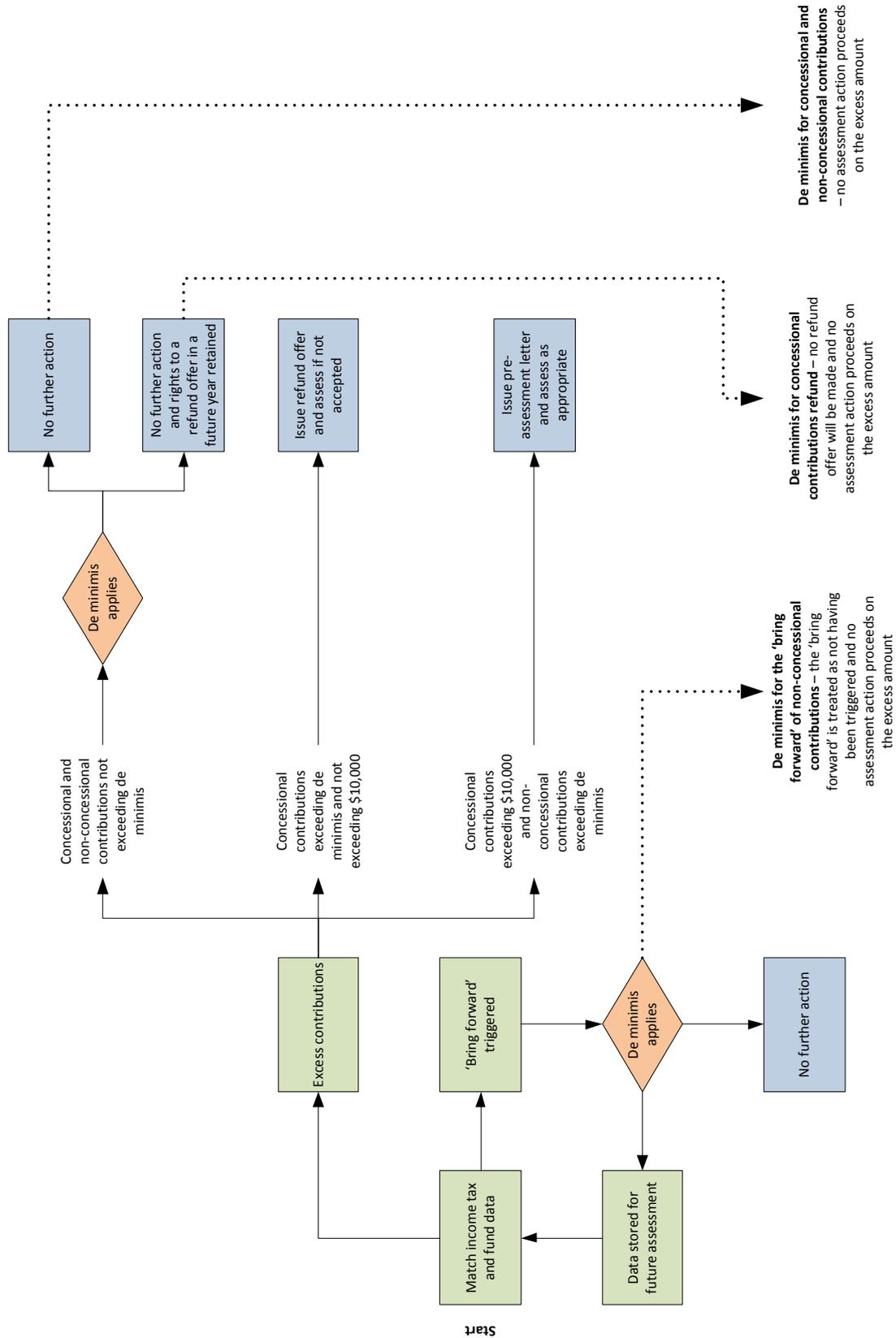
Submissions provided to the IGT are dealt with in strict confidence. This means that the identity of the taxpayer and/or of the tax practitioner and any identifying information contained in such submissions will not be made available to any other person, including the ATO. Sections 23, 26 and 37 of the IGT Act 2003 safeguard the confidentiality and secrecy of such information provided to the IGT – for example, generally the IGT cannot disclose the information as a result of a Freedom of Information request, or as a result of a court order. Furthermore, if such information is the subject of legal professional privilege, disclosure of that information to the IGT is protected and will not result in a waiver of that privilege.







# APPENDIX 3 — ATO ECT *DE MINIMIS* PROCESS





## APPENDIX 4 — ATO RESPONSE



Mr Ali Noroozi  
Inspector-General of Taxation  
GPO Box 551  
SYDNEY NSW 2001

Dear Ali

**Review into the ATO's compliance approach to individual taxpayers -  
superannuation excess contributions tax**

Thank you for the opportunity to comment on the final draft of your report on the review into the ATO's compliance approach to individual taxpayers – superannuation excess contributions tax.

We welcome your constructive feedback and note that a number of your recommendations are aimed at achieving greater transparency in the way the ATO administers the superannuation excess contributions tax.

While we are in agreement with most recommendations, for the reasons outlined in our response we do not agree with recommendation 3.1. It should also be noted that two recommendations are matters for Government.

Our detailed response to your recommendations is attached at Annexure 1.

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

Yours sincerely

A handwritten signature in black ink, appearing to read "Neil Olesen".

Neil Olesen  
Second Commissioner  
Australian Taxation Office

21 March 2014

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[To minimise space, the annexure to the ATO's response has not been reproduced here, but has been inserted into the text of this report underneath each of the recommendations to which that text relates.]

