Australian Government
Australian Taxation Office

SUBMISSION RESPONDING TO QUESTIONS TAKEN ON NOTICE AT THE JCPAA PUBLIC HEARINGS - 'RANGE OF TAXATION MATTERS' AND 'BIANNUAL HEARING WITH THE COMMISSIONER OF TAXATION' ON 20 APRIL 2007 AND SUPPLEMENTARY QUESTIONS

6 SEPTEMBER 2006

INTRODUCTION

At the public hearing of the JCPAA on 20 April 2007 13 questions were taken on notice. This submission responds to those questions with additional information where applicable.

The submission also responds to the 8 supplementary questions provided by the Committee secretariat following the hearing.

The submission is structured into chapters by subject matter. The table below maps the questions to the Chapters of this submission.

Chapter	**Question on notice/supplementary question**	**Reference**
1 Rulings system	Question on notice	PA 11, Certain taxation matters, Mrs Bishop
	Supplementary question 2	
	Supplementary question 1	
	Question on notice	PA11, Biannual hearing, Mrs Bishop
	Question on notice	PA12, Biannual hearing, Mrs Bishop
	Supplementary question 3	
2 Interpreting the law	Supplementary question 4	
	Supplementary question 5	
	Question on notice	PA 10, Certain tax matters, Mrs Bishop
3 Penalties and interest	Question on notice	PA9, Certain tax matters, Mrs Bishop
	Question on notice	PA7, Certain taxation matters, Mrs Bishop
	Supplementary question 6	
	Supplementary question 7	

Chapter	Question on notice/supplementary question	Reference
4 Settlements	Question on notice Supplementary question No 8	PA 11-12, Certain Taxation Matters, Ms Grierson
5 Taxation Statistics and union fees	Question on notice Question on notice	PA 22-23, Biannual hearing, Mrs Bishop PA 23, Biannual hearing, Ms Grierson
6 GST BAS forms	Question on notice	PA18, Biannual hearing, Senator Watson
7 Government and GST	Question on notice	PA 5, Certain taxation matters, Senator Watson
8 HECS and Help debts	Question on notice	PA 5, Certain taxation matters, Senator Watson
9 Future of tax agent industry	Question on notice	PA 11, Certain taxation matters

CHAPTER 1: RULINGS SYSTEM

PUBLIC DOCUMENTS RELEVANT TO THIS CHAPTER:

- Public Rulings Program – August 2007

PUBLIC RULINGS

General information

Public rulings are the flagship interpretative products of the Tax Office and are legally binding on the Commissioner of Taxation but not on taxpayers. Public rulings provide certainty for taxpayers and protection from any resulting tax shortfall, penalties and interest where taxpayers choose to rely on the public ruling. The Commissioner prepares and issues a public ruling where he considers it is needed to explain the administration's view of the law on significant interpretative issues facing the community or identified compliance risks. The Commissioner benefits from the advice provided by the National Tax Liaison Group on the relevance of the matters contained in the publicly available Public Rulings Program, and on their priorities.

The two main categories of public rulings are taxation determinations or TDs (a short question and answer format) and taxation rulings or TRs (a more detailed examination of an issue).

The Tax Office has general timeframes for development once a decision is made that a TR or TD be developed to address a significant interpretative issue or an identified compliance risk. These are:

- three months for the release of a draft TD after being notified on the Public Rulings Program
- six months for the release of a draft TR after being notified on the Public Rulings Program
- three months from when a draft TD is released to the issue of the TD as a final, and
- six months from when a draft TR is released to the issue of the TR as a final.

These timeframes are indicative of an "average" development time, so that particular individual rulings may take more or less time than this standard depending on their specific nature.

Number of public rulings issued

Question: How many public rulings were made last year? (Certain Taxation matters hansard, PA 11 by Mrs Bishop)

In the 2006 calendar year the Tax Office issued 481 public rulings:

- 120 public rulings and tax determinations dealing with a range of income tax, international, GST, superannuation and excise issues
- 63 draft rulings and determinations
- 133 class rulings, and
- 165 product rulings.

To date in 2007 (as at end July 2007), 196 public rulings have been issued:

- 32 rulings and determinations
- 22 draft rulings and determinations
- 70 class rulings, and
- 72 product rulings.

Monitoring timeliness

Supplementary question 2:
In the Inspector-General's recent report on service entities, he noted that the Australian Taxation Office (ATO) had discontinued monitoring its timeliness in producing public rulings. We understand that these arrangements were instituted following a performance audit by the Auditor-General in 2001.

- ***Could you please explain why you discontinued this monitoring?***
- ***Can you give us a commitment that any decision to discontinue such monitoring in future will be publicly announced?***

The Inspector-General of Taxation's report on the 'Review of Tax Office Management of Complex Issues - Case Study on Service Entity Arrangements' at Key Finding 5.10 stated that "The Tax Office has not been consistently monitoring and assessing the timeliness of public rulings on an annual basis, despite the Australian National Audit Office's (ANAO) earlier recommendation that it establish a periodic process of this nature."

A timeliness review of public rulings was finalised in mid 2004. This review was the first in a series of formally described reviews to assess the timeliness of public rulings, as recommended by the ANAO in its Follow-up Audit on the Tax Office's Administration of Taxation Rulings.

However without calling previous processes "reviews", the Tax Office has had established processes in place for at least the last seven years to continually review (usually monthly) the timeliness of public rulings. Also, at least since 1995, the Chief Tax Counsel (and Second Commissioner Law) personally monitored the timeliness and quality of public rulings, assisted by the Office of the Chief Tax Counsel. In addition, from 1995 the NTLG was invited to monitor the program and provide feedback.

The Tax Office continues to monitor and assess the timeliness of public rulings on an ongoing basis. Our ongoing managerial focus on both quality and timeliness is consistent with the ANAO's advice, but goes further. Our Public Rulings Program (which is published on the Tax Office's website) charts the progress of unfinalised rulings and is updated monthly.

In our 2005-06 Annual Report we reported that the time taken to issue draft rulings and determinations has reduced overall (compared to the previous year) but that the time taken to finalise the rulings after the draft had issued had increased. In the 2006-07 Annual Report we propose reporting on the numbers of public rulings on our rulings program that are outside standard timeframes. As at 30 June 2007, 33 of our 69 public rulings were outside our standard timeframes for publication – 5 of these are for reasons beyond our control such as being dependent on obtaining advice from Treasury or awaiting the outcome of litigation. This

compares to our performance in 2005-06 when as at 30 June 2006, 50 of 107 rulings were outside our standard timeframes (14 of which were beyond our control).

In addition we regularly discuss the Public Rulings program with the tax professions at the NTLG meetings. In this way we can seek to ensure that those rulings for which there is a significant external demand are given priority.

We also regularly report on our performance against this standard as a part of our internal governance processes, such as in monthly Heartbeat reports for senior management (including the Chief Tax Counsel), the Priority Technical Issues (PTI) Committee and our Plenary Governance Forum.

Public Rulings are a means of publicising the Tax Office's view of the law – but this could be done in other ways. What distinguishes public rulings from "guidance materials" is that they prevent the recovery of tax payable by a taxpayer or group of taxpayers where the Commissioner makes a mistake of law. Accordingly, it is incumbent on the Commissioner to ensure that public rulings are subject to a high level of quality assurance. While we will continue to focus on timeliness, we have generally delivered those public rulings considered urgent by the NTLG in a timely way and delays in these have often been associated with requests for further consultation or Treasury and legislative processes. Given the generally complex nature of issues requiring the authoritative explanation of the Commissioner's view of the law, some public rulings take time to get right.

Time taken to issue public rulings

Supplementary Question 1:
We have received evidence that 65% of public rulings are subject to delay (submission 37, p 6). In other words, they do not meet the 12 month target of being finalised after being placed on the rulings program.

- ***What are the reasons for these delays?***
- ***Is your 12 month target realistic?***
- ***Do you have enough resources devoted to public rulings?***

As outlined above, the Tax Office has in place general timeframes for issuing public rulings. These general timeframes were suggested by the ANAO in its Audit Report No. 3 2001-2002 on the Administration of Taxation Rulings as being more realistic (compared to the previous arrangements of six months from the commencement of drafting to finalisation of rulings). While these suggested timeframes have been adopted as being what could normally be expected in the general case, there is recognition that more or less time may be needed for particular rulings.

There are a number of reasons why individual public rulings do not meet the general timeframes including:

- additional consideration by the public rulings panel consisting of external and senior Tax Office experts
- further research required following advice from the panel
- extensive consultation with external stakeholders both before and after the release of a draft ruling for public comment and external stakeholder requests to extend consultation periods

- the need to consult with other agencies such as Treasury on possible consequences and impacts of the Tax Office's interpretation, and
- awaiting a court decision to clarify the law.

We are progressing changes to improve the timeliness of public rulings including:

- Our new case management system should improve the project management of public rulings
- Requiring approval by our Priority Technical Issues Committee (chaired by the Chief Tax Counsel) before an issue is included on the Public Rulings Program, to ensure only those matters genuinely requiring a public ruling are included on the program
- Establishment of a sub-group of the National Tax Liaison Group to sharpen the NTLG's focus on the management of the public rulings program
- Improving the efficiency of the rulings panel process including providing material to members earlier to enable better identification of issues for discussion at the panel meeting and a more focussed panel discussion, and
- Removing the requirement for peer review where a matter has been considered by the rulings panel.

Resourcing of tax rulings

The Tax Office makes risk management choices in the allocation of our skilled resources. We could use more resources but at this time we are seeking to improve our efficiency.

PRIVATE RULINGS

As the Committee is aware, we provide private rulings free of charge. The rationale is to give taxpayers the opportunity to have an existing transaction or proposed transaction 'assessed'. That is, it provides taxpayers with the same mechanism as existed under the old 'assessing' regime, with the additional benefit that private rulings may also be sought and given on proposed transactions.

The JCPAA has expressed concern that some lawyers and accountants were charging their clients large fees for lodging private ruling requests or were unwilling to seek private rulings because of concern about charging the client for tax technical analysis of the issues. We have made the provision of any technical analysis of the issues optional for tax professionals as it always has been for taxpayers.

Tax Office costs of preparing private rulings

Question: How much does it cost the Australian Taxation Office (ATO) to make the approximately 13,000 private rulings each year? (PA 11, Biannual hearing with Taxation Commissioner transcript, Mrs Bishop).

The cost of providing private rulings will vary from case to case as the complexity and range of private rulings varies widely across all market segments and revenue products. For instance, a ruling on a complex transaction for a large market entity is likely to involve considerably more resources than a straight forward income or deduction query from an individual.

Our costing systems have not been set up to provide sufficient detail to calculate the exact cost of a particular type of product or service such as private rulings. We can however provide an estimate of the cost of staff resources engaged in providing rulings for a particular period. This will assist to give some indication of the cost involved in providing private rulings.

Our systems show that the approximate costs in providing private rulings for the 2005-06 and 2006-07 income years are as follows:

Income Year	Approximate number of private rulings	Approximate cost (includes both direct and indirect costs)	Average cost per private ruling (approx)
2005-06	14,000	$51.6 million	$3,686
2006-07	12,600	$53.8 million	$4,270

We will be undertaking an analysis of the data to better understand the apparent increase in the average cost of staff resources engaged in providing private rulings in 2006-07. The roll-out of our new systems dealing with interpretative advice in the second half of 2009 will improve system support for this reporting.

Private rulings – by product and market segment

Question: Could you please provide a breakdown of the number of private rulings issued each year, including the categories of large corporations, government, small business and individuals? (PA12, Biannual hearing with Commissioner of Taxation transcript, Mrs Bishop)

In the Tax Office's submission to the Committee dated 25 October 2006, we provided some information regarding private rulings (see page 35). That information has been reproduced below with an update to include figures for the 2006-07 income year.

Income year	Income Tax (inc FBT)	Excise	GST (inc FBT)	Superannuation	Total
2007	8,298	244	2,411	1,665	12,618
2006	9,492	190	2,711	1,659	14,052
2005	9,501	153	3,125	1,608	14,387
2004	9,636	145	3,568	1,719	15,068
2003	10,865	23	3,954	895	15,737
2002	8,790	30	5,453	763	15,036

Our current systems do not readily support the capture of market segment details for all private ruling requests. This should change once new systems are implemented through the Change Program but the earliest date that will commence for private rulings is after rollout of the new system scheduled for July 2009.

However, within the constraints of existing systems, some high level analysis has shown that the majority of ruling requests come from individuals and from micro businesses. This analysis is necessarily very general in nature as, unfortunately, the systems limitations referred to

above, result in approximately 25% of cases showing the market segment as unknown in the first instance.

The table below shows the general trend for market segment splits in recent years:

Market Segment	% of all private rulings
Government	2%
Individuals	44%
Large market[1]	3%
Micro enterprise	22%
Not for Profit	1%
Small to Medium Enterprise	3%
Unknown	25%

Indicative private ruling advice

Supplementary question 3:
The Tax Institute of Australia has argued that you should communicate more with parties who submit applications for private rulings while you consider the application to give them a rough idea of whether it will be accepted. Are you able to give preliminary advice and still maintain the integrity of the system?

It was because of criticism from the professions and others that we tightened what had previously been our approach which was broadly in line with what the TIA now suggest.

We tightened our approach because preliminary advice could mislead the taxpayer. For example, when the *Bellinz* matter was reviewed at senior levels serious problems existed which had not been identified in the earlier discussions. Hence, we need to be cautious about what we say prior to having all necessary information and reaching a concluded view. We wish to avoid creating expectations with taxpayers that may not subsequently be met when the final advice is provided.

Nevertheless, staff can and do have informal discussions with taxpayers and/or their advisers on complex technical matters raised in applications for private rulings. We encourage these discussions to clarify matters or better understand the taxpayer's position. This includes raising areas of potential concern with the taxpayer or their adviser. Where these concerns may lead to an unfavourable response, staff are asked to inform the taxpayer or their adviser accordingly, making it clear at the time of the discussion that:

- these concerns are being communicated so that they can take the possibility of a final unfavourable view into account in deciding whether to continue to expend time and money preparing to implement the proposed scheme, and
- communicating concerns in this informal way does not constitute the Tax Office's view of the law in relation to the scheme.

In addition, our procedures do allow for the provision of preliminary favourable advice, but only in exceptional circumstances, and under strict rules which include

[1] These are typically very complex private rulings due to the number of issues or individual questions within each ruling and the complexity of the arrangements.

- a substantial and time dependent business need
- a very low risk of a different view being taken
- appropriate documentation and transparency.

Importantly, where this advice is given, it is subject to the clear notification and acknowledgement that the preliminary position is not binding and is subject to further consideration.

Our policy on this issue is being clarified in a comprehensive new Law Administration Practice Statement on the Provision of Advice by the Tax Office. It is scheduled to be published shortly.

We have or are introducing a number of initiatives to reduce the time spent on preparing an application for a private ruling and to improve the timeliness of our response. These include:

- Modifications to private ruling application forms, reducing the amount of information that needs to be provided. For example, advisers now only need to provide us with the material facts, which has always been the case for taxpayers.
- Provision, via our website, of more guidance on what needs to be provided in the application, reducing the need to seek further information. (done)
- Removal of the need for tax professionals to provide supporting arguments and legal references. Nevertheless, in the abovementioned practice statement, we will be encouraging the provision of such information as we consider that it enables us to identify the key issues, etc., more quickly with a consequential improvement in response times. (shortly)
- Introduction of streamlined application and lodgement processes for private rulings through the tax agents and business portals. Once we have overcome some security issues with the technology, we will be able to respond via the portal, again reducing response times. (lodgement done; electronic responses medium term)
- Availability of priority private rulings where the transaction is:
  - time sensitive,
  - prospective,
  - has a major commercial significance and requires consideration at corporate Board level,
  - has a tax outcome that is a critical element of the transaction,
  - involves complex law and facts requiring analysis, and
  - where the taxpayer:
    - notifies the Tax Office as soon as practicable after the transaction is first contemplated,
    - agrees to provide an application incorporating a full brief with:
      - all relevant information,
      - position for and against (a draft ruling), and
      - timeframes identified
    - nominates a taxpayer representative who will be responsible for dealing with the Tax Office, including promptly providing any requested information.
- Co designing with the tax agent community to improve the advice service we provide to them. Working with the ATO Tax Practitioner Forum we are seeking to:
  - build self sufficiency within the tax profession
  - improve access to experts, and

  - take an enterprise-wide approach to tax practitioner products and services.
- Establishment of 11 working groups as part of the ATO Tax Practitioner Forum including the Accounting Working Group, the Active Compliance Working Group and the Advice Working Group.
- Seeking nominations for membership of Regional Practitioner Forums for tax practitioners in North Queensland, Melbourne and Tasmania.
- Other support provided to tax practitioners includes:
  - an induction package for new tax practitioners,
  - tax agent portal training, and
  - tax agent relationship manager program.

CHAPTER 2: INTERPRETING THE LAW

PUBLIC DOCUMENTS RELEVANT TO THIS CHAPTER

- Practice Statement PS LA 2005/10
- Practice Statement PS LA 2003/10

RESOLVING TAX OFFICE POSITION IN COMPLEX MATTERS

Supplementary Question No 4
We have received evidence that the ATO tends to experience significant delays in resolving complex issues. Examples include mass marketed investment schemes, research and development syndicates, service entities, and living away from home allowances:

- ***Is there a pattern here?***
- ***Do you accept the claim that you have a systemic difficulty in resolving complex issues in a timely way?***
- ***Or do you in fact resolve a large number of complex issues quickly, and these listed above are the small number left over?***

In its administration of the tax and superannuation systems, the Tax Office regularly identifies and resolves many complex issues. These issues cover both the way the law is administered and the way the law is interpreted.

There have been instances (such as service entities and living away from home allowance) where the timeliness of the resolution of the issues could have been better, however we do not agree that this indicates that there is a pattern or systemic difficulties in resolution of complex issues. We would note the extensive consultation and external scrutiny and review that formed part of the context for the resolution of Mass Marketed Investment Schemes, R & D syndicates and service entities. In all these cases there was also strong lobbying from promoters and others who wanted a different resolution of these issues.

To put those cases in context, our stock of priority technical issues (that is, the most complex matters we deal with) decreased from around 1500 to less than 250 over the last decade. Last financial year we resolved 172 PTIs and added 134 new PTIs to our list. PTIs are actively managed via our PTI Committee which is currently chaired by the Chief Tax Counsel.

Mass Marketed Investment Schemes

Our management of anti-avoidance schemes (including mass marketed investment schemes) was covered in our second submission to the JCPAA dated 7 June 2006.

In the submission we acknowledged that we were acutely aware of past criticism that we were too slow to respond to mass marketed investment schemes and to warn taxpayers earlier of our concerns. Our submission explained that we have developed new products, capabilities, and intelligence to help guide taxpayers to avoid the pitfalls of schemes that are ‘too good to be true’.

We also provided details of the proactive steps we are taking such as warnings about 'dodgy investments'. We have continued these proactive steps by, for example, in June 2007 issuing a new brochure on our website providing tips about avoiding schemes titled *"Don't Take the Bait".*

Processes for managing complex issues

Our most complex issues involving the way the law is interpreted are usually risk assessed and approved as "priority technical issues"[2]. Resolution strategies include:

- issuing taxpayer alerts
- issuing a public or private ruling, a practice statement or other publication
- pursuing litigation, or
- briefing Treasury or other government agencies on the consequences of changes to interpretation of the law.

In recent years the Tax Office has introduced a number of initiatives to improve the quality and timeliness of its decision-making processes relevant to managing complex issues. These include:

- Establishing a framework for risk and issues management and for better project management of issues, as set out in Practice Statements PS CM 2003/02 and PS CM 2003/05
- Improving management of priority technical issues through the procedures set out in Practice Statement PS LA 2003/10, including monitoring and review of issues and practices through the Priority Technical Issues Committee[3]
- Introducing case leadership roles for the large business and small to medium enterprise segments
- Implementing the priority private binding ruling process, as set out in Practice Statement PS LA 2005/10, and
- Providing practical guidance and instruction to staff on the application of the general anti-avoidance provisions as set out in Practice Statement PS LA 2005/24. This framework provides an opportunity for a taxpayer (and/or a representative of the taxpayer at the taxpayer's election) to attend a General Anti-Avoidance Rules panel meeting and address the Panel.

Factors that may contribute to the time taken to resolve complex issues include:

- the complexity of the issues involved, the number of competing arguments and the lack of existing case law or guidance to assist both taxpayers and tax officers in resolving the issue
- the need for extensive consultation with external stakeholders, including industry and professional bodies
- the need to consider practical implications of implementing any resolution strategy such as systems impacts on taxpayers,
- activities by promoters of schemes and others that have the effect of delaying matters, and

[2] Priority technical issues are technical issues that have been ranked as a priority using a risk rating matrix.
[3] The PTI committee is chaired by the Chief Tax Counsel and has been established to provide guidance and direction, and to monitor the management of Priority Technical Issues.

- consideration by Treasury and Government of the need for a legislative response.

As at 31 August 2007, there were 223 issues registered as priority technical issues. While the Tax Office had not yet established its view of the law on 75 of these issues, 33 of these were registered in the last 6 months and 49 in the last 12 months. Only 6 are older than 2 years.

The table below shows the change in numbers of PTIs on hand in the 2005-06 and 2006-07 financial years:

	Opening balance	**Added**	**Finalised**	**Closing balance**
2006-07	274	134	172	236
2005-06	300	182	208	274

INDOOROOPILLY DECISION AND DECLARATORY ORDERS

Public documents relevant to this section

- Revised decision impact statement for Indooroopilly decision.

Supplementary Question No 5:
Following the Court's decision in Indooroopilly, you issued a Decision Impact Statement identifying the need to obtain legal advice for using the declaratory powers of the Court to clarify the proper construction of the taxation laws in a more timely way:

- ***Can you advise the progress?***
- ***How would court declarations work?***
- ***Would court declarations significantly reduce the time and costs for all involved?***
- ***Would court declarations be a more efficient than test cases in creating certainty in the tax system?***
- ***Will court declarations replace test cases?***

In our 17 April 2007 report to the JCPAA and in evidence at the public hearing on 20 April 2007 we advised that we have sought advice from the Commonwealth Solicitor-General, the Chief General Counsel of the Australian Government Solicitor on issues raised by the court in *Indooroopilly*.

The Solicitor-General and counsel have advised that it would not usually be appropriate for the Commissioner to seek to use declaratory proceedings to resolve taxation disputes. In many cases, a declaration from the court would not be available to test an interpretation of the law because the question would be hypothetical or advisory. The advice confirms that the usual objection and appeal processes involving assessments and private rulings should be used to resolve issues between a taxpayer and the Tax Office.

The Solicitor-General and counsel have confirmed their earlier advice that the ATO is not required to follow a single judge decision, if on the basis of legal advice, there are good arguments that, as a matter of law, the decision is incorrect and prompt action is being taken to clarify the position. In the rare circumstances where the Commissioner does not appeal a

decision which is considered incorrect, the ATO will seek to take prompt action to test the issue before the Full Court.

A copy of the Solicitor-General's advice is at Attachment 2. The revised Decision Impact Statement and the Commissioner's speech "The rule of law: a corporate value" of 1 September 2007 are at attachments 3 and 4.

GENERAL ADMINISTRATIVE PRACTICE

Public documents relevant to this section

- Explanatory Memorandum to Taxation Laws Amendment (Improvements to Self Assessment) Bill (No 2) 2005
- Taxation Ruling TR 2006/10 Income tax, fringe benefits tax and product grants and benefits: Public Rulings
- Law Administration Practice Statement PS LA 2001/8 ATO interpretative decisions
- Law Administration Practice Statement PS LA 2003/3 Precedential ATO view
- Law Administration Practice Statement PS LA 2006/2 Administration of shortfall penalty for false or misleading statement
- Law Administration Practice Statement PS LA 2006/8 Remission of shortfall interest charge and general interest charge for shortfall periods

Question: Could you please provide information on the definition of 'general administrative practice,' especially given concerns raised with the Committee that it is not sufficiently defined? (PA 10, Certain Taxation Matters transcript, Mrs Bishop)).

General

The phrase 'general administrative practice' is used in three contexts in the *Taxation Administration Act 1953* (TAA)[4]:

- providing protection to taxpayers from shortfall penalty,
- providing protection to taxpayers from the general interest charge and shortfall interest charge, and
- public rulings provisions.

'General administrative practice' is not defined in the legislation. The only guidance provided by Parliament as to the policy intent of the phrase is in the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 (the EM), which introduced the phrase in relation to the general interest charge, shortfall interest charge and public rulings provisions. Paragraphs 3.130 and 3.131 of the EM discuss a number of factors which might be relevant in determining whether a general administrative practice is established.

The existence or otherwise of a general administrative practice is a question of fact based on the particular circumstances being considered. Accordingly, it is difficult to provide a

[4] All legislative references are to Schedule 1 of the TAA, unless otherwise indicated.

generalised definition. Hence the EM discusses the concept in a general way and does not attempt to define it in a prescriptive manner.

Tax Office view of the meaning of 'general administrative practice'

TR 2006/10 provides the following guidance on the meaning of 'general administrative practice':

> 72. General administrative practice will usually be established by the Tax Office having consistently communicated to a wide range of entities on a particular issue. A general administrative practice is usually adopted for the efficient administration of the taxation system and would generally be documented in products such as:
>
> - Law Administration Practice Statements;
> - General Administration Law Administration Practice Statements;
> - a Tax Office policy document (such as the ATO Receivables Policy); and
> - other precedential material.
>
> 73. Importantly though, not all precedential material (such as ATO Interpretative Decisions (ATO IDs)) indicate a general administrative practice. An ATO ID will only be accepted by the Tax Office as representing general administrative practice where the view contained therein is supported by other evidence of a pattern of Tax Office treatment of the issue consistent with the view expressed in the ATO ID (for example, a significant number of private rulings on the same matter which reach the same conclusion).
>
> 74. Other situations where a general administrative practice is not necessarily established include:
>
> - Where there are merely several private rulings on a matter. However, a significant number of uncontradicted private rulings on a matter over time will tend to support the establishment of a general administrative practice.
> - A bare failure by the Commissioner to take some action within his or her power. However, a repeated failure to exercise that power after the issue is drawn to the Commissioner's attention will tend to support the establishment of a general administrative practice.
> - Mere silence or failure to issue a public ruling on a matter. However, a general administrative practice may be established where, following the identification of an issue, the Tax Office has accepted the practice as a basis on which entities should treat the issue in a range of situations.

The discussion in TR 2006/10 is based on paragraphs 3.130 and 3.131 of the EM. These statements are also reiterated in the Law Administration Practice Statements referred to above[5],.

[5] See paragraphs 46-49 of PS LA 2001/8, paragraph 35 and footnote 15 of PS LA 2003/3, paragraphs 81-82 of PS LA 2006/2 and paragraphs 104-105 of PS LA 2006/8.

Relevant legislative provisions

The following paragraphs provide a brief overview of the specific legislative provisions which refer to the phrase 'general administrative practice'.

Shortfall penalty

The phrase 'general administrative practice' was first used in a penalty context in the former penalty regime under Part VII of the *Income Tax Assessment Act 1936* (ITAA 1936). Section 226V of the ITAA 1936 provided that if the tax shortfall was caused by the taxpayer treating an income tax law as applying in a way that agreed with a general administrative practice under the Act, then the shortfall was not considered a tax shortfall for the purpose of sections 226G, 226H, 226J, 226K or 226L of the ITAA 1936.

A similar provision was then included in the uniform administrative penalty regime under Schedule 1 to the TAA, in 2000. Subsection 284-215(1) provides that a shortfall amount or scheme shortfall amount is reduced, for the purposes of shortfall penalty, to the extent to which the taxpayer acted in a way that agrees with:

- advice given by the Commissioner
- general administrative practice, or
- a statement in a publication approved in writing by the Commissioner.

General interest charge and shortfall interest charge

Subsection 361-5(1) provides similar protection from the general interest charge and shortfall interest charge where the taxpayer reasonably relied in good faith on:

- the Commissioner's general administrative practice, or
- advice given by the Commissioner or a statement in a publication approved in writing by the Commissioner (unless labelled as non-binding).

Public rulings

Subsection 358-10(2) provides that a public ruling will not apply to a scheme already commenced by a taxpayer where the public ruling changes the Commissioner's general administrative practice and the change is less favourable than the general administrative practice.

An example of the application of this provision is described in PS LA 2003/3 at footnote 22. Where a draft public ruling represents the Commissioner's general administrative practice, and the final public ruling takes a position contrary to that in the draft public ruling, the final public ruling cannot apply retrospectively if it is less favourable than the draft public ruling. For this to apply, it must first be determined, on all the facts and circumstances, that the draft public ruling represents the Commissioner's general administrative practice.

Is further clarification of the phrase 'general administrative practice' required?

The Tax Office considers that both the discussion in TR 2006/10 and the Explanatory Memorandum provide adequate guidance on the meaning of the phrase 'general administrative practice'.

CHAPTER 3: PENALTIES AND INTEREST

PUBLIC DOCUMENTS RELEVANT TO THIS CHAPTER

- ATO Receivables Policy
- Law Administration Practice Statement 2006/8 - Remission of shortfall interest charge and general interest charge for shortfall periods

INCOME TAX AND GST LAWS DISCRETIONS TO REMIT PENALTIES AND INTEREST

Question: In terms of remitting penalties and interest, is there any difference between your discretions for GST and income tax? (PA9, Certain Taxation Matters Transcript, Mrs Bishop)

How is shortfall penalty treated differently in GST and Income Tax?

In broad terms, shortfall penalty is not treated differently in GST and Income Tax. A uniform penalties regime applies. However, under those provisions a penalty for taking a position that is not reasonably arguable applies only to large income tax shortfalls.

The penalty regime is contained within Part 4-25 of Schedule 1 to the Tax Administration Act 1953 (TAA). It sets out the uniform administrative penalties that apply to entities[6] for failing to satisfy obligations under taxation laws.[7] Uniform penalties will apply where an entity fails to satisfy the same type of obligation under different taxation laws. More specifically Division 284 of Schedule 1 to TAA sets out circumstances in which administrative penalties apply for:

a making false or misleading statements; and

b taking a position that is not reasonably arguable; and

c entering into schemes.

The administrative penalty provisions consolidate and standardise the previous penalties framework, and also apply in respect of the New Tax System taxes and collection systems, including withholding and instalments for GST and PAYG, reported on the Business Activity Statement.

The Tax Office's approach to administering shortfall penalties reflects its character as a uniform penalties regime across the various taxes but noting that the additional requirement for a reasonably arguable position does not exist for GST purposes.[8]

[6] Entity includes an individual.

[7] Subsection 2(2) of the *Taxation Administration Act 1953* specifies Acts which are not taxation laws for the purposes of Subdivision 284-B in Schedule 1.

[8] See TR 94/4, TR 94/6 and PS LA 2006/2. Note that TR 94/4 and TR 94/6 were published at the time of the previous penalties regime and have recently been added to the Public Rulings Program for re-write, to reflect the uniform penalties provisions.

How is interest treated differently in GST and Income Tax?

It is important to differentiate between General Interest Charge (GIC) and that of Shortfall Interest Charge (SIC).

GIC imposed for **late payment** of a tax liability is applied uniformly regardless of the underlying tax liability. That is, it is administered identically for a GST debt and an Income Tax Debt.

SIC applies to **understatements** of **income tax** liabilities. Before the introduction of SIC, such understatements were subject to GIC. SIC does not apply to GST.

As some background, the SIC regime was introduced as a result of the *Report on Aspects of Income Tax Self Assessment* (the Report). GIC, which existed before the Report, is set at a higher rate compared with indicator rates for commercial borrowing to encourage prompt payment of tax liabilities. SIC is an interest charge which is at a lower rate than GIC for shortfall amounts for income tax amendments for the 2004-05 and later income years. It was introduced because taxpayers who were genuinely unaware of the shortfall may be unable to take any steps to reduce their exposure to the higher rate GIC.

Remission of interest

The Commissioner has taken steps to extend the interest remission guidelines. This has ensured that the same remission principles for SIC are applied to all shortfalls which result in interest being payable. Law Administration Practice Statement 2006/8 'Remission of shortfall interest charge and general interest charge for shortfall periods' provides guidelines on the remission of shortfall interest charge and general interest charge accrued during shortfall periods.

Key points from the Practice Statement include:

- For GIC relating to income tax shortfalls for the 2003-04 and earlier income years it is considered fair and reasonable that in respect of the shortfall period after 30 June 2005 the rate of interest should not exceed the SIC rate. That is, the interest charge should be remitted to the SIC rate for the shortfall period after 30 June 2005 to the day before the issue of the amended assessment.
- Recognition that there are circumstances which justify the Commonwealth bearing part or all of the cost of delayed receipt of taxes and therefore that remission of general interest charge (GIC) and shortfall interest charge (SIC) should occur. Examples of situations where full or partial remission of interest charges may be appropriate include where:
  - There is an unreasonable delay caused by the Tax Office during the course of the audit.
  - The expected time to complete an audit (as is generally notified to the taxpayer) is exceeded.
  - There is delay by the tax office in processing an amendment request;
  - The taxpayer has reasonably relied in good faith on Tax Office publications, general administrative practice and ATO Interpretive Decisions (IDs), they will receive full protection from interest charges.
- The Tax Office will initiate the remission of interest where it is aware that circumstances warranting remission exist. Taxpayers can also request remission of interest charges at any time.

- The remission policy for GIC relating to established debt is still contained in the *ATO Receivables Policy*.

NUMBER OF PEOPLE ATTRACTING SIC INSTEAD OF GIC

Question: Could you please provide data and trend information on the number of people attracting the SIC instead of the GIC? (PA 7, Certain taxation matters, Mrs Bishop)

The SIC replaced the GIC for only the shortfall period, i.e. the period between the due date for the original assessment and the correction of the shortfall, for all income tax amended assessments for 2004/05 and later income years.

The annual SIC rate is 4 percentage points lower than the GIC rate.

Since SIC was introduced, the number of taxpayer adjustments made where SIC was imposed, the average SIC amounts imposed, net of remissions, for the 2004/05 and later years is:

	2004/05 Income Year	**2005/06 Income Year**	**2006/07 Income year**
Number of taxpayer adjustments with SIC as at 21/6/07	301444	16060	0
Average SIC amount net of remissions as at 21/6/07	$117	$177	0

The number of taxpayer adjustments with SIC is lower for the 2005/06 year because it is a more recent income year and over time, as we make adjustments as a result of our compliance activities, the number is likely to increase. The number of taxpayers is zero for 2006/07 because we have not made any adjustments for that year as yet since most taxpayers have not lodged tax returns for that income year.

CONSISTENCY OF APPLICATION OF PENALTIES ACROSS THE ATO

Supplementary question no 6:
We are interested in whether penalties are applied consistently across the ATO:

- ***What systems do you have in place to ensure this occurs?***
- ***Has this issue been subject to internal audit or technical quality reviews? If so, what has been the result of these investigations?***
- ***Have you implemented the Auditor-General's recommendation in the 2000 performance audit to develop an internal website to help ATO officers calculate penalties? If no, why not?***

Policies, procedures and tools to promote consistent application of penalties

The Tax Office has a variety of policies, procedures and tools in place to support staff making penalty decisions. These include:

- Law Administration Practice Statements - particularly PS LA 2006/2 Administration of shortfall penalty for false or misleading statement and PS LA 2006/8, Remission of shortfall interest charge and general interest charge for shortfall periods to provide a basis for consistent application of penalties supported by efforts to skill our officers in their application,
- internal calculation tools which work out the penalty amount on shortfalls for income tax (they are referred to as WINTAP and COMTAP),
- all penalty decisions are reviewed by an accredited authorising officer (usually a team leader) before amendments issue, and
- specialist officers assigned to penalty panels which review the more significant penalty decisions.

Technical Quality Reviews

Our biannual Technical Quality Reviews (TQRs) are our main process for ensuring quality technical decisions including penalty decisions and, amongst other things, is necessary to assess the level of compliance with mandatory work practices and procedures (including those outlined above). These panels include external representatives[9]. See the section under Penalties below.

Penalties

Penalty decisions are subject to TQRs. Our practice statement on these reviews, PS LA 2001/11 provides that a sample of penalty decisions is selected for technical quality review. This gives effect to recommendations outlined in the *Australian National Audit Office report No. 31 Administration of Tax Penalties.*

The population is to consist of all decisions finalised, where penalties should have been considered.

The table below provides results for the last 2 TQR reviews of penalty decisions. In the most recent TQR in February 2007 (which covered decisions finalised during the period 1 August 2006 to 31 January 2007) we exceeded our corporate standard for both the “A” rating target of 85% and the “pass” rating target of 95% for the reviewed penalty decisions. The “A” rating result was 92% and the “pass” rating result was 97%.

The model to allocate ratings such as “A” or “Pass” are explained in the Tax Office Judgment Model grading matrix shown at Attachment 1 to this submission**.**

Table – TQR penalty decision ratings

Category	Corporate Standard	Feb 06 – Jul 06 Result	Aug 06 – Jan 07 Result
Penalty 'A'	85.00	89.77	92.09
Penalty 'Pass'	95.00	96.46	97.17

[9] The panels have included representatives of the Australian Government Solicitor and academia.

Shortfall interest remissions

An additional short-form TQR process was undertaken earlier this year to review a sample of randomly-selected interest remission decisions across the Tax Office. That TQR process resulted in the following ratings:

Table: Shortfall interest remission decisions (Aug 2006 to Jan 2007)

Judgment Model Grade	No of cases reviewed	A %	Pass %
A pass	34	49% (standard 85.00)	84% (standard 95.00)
B pass	1		
C pass	23		
F fail	11		
Total	69		

These ratings mean that we have some way to go before we are satisfied with the quality of documentation for our shortfall interest decisions.

The release of PS LA 2006/8 last year represented a significant change to existing work practices because of the different calculations required. It is therefore expected that there will be an adjustment period before case officers correctly document the application of these new procedures. The next TQR will take place in July this year and will again review interest remission decisions for quality.

Implementation of ANAO recommendation to develop internal website

The ANAO recommended that the Tax Office investigates the cost-effectiveness of providing on-line decision support tools to staff to assist with consistent and efficient application of penalties.

We accept that we have not specifically nor completely implemented this particular recommendation from the ANAO report. Since the release of the ANAO report, we have undergone rapid enhancements in technology and also introduced a New Tax System. This has resulted in staff being able to access penalty policy and practice material using web browser capability that could be in advance of anything envisaged at the time of the ANAO report. We have also released a Decision Support Tool to coincide with the release of Law Administration Practice Statement PSLA 2006/8: Remission of Shortfall Interest Charge and General Interest Charge for Shortfall periods..

In addition the policies and practices referred to above (under the heading policies and practices) such as requiring all penalty decisions to be reviewed by an accredited authorising officer (usually a team leader) before amendments issue, and specialist officers being assigned to penalty panels which review the more significant penalty decisions, assist Tax Office staff to correctly calculate the amounts.

Supplementary Question 2.
In the Inspector-General's review of remitting the general interest charge (GIC) in relation to employee benefit arrangements, the report noted that you took a narrow view of when to remit GIC, especially in relation to GIC accrued prior to an amended assessment:

- ***Do you believe that to have been more generous would have been acting outside the law?***
- ***Do you have legal advice to this effect?***

GIC is imposed by the law. The Commissioner has a discretion to remit GIC, but the general principle is that taxpayers should not be advantaged over other taxpayers when paying their tax debts late. We applied our ATO Receivables Policy accordingly. However, by 2004, the size of GIC that had accrued on the outstanding debts of participants in employee benefit arrangements had become a barrier to their ability to clear their debts.

The Commissioner announced in November 2004 the following approach to remission of GIC for employee benefit arrangements (EBAs) following the IGOT review:

- Guidelines were released for participants in EBAs to make an application for remission of interest and/or penalties based on their individual circumstances. More than 1830 applications for remission under these guidelines have been received and a partial remission has been made in about 1180 cases (64%) worth over $30 million.
- Interest accruing to 19 January 2005 was capped at 70 per cent of the primary tax owed for EBAs. This has resulted in a further 990 taxpayers receiving remission of interest worth about $36 million. This approach was designed to try to finalise outstanding cases by capping the accruing interest changes.

As a result of the 2004 *Report on Aspects of Income Tax Self-Assessment,* the shortfall interest charge (SIC) was introduced for amended assessments from 2004–05 onwards, replacing the higher general interest charge (GIC) during the shortfall period. The SIC rate is 4% lower than the GIC rate – recognising that, generally, taxpayers should not pay an excessive interest charge during the time they were unaware or were not advised by the Tax Office they had a tax shortfall amount.

The SIC legislation provided more explicit principles around remission of interest charges for the period prior to the issue of an amended assessment. Guidelines on remission of SIC and GIC in a pre-amendment period were released as Law Administration Practice Statement PS LA 2006/8 and the Tax Office decided to apply the SIC remission policy to pre- amendment GIC for periods after 30 June 2005.

CHAPTER 4: SETTLEMENTS

PUBLIC DOCUMENTS RELEVANT TO THIS CHAPTER

- Code of Settlement Practice
- Law Administration Practice Statement PS LA 2007/5 Settlements - Prescribes mandatory use of the Code of Settlement Practice by all Tax Office staff in the settlement of taxation disputes; and
- Law Administration Practice Statement PS LA 2007/6 Guidelines for settlement of widely-based tax disputes - Sets out practical guidelines for the settlement of widely-based tax disputes

CODE OF SETTLEMENT PRACTICE

Question: Could you please provide an explanation of the code of settlement practice, what principles are being applied, and what the justification is for them? (PA 11-12, Certain Taxation Matters transcript, Ms Grierson)

Background

The Tax Office's Code of Settlement Practice was first released in February 1991 as the Settlement Guidelines. The Settlement guidelines were developed in consultation with taxpayer, professional and industry groups. The key principle is transparency of process and settlement of liabilities on a basis that reflects the prospects of success or is considered to be in the best interests of the Commonwealth.

The guidelines were revised and renamed the Code of Settlement Practice in September 1999. A further revision was issued in January 2001.

Current code of settlement practice (third version)

During 2006 we reviewed our practices and procedures for settlements including a review of the Code. The Code was reviewed to ensure that it continues to provide a robust and transparent framework for the settlement of taxation disputes.

We invited feedback from members of the NTLG and the Taxation Ombudsman and Inspector-General on the revised Draft Code of Settlement Practice. We received comments from some of the members of the National Tax Liaison Group and the Taxation Ombudsman. Where appropriate, these comments were incorporated into the Code.

The revised Code of Settlement Practice was released on 21 February 2007 internally as well as on the Tax Office website. Included in the guidelines is a standard settlement template and model deed. We also issued two law administration practice statements on Settlements in conjunction with the Code. Law Administration Practice Statement PS LA 2007/5 Settlements mandates that officers must follow the Code of Settlement Practice when concluding settlements. Law Administration Practice Statement PS LA 2007/6 sets out the procedures for widely based settlements.

A major initiative to ensure appropriate clearance from February 2006 is that settlements (other than widely based ones and some specific settlements in the Large Business and Individuals Innovation Segment) must be signed off by a duly delegated Senior Executive Service officer.

Settlement register

The Settlement Register was also revised in October 2006 to ensure more integrity around data capture, allow better reporting and ease of use. The data definitions were clarified and strengthened. Additional information on the positions of both the taxpayer and the Tax Office are now captured so as to give a clearer picture of the issues involved and the outcomes of negotiations.

Reasons for settlement

As a general guide, settlement may be an appropriate way to resolve a matter if:

- the cost of litigating (including internal Tax Office costs) is out of proportion to the possible benefits, having regard to prospects of success (including collection of the tax), and likely award of costs, assessed as objectively as possible
- there are complex factual or quantum issues in contention, or evidentiary difficulties, or there is genuine uncertainty as to the proper application of the law to the facts, sufficient to make the case problematic in outcome or unsuitable for resolution through the AAT or courts, (for example, where the issue is peculiar to the particular taxpayer, and the opposing positions are each considered reasonably arguable.) This is particularly so where the settlement includes an agreed approach for future income years
- a participant or group of participants in a tax avoidance or other arrangement has come to accept the Commissioner's position and settlement is around the steps necessary to unwind existing structures and arrangements
- the settlement will achieve compliance by the taxpayer, group of taxpayers, or section of the public, for current and future years, in a cost-effective way, and
- unique or special features exist which make it unsuitable for resolution through litigation, for example, a dispute about the valuation of a unique asset.

SETTLEMENT PERCENTAGES

Supplementary Question No 8: We understand that the ATO has a great deal of discretion in how it manages settlements:

- ***Do the settlement percentages vary greatly between individual cases? (That is, the amount that the taxpayer agrees to pay, compared with the amount the ATO initially claims).***
- ***What is a normal range of settlement percentages?***
- ***Can you explain this figure?***
- ***Would it be practicable for the Tax Office to publish in its annual report the amount of revenue collected annually through settlements?***

Settlements are finalised in accordance with the Tax Office's Code of Settlement Practice discussed above. Each settlement is concluded based on the relevant individual circumstances of the particular issue.

The Commissioner is obliged to manage the affairs of the Tax Office in a way that promotes the efficient, effective and ethical use of Commonwealth resources. The courts have recognised that it is open to the Commissioner to use the "good management rule" when making decisions in regard to the best use of resources available. Settlements are an example of this. Accordingly, a settlement does not of itself indicate that revenue has been forgone.

Number of settlements completed

In our 2005-06 annual report (at table 3.50) we published the number of settlements registered in 2005-06. This was the first time that we published settlement figures. Those figures are:

- Widely based scheme settlements 2185
- Other settlements 211

The 2006-07 Annual Report will show the number of settlements registered as:

- Widely based scheme settlements 1580
- Other settlements 225

It should be noted that in the 2005-06 annual report, the Tax Office reported 13,985,327 lodgments of income tax returns and undertook 1,553,622 Active Compliance Activities.

Settlements form a small proportion of our activities but are subject to strict guidelines to ensure the integrity and transparency of their outcomes.

The extent of settlement data to be published in future annual reports (including 2006-07) is currently being considered.

CHAPTER 5: TAXATION STATISTICS AND UNION FEES

Question: Could you please provide the number of taxpayers making deductions for union fees and the dollar value of those deductions? (PA 22-23, Biannual hearing with Commissioner of Taxation, Mrs Bishop)).

The Tax Office is unable to provide actual figures in relation to this enquiry because it does not isolate this information in Income Tax Returns.

Union Fees form part of a tax return item titled "Other Work Related Expenses" and are not itemised separately. Nevertheless an estimate has been made using Australian Bureau of Statistics figures of union membership and income, and schedules of work related expenses collected for Tax Office compliance purposes in relation to this item.

Based on Australian Bureau of Statistics and Tax Office compliance data, it is estimated that around 1.9 million individuals claimed around $720 million of union fees on their 2004-05 income tax return.

Could you please provide a costing of the work required to answer questions one, above? (PA 23 Biannual hearing with Commissioner of Taxation, Ms Grierson)).

The direct cost to the Tax Office in answering the question was around $1,000.

CHAPTER 6:GST BAS FORMS

Question: Why is it that the cancellation of GST BAS forms cannot be done electronically unless the tax agent has tax portal access? (PA 18, Biannual hearing, Senator Watson)

When a lodged activity statement contains information which is incorrect or incomplete, it should be 'revised' rather than cancelled (in limited circumstances, corrections can be made in a subsequent BAS). This process replaces the original activity statement with a subsequent statement including new or different information. Activity statements can be revised by a tax agent via the Tax Agent Portal, Electronic Lodgment Service, by calling our client contact centre, or in writing.

An activity statement that has not yet been lodged for a period can only be cancelled if the taxpayer's registration/role is cancelled before the commencement of that period.

The circumstances in which a BAS form can be cancelled are very limited. The Tax Office receives less than 100 requests for cancellations per year. Usually the requests for cancellation relate to circumstances where the activity statement has been lodged in error—for example, where a tax agent has inadvertently used incorrect client's data (ie information relating to another client).

When an activity statement has been lodged, cancellation of the activity statement results in a complete deletion of the lodgment of that activity statement.

There is no electronic facility for tax agents to cancel activity statements. All requests for cancellation of an activity statement after it has been lodged, need to be made to the Tax Office via secure messaging in the tax agent portal, by calling our client contact centre, or in writing. Cancellations are only processed by Tax Office staff to ensure the integrity of accounts is maintained and as a safeguard against fraudulent activities.

CHAPTER 7: GOVERNMENTS AND GST

PUBLIC DOCUMENTS RELEVANT TO THIS CHAPTER

- Compliance Program 2007-08

Question: Is it true that governments, federal and state agencies and departments are significantly error prone in the area of GST and, if so, why? (PA 5, Certain Taxation Matters transcript, Senator Watson).

There is no evidence to suggest Governments, federal and state agencies and departments are more error prone in the area of GST than other taxpayers. However they have experienced difficulties in the areas of GST relating to:

- Incorrect credit claims in multi-party transactions
- Treatment of grants
- Property transactions
- Public-private partnerships, and
- Machinery of government changes.

To assist them in their compliance efforts we provide a range of help and education services and implement compliance strategies that are commensurate with the identified risks in that sector.

CHAPTER 8: HECS AND HELP DEBTS

Question: Why aren't HECS and HELP debt repayments credited as they are received or when they are paid? (PA 5, Certain Taxation Matters transcript, Senator John Watson)

BACKGROUND INFORMATION

The law requires that employers take into account any accumulated Higher Education Loan Programme (HELP) debt of their employees when determining the amount of pay as you go (PAYG) withholding to be withheld from an employee's salary and wages. However, the law does not allow the amount withheld to be credited against the employee's HELP account (which maintains a record of their accumulated HELP debt) prior to the day on which an income tax assessment has been made for the employee.

To help individuals meet their annual tax obligations, they are required to pay amounts of their income at regular intervals as it is earned during the year. The system for collecting these amounts is called pay as you go (PAYG) withholding.

The PAYG withholding system requires an employer to withhold an amount from the salary or wages it pays to an individual as an employee. Generally, where an individual has advised their employer that they have an accumulated HELP debt, the employer is required to withhold additional amounts (to cover the individual's anticipated compulsory HELP repayment amount) in accordance with the relevant PAYG withholding schedule.

The total amount withheld, which includes the amount withheld for the anticipated HELP repayment amount, is reported as a single amount on the individual's annual PAYG payment summary. The law provides that the individual is entitled to a credit equal to the total of the amounts withheld from their salary or wages paid to them during the income year when their income tax assessment has been made. In other words, the making of the assessment triggers their entitlement to the credit.

Individuals who pay HELP debts through the tax system are not required to make any payments until their HELP repayment income is above the minimum threshold for that particular year ($38,148 for the 2006-07 income year). Under the relevant legislation, an individual's compulsory HELP repayment amount can only be calculated when their income tax is assessed

- Where an individual's repayment income is not above the threshold, any PAYG withholding credits (including credits that pertain to the additional amounts withheld for HELP) that arise on the making of the income tax assessment are applied against the individual's income tax liabilities (including any Medicare levy) for that year. If any credit remains and the individual has no other outstanding tax debts, the excess will be refunded when the income tax assessment is made.
- Where an individual's repayment income is above the threshold, the compulsory HELP repayment amount will be notified on the individual's income tax notice of assessment and the PAYG withholding credits will be applied against the HELP repayment amount in priority to any other amounts notified on the notice.

Upon the raising of the compulsory HELP repayment amount on the income tax notice of assessment, the individual's accumulated HELP debt is reduced by an amount equal to the compulsory repayment amount.

ACCELERATED PAYMENTS TO REDUCE HELP DEBTS

Taxpayers may, however, enter into an arrangement with their employer to increase the amount withheld from their salary or wages. Once the arrangement has been entered into, it becomes a requirement for the employer to withhold the increased amount. The taxpayer will not be entitled to a PAYG credit for the total of amounts withheld until an assessment for the relevant income year has been made.

Accordingly, where a taxpayer wishes to make accelerated payments with the object of reducing their accumulated HELP debt, the best avenue available to them is to make a voluntary payment directly to the Tax Office. In some instances the law provides a benefit for these individuals. The *Higher Education Support Act 2003* provides a benefit in the form of a 10% bonus where a voluntary repayment of $500 or more is made, or a voluntary repayment is made to repay the entire HELP debt.

Voluntary repayments may be made at any time directly to the Tax Office and are immediately credited to the employee's HELP account.

Since 1 July 2006, over $138 million has been received by the Tax Office in voluntary repayments which have attracted a bonus in the amount of approximately $13 million. These figures highlight the fact that there are a significant number of taxpayers who make voluntary repayments and benefit from the associated bonus.

CHAPTER 9: FUTURE OF THE TAX AGENT INDUSTRY

PUBLIC DOCUMENTS RELEVANT TO THIS CHAPTER

- Minutes of CEO meetings:
  - 26 May 2006
  - 22 September 2006
  - 4 December 2006
  - 19 April 2007
- Commissioner of Taxation speech to the Chartered Institute of Management Accountants, Canberra, 17 August "A long-term commitment to the profession"

CEO MEETINGS

The Tax Office is working in conjunction with the professional bodies to jointly develop strategies in response to professional association concerns about the future sustainability of the profession.

The CEO meeting is a quarterly meeting of CEOs of the recognised professional associations and the Commissioner of Taxation, requested and initiated by CEOs in September 2004.

The minutes of the meetings are published on the Tax Office's website. The most recent meeting was held on 16 July 2007 and the minutes will be available when authorised for release.

The minutes of the December 2006 and April 2007 meetings (which are available on our website) are attached to this submission as Attachments 5 and 6.

PRELIMINARY RESEACH RESULTS

The Tax Office conducts biennial State of the Industry research with input from the professional associations. The purpose of the research is to explore, and where possible track attitudes, issues and priorities of the tax profession to ensure that new and emerging issues are identified.

The 2007 wave of this research focussed on tax agents, accountants new to public practice, overseas trained accountants and bookkeepers employed by general business.

Some early results from the research shows:

- satisfaction with the overall service of the Tax Office increased from 39% in 2003 to 70% in 2005, and 78% in 2007
- tax agent overall satisfaction with their current work has risen 33 percentage points from 40% in 2003 to 73% in 2007
- Overall satisfaction with their current work for accountants new to public practice is a healthy 79% with 16% undecided

- Almost three quarters of the surveyed group of accountants new to public practice (73%) were optimistic about the future of the accounting profession in Australia
- Overseas accountants surveyed tend to work in a lower level role in their first position in Australia when compared to the position held prior to coming to Australia. However, the majority subsequently move to a comparable level position
- Almost three quarters of overseas trained accountants (72%) were optimistic about the future of the accounting profession in Australia, and
- Seventy six per cent of overseas trained accountants indicated that they were satisfied with their jobs.

We are currently finalising the analysis for this research project and expect to externally publish highlights of the results by October 2007. We will provide a copy to the Committee at that time.

ATTACHMENT 1: JUDGMENT MODEL GRADING MATRIX

Each of the four elements of the Judgment Model is assessed individually using a template - Judgment Model - individual case review form. A ‘yes’ or ‘no’ response is provided for each element. Results are matched with the Judgment Model grading matrix (refer to the table below) to formulate a grading under the Judgment Model.

The following table gives an example of the grading matrix, and outlines the criteria for each grade.

Question	Decision	Explanation	Delivery	Result
Yes	Yes	Yes	Yes	**A**
Yes	Yes	Yes	No	**B**
Yes	Yes	No	Yes or No	**C**
All other combinations: **Fail**				

With reference to the grading matrix table, the minimum pass rate is ‘C’ or above. To attain a ‘C’ rating, a case must be sufficient in both criterion one (question) and criterion 2 (decision).

Grading	Pass/Fail	What’s needed to achieve this rating
A	Pass	Cases with an ‘A’ rating meet the standards for all four elements.
B	Pass	Cases with a ‘B’ rating meet the standards for the first three elements (Question, Decision and Explanation), but not the delivery element. For example, the delivery of a decision could be improved in terms of grammar and expression.
C	Pass	Cases with a ‘C’ rating are technically correct (the standards for the first two elements of Question and Decision are satisfied), but the reasons for the decision could be better explained or related to the client’s situation. It may also involve problems with delivery or expression.
Fail	Fail	Cases with a fail rating identify the question but provide an incorrect answer. It may also involve problems with explanation and/or delivery.

ATTACHMENT 2: SOLICITOR-GENERAL ADVICE

APPLICATION OF PRECEDENT TO TAX CASES – FURTHER OPINION ON DECLARATORY PROCEEDINGS

1. In light of the recent judgment of the Full Court in *Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* [2007] FCFA 16 (hereafter *Indooroopilly*), we are briefed to advise in relation to what process the Australian Taxation Office (ATO) should follow in future to challenge perceived incorrect views of the taxation laws expounded by the judiciary in a way that is consistent with the Commissioner's obligations to administer the law as interpreted by the judiciary.

2. We are asked to advise the ATO on the following questions:

   (a) What process should the ATO follow to challenge perceived incorrect views of the taxation laws expounded by the judiciary in a way that is consistent with the Commissioner's obligations to administer the law as interpreted by the judiciary?

   (b) To what extent is the process suggested in previous joint opinions given by the Solicitor-General and Chief General Counsel consistent with the approach suggested by the Court in *Indooroopilly* and to what extent, if any, does the process need to be altered having regard to the Court's observations in *Indooroopilly*?

   (c) Should the Commissioner use declaratory proceedings, as suggested by Edmonds J, or other types of proceedings to obtain a prompt determination by the courts of questions that the ATO thinks have

been wrongly decided but for one reason or another the Commissioner has been precluded from appealing or decided not to appeal?

(d) Should the Commissioner use declaratory proceedings to determine whether his proposed change of position in relation to certain managed investment schemes in the agribusiness sector is correct?

3. In providing this advice we have been asked to consider the use of declaratory proceedings in income tax and GST disputes before an assessment is issued. We have also been asked to consider a particular proposal in relation to certain deductions claimed in connection with particular agricultural schemes.

4. The reference in these questions to earlier opinions is to opinions given on 15 December 2005 and 16 January 2006 by the Solicitor-General and Chief General Counsel in relation to the application of precedent in tax cases generally and, in particular, the manner in which earlier Court decisions may be challenged. That advice said:

> We consider that, in order to resist accusations that the ATO is disregarding judicial decisions contrary to the rule of law, it is important that, if the ATO considers that a decision is wrong, it should as soon as possible put those affected on notice of this view. It should only seek to challenge an earlier decision where it has legal advice to the effect that the decision is wrong. To avoid criticism it will also normally be appropriate, if the ATO launches a challenge to the earlier decision, to fund or organise suitable assistance to

> bring a test case. Pending the outcome of such a decision, other taxpayers affected should be informed of the proposed course of action. ....
>
> The position is, however, quite different where the law has been administered for a period of time on the basis of a judicial interpretation and the Commissioner subsequently decides that that interpretation is wrong or that it is prejudicial to the revenue. In that situation it is far more difficult to justify seeking to overturn the established interpretation on which the law has been administered and a taxpayer's liability determined. See recent remarks by the Victorian Court of Appeal in *Smith v Transport Accident Commission* [2005] VSCA 251, esp [18],[41],[45].To act in this way can be seen as disadvantaging one group of taxpayers over another. It, therefore, seems important, in our opinion, that a challenge to a decision considered wrong as a matter of law should occur as soon as possible after the particular decision, and that the Commissioner publicly indicate that he considers that the decision is wrong as a matter of law and that he will be seeking an opportunity to have the matter reviewed. He should normally take steps to generate and fund a test case on the point. In this way the model litigant obligations are met

That advice recognised that private rulings may on occasion be used to allow the Commissioner to argue that an earlier judicial decision is incorrect, and that was not seen as a problem provided that the Commissioner is open about his intentions.

Indooroopilly

5. The taxpayer in *Indooroopilly* applied to the Commissioner of Taxation for a private ruling under Part IVAA of the *Taxation Administration Act* 1953 (the "***Administration Act***"). The question on which the Commissioner was asked

to rule was whether the issue of certain shares gave rise to a fringe benefit within the meaning of the *Fringe Benefits Tax Assessment Act* 1986 (Cth) (the "**FBTAA**"). That question turned largely on the definition of "fringe benefit" in section 136 of the FBTAA and, in particular, whether it was necessary to be able to identify particular employees to whom benefits were provided.

6. On that question both Kiefel J (in *Essenbourne Pty Limited v Commissioner of Taxation* 2002 ATC 5201) and Hill J (in *Walstern v Commissioner of Taxation* (2003) 138 FCR 1) had held that section 136 should be construed so as to require particular employees to be identified. Other judges had either assumed that proposition to be correct or had not been satisfied that it was clearly wrong: see the references at para [13].

7. The Commissioner disagreed with the construction suggested by Kiefel J and Hill J and ruled accordingly. On appeal to the Federal Court, Collier J followed the earlier judgments and allowed the taxpayer's application. The Commissioner then appealed.

8. The Full Court (Stone, Allsop and Edmonds JJ) rejected the Commissioner's construction of section 136 and dismissed the appeal. In so doing, both Allsop and Edmonds JJ were sharply critical of the fact that the Commissioner had issued his ruling contrary to the earlier single judge decisions: Allsop J at [3] to [7], Edmonds J at [41] to [48]. Their remarks were made in the context of the respondent's notice of contention which sought to affirm the trial judge's decision on the basis that the Commissioner was "bound" to follow the earlier judgments: [41].

9. Additionally, Edmonds J (with whom both Stone and Allsop JJ agreed) said at [47]:

> "At the time the Commissioner issued the ruling, Hill J in *Walstern* had indicated that, in his view, Kiefel J's construction was 'clearly correct' and Merkel J in *Spotlight Stores* had indicated his satisfaction that both those decisions were not clearly wrong and that he intended to follow them. In those circumstances, faced with the ruling application, in my opinion, it was incumbent on the Commissioner, having taken the view that findings of fact precluded him from appealing *Essenbourne* — a view with which I have already expressed my disagreement — either to follow the construction embraced in those cases or seek a declaration from the Court as to the proper construction and apply that construction in the ruling."

10. It is against this background that the questions on which we are asked to advise have arisen. In particular, we are asked to comment on the Court's suggestion that the Commissioner should have sought a declaration prior to issuing his ruling in *Indooroopilly.*

11. Despite the stark alternative posed by Edmonds J, it is not entirely clear how he considered that declarations could be sought in all cases, given the well established limitations on their use, the existence of the assessment and private ruling systems and the procedures for challenging them. It may be that his Honour had in mind that the Commissioner, instead of ruling, should have sought a declaration as to the fringe benefits tax liability of the taxpayer. If that is what his Honour had in mind then there are various considerations, discussed below, as to why that will generally be inappropriate. He appears to have envisaged, however, that the Commissioner would seek a declaration as to how he should rule. If that was the course his Honour had in mind then there are, in additional to the general considerations, more serious obstacles which we discuss in the following paragraphs.

Availability of Declarations in Income Tax Cases Generally

12. There are numerous situations in which it may be appropriate to seek a declaration in relation to the operation of Federal income tax legislation. It would be difficult to list or even categorise all of those situations, however it is clear that a Court will grant a declaration in cases where, for example, no assessment has issued or where liability does not depend on a notice of assessment: *Unisys Corporation Inc v Commissioner of Taxation* (2002) ATC 5146 (withholding tax), *Bluebottle UK Limited v Deputy Commissioner of Taxation* (2006) ATC 4803 (notice to pay money to Commissioner under section 255 of the *Income Tax Assessment Act* 1936); *Marana Holdings Pty Limited v Commissioner of Taxation* (2004) 141 FCR 299 (GST).

13. The question of whether and in what circumstances the Commissioner should seek a declaration where he has been asked to make a private ruling, however, raises issues which can only be resolved by reference to the particular features of the statutory ruling regime in Division 359 of Schedule 1 to the *Administration Act.*

Division 359

14. Like its predecessor (Part IVAA of the *Administration Act*), Division 359 contains a comprehensive regime for the making of private rulings by the Commissioner on the way in which a tax law applies to certain facts.

15. There are several features of that regime which are important to note. The provisions in relation to rulings are now contained in part 5.5 of Schedule 1 to

the *Administration Act*. Section 357-5 states the objects of the Part as follows:

> (1) The object of this Part is to provide a way for you to find out the Commissioner's view about how certain laws administered by the Commissioner apply to you so that the risks to you of uncertainty when you are self assessing or working out your tax obligations or entitlements are reduced.
>
> (2) This object is achieved by:
>
> (a) making advice in the form of rulings by the Commissioner available on a wide range of matters and to many taxpayers; and
>
> (b) ensuring that the Commissioner provides rulings in a timely manner; and
>
> (c) enabling the Commissioner to obtain, and make rulings based on, relevant information; and
>
> (d) protecting you from increases in tax and from penalties and interest where you rely on rulings; and
>
> (e) protecting you from decreases in entitlements where you rely on rulings; and
>
> (f) limiting the ways the Commissioner can alter rulings to your detriment; and
>
> (g) giving you protection from interest charges where you rely on other advice from the Commissioner, or on the Commissioner's general administrative practice.

16. The Part relates to public rulings (Division 358), private rulings (Division 359) and oral rulings (Division 360). Subdivision 357B contains certain rules common to all three types of ruling.

17. The central provision in Division 359 is section 359-(5)(1). It provides:

> "The Commissioner may, on application, make a written ruling on the way in which the Commissioner considers a relevant provision applies or would apply to you in relation to a specified *scheme. Such a ruling is called a ***private ruling***."

18. The "relevant provisions" are defined in section 357-55 as follows:

> Provisions of Acts and regulations of which the Commissioner has the general administration are relevant for rulings if the provisions are about any of the following:
>
> (a) *tax;

(b) Medicare levy;
(c) fringe benefits tax;
(d) *franking tax;
(e) *withholding tax;
(f) *mining withholding tax;
(fa) *petroleum resource rent tax;
(g) the administration or collection of those taxes;
(h) a grant or benefit mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000*, or the administration or payment of such a grant or benefit;
(i) a *net fuel amount, or the administration, collection or payment of a net fuel amount.

19. "Scheme" is defined in section 995-1 of the *Income Tax Assessment Act* 1997 ("**ITAA 97**") to mean:

(a) any *arrangement; or
(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

20. Section 357-100 is a privative clause. It provides:

The production of:
(a) a *public ruling or *private ruling; or
(b) a document signed by the Commissioner, a Second Commissioner or a Deputy Commissioner, purporting to be a copy of the ruling or of a notice of withdrawal of a public ruling;
is conclusive evidence of the proper making of the ruling, or of the withdrawal of the public ruling.

21. Once made, a ruling binds the Commissioner where the taxpayer relies on it: section 357-60. The Commissioner retains a discretion to apply the law to a taxpayer more favourably than the way in which he has ruled: section 357-70. The Commissioner may revise a ruling but only before the scheme to which it relates commences: section 359-55. Similarly, a taxpayer will lose the benefit of a private ruling if the Commissioner later issues an inconsistent public ruling but only if the scheme to which it relates has not yet commenced: section 357-75.

22. Once a private ruling has been issued and the scheme to which it relates has commenced, the Commissioner has no discretion or power to retreat from it even if a Court in another matter later construes the tax law in a less favourable way. In this respect, the ruling binds the rights of the Commissioner and the taxpayer notwithstanding the interpretation of a tax law by the Courts: see the observations of Gummow J in *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397 at 402E-F. In other words, the Commissioner will be bound by a wrong private ruling.

23. A private ruling is taken to be a taxation decision within the meaning of part IVC of the *Administration Act* (section 359-60(2)) and a taxpayer may object if "dissatisfied" with it (section 359-60(1)). The *Administration Act* therefore provides the same rights of objection and appeal to the Administrative Appeals Tribunal or the Federal Court as are available in relation to assessments generally.

24. The question for the Court in proceedings in relation to a private ruling is whether the ruling "should not have been made or should have been made differently": section 14ZZO of the *Administration Act*.

Jurisdiction of Courts to make Declarations Generally

25. The jurisdiction of Courts to make declarations depends, as in any proceeding, upon the existence of some controversy. A Court exercising federal jurisdiction has no power to give an advisory opinion: *In re Judiciary Act and Navigation Act* (1921) 29 CLR 257. In *Bruce v Commonwealth Trade*

Marks Label Association (1907) 4 CLR 1569 at 1571 the High Court said the Court was:

> "limited to determining the rights of persons or of property, which are actually controverted in the particular case before it....But the court is not empowered to decide moot questions or abstract propositions...which cannot affect the thing in the case before it."

26. This proposition, as *In re Judiciary Act and Navigation Act* makes clear, is one which goes to the jurisdiction of the Court to grant the relief and not merely to the exercise of the Court's discretion in cases where it has jurisdiction: see also *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 at 437-438 and *CTC Resources* at 406-407 per Gummow J and at 428 per Hill J.

27. This proposition does not, however, necessarily prevent a Court from granting a declaration in relation to a matter that has not yet occurred or a proposed scheme or transaction. As Barwick CJ said in *The Commonwealth v Sterling Nicholas Duty Free Pty Limited* (1971-1972) 126 CLR 297 at 305:

> "Of its nature, the jurisdiction includes the power to declare that conduct which as not yet taken place will not be in breach of a contract or a law. Indeed it is that capacity which contributes enormously to the utility of the jurisdiction."

28. What is required is that the question be:

> "a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought": *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448 per Lord Dunedin, cited with approval by Gibbs J *Forster v Jododex* at 1312.

29. However, as Gibbs J went on to note, beyond that there is little guidance that can be given. It is certainly the case that questions which are based upon

hypothetical or assumed facts will not be the subject of declaration: *University of NSW v Moorhouse* (1975) 133 CLR 1 per Gibbs J at 9-10. Nor will a declaration be granted where there is no certainty that future conduct will be engaged in: *Re Trade Practices Act 1974 (s163A) and Re an Application by Tooth & Co Ltd* (1978) 19 ALR 191 at 201-203 per Bowen CJ and Franki J and at 209 per Brennan J.

30. This rule does not prevent a party from seeking a declaration to determine what course of conduct it should adopt to avoid some legal liability: *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Limited* [1921] 2 AC 438. Lord Sumner said at 452:

> "For many years it has been accepted practice in cases in the Commercial List to hear and determine claims for a declaration of right, when a real and not a fictitious or academic question in involved and is in being between two parties, in order that they may know what business course to take without having to run the risk of acting and finding themselves liable in damages, what at las the matter is brought before the Court."

31. Although sometimes described as a "commercial rule" (e.g. P.W. Young Q.C. *Declaratory Orders* (2nd Ed.) Butterworths 1984 at [718]) the principle stated by Lord Sumner in the *Russian Bank* case also extends to other situations. In *Sarkis v Deputy Commissioner of Taxation* (2005) ATC 4205 the plaintiff Deputy Commissioner obtained a declaration as to whether the defendant judgment debtor was the beneficial owner of certain property. The plaintiff sought the declaration in order to determine whether or not to commence execution proceedings which would have been futile if the defendant had not been the beneficial owner: Nettle JA at [20] to [21].

32. In our opinion, the fact that a ruling request relates to a proposed transaction or to facts which have not yet occurred would not of itself deprive a Court of jurisdiction to grant a declaration. As discussed below, there are more fundamental reasons why a declaration would be unavailable in relation to private ruling requests, namely the absence of a justiciable controversy, and why other considerations generally make such an application inappropriate in any event.

33. The requirement that there be relative certainty about the likelihood of the scheme being entered into would nevertheless be bound to present practical problems for the Commissioner if he were to seek declaratory relief. Unless a taxpayer volunteers evidence about the matter, neither the Commissioner nor the Court will ever be in a position to know whether a scheme is sufficiently likely to be entered into to found the Court's jurisdiction (see Brennan J in *Re Trade Practices Act* at 209) or, alternatively, to warrant the exercise of its discretionary power to grant a declaration.

34. More fundamental difficulties with the Court's suggestion that the Commissioner obtain declaratory relief before issuing a private ruling are presented by the nature of the Commissioner's power under section 359-5 and in the tension between obtaining declaratory relief, on the one hand, and the scheme for objection, decision and appeal contained in Part IVC of the Administration Act, on the other.

The Commissioner's Power to Make a Ruling

35. As noted above, the Commissioner is empowered to make a ruling on the way in which he "considers" a tax law will operate: section 359-5(1). It is clear the Commissioner is doing no more than expressing his "view" (section 357-5(1)) or providing "advice" (section 357-5(2)).

36. It is difficult in this context to identify what, if any, controversy exists prior to the making of a private ruling. No doubt there is a dispute in a vernacular sense because the taxpayer and the Commissioner have different views about the operation of the law. However, there does not appear to be any controversy in a legal sense. This is because the Commissioner's task effectively ends once he has formed his "view". Indeed it is only where the Commissioner has a "view" that the problems now under consideration ever arise.

37. The facts of *Indooroopilly* illustrate this point. At the time when the Commissioner was asked to rule, he already (or soon thereafter) had an opinion about the operation of section 136 of the FBTAA. That opinion was admittedly contrary to the manner in which the Courts had construed the section but was nonetheless reached in good faith. It is difficult to know what the Commissioner could have asked the Court that he did not already know or, to put it another way, it is difficult to know what more the Commissioner needed to know before he could issue his ruling. There would have been no utility in the Court granting a declaration at that point because the only identifiable controversy (namely what "view" or "opinion" the Commissioner comes to) was already resolved.

38. It is important to remember that it is *not* a requirement of the statutory scheme that the view be correct. As noted above, a wrong ruling is valid and binds the Commissioner. This is to be contrasted to those administrative decisions which lack validity where they can be shown to be made in error: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597. In some cases, it is arguable that a decision-maker could approach the Court to determine a legal question, the answer to which was important in ensuring that the opinion was validly formed or that a satisfaction was properly arrived at.

39. However, that is not the case in respect of the Commissioner's opinion for the purposes of section 359-5. Once the Commissioner has formed a view – irrespective of whether it is right or wrong – he is bound to make the ruling accordingly. There will of course be disputes about whether the ruling, once made, should have been made differently, but only where a taxpayer is dissatisfied with the ruling and appeals the matter pursuant to Part IVC of the *Administration Act*.

40. Given that the Commissioner's power is to form a "view" or "opinion", there would not appear to be any utility in seeking a declaration as to what his view or opinion should be. In fact, the Commissioner may, because of the statutory scheme, be entitled to ignore the declaration if it does not coincide with his own view. This may then make obtaining a declaration difficult as it could be seen as purely hypothetical.

41. If it were the case that the Commissioner approached the Court *before* he had formed any view about the operation of the law, it is, we think, almost inevitable that the Court would decline to make a declaration on the basis that it was doing no more than giving an advisory opinion on the way in which the Commissioner should form a view.

Other Considerations

42. These considerations are in our view sufficient to conclude that it would be undesirable for the Commissioner to seek declaratory relief prior to issuing private rulings in circumstances like those in *Indooroopilly.* However, other aspects of the statutory scheme also support this conclusion.

43. In *CTC Resources*, Gummow observed at 407A:

> "the rigour of the rule preventing conferral of federal jurisdiction to give advisory opinions has been mitigated by the broad scope of the declaratory judgment, but this still requires a controversy and a contradictor." (our emphasis)

44. The requirement to identify a contradictor is more than a formal requirement. The absence of a contradictor will suggest that the declaration is not sought in order to resolve a controversy. There is a real possibility that a taxpayer who has sought a ruling will have no interest in taking part in "pre-emptive" legal proceedings, with or without test case funding. A taxpayer in that position will be entitled to await a ruling and, if dissatisfied and if the taxpayer considers the matter worth pursuing, object against it.

45. More importantly, however, the clear scheme of Division 359 is that the Commissioner will form a view and issue a ruling prior to the commencement

of legal proceedings. Those proceedings will take the course of other tax litigation within the rubric of Part IVC of the *Administration Act.*

46. Given that both courses – issuing a ruling contrary to Court decisions and funding an appeal or, alternatively, bringing declaratory proceedings and funding a contradictor – involve the (unwilling) taxpayer in litigation to re-argue a point which has already been decided in previous cases in the taxpayer's favour, there does not appear to be any principled reason to prefer the course suggested by Edmonds J over the course clearly contemplated in the legislation. On the contrary, this fact points to the former course as being undesirable.

47. In our opinion, the Commissioner should be slow to attempt to invoke the jurisdiction of the Courts in a private ruling case other than in the manner contemplated by Division 359 and Part IVC of the *Administration Act.*

Use of Declaratory Proceedings Before an Assessment has Issued

48. In our opinion, for similar reasons, the Commissioner should also be reluctant to seek declarations even where the Court has undoubted jurisdiction to make such an order, such as in relation to a taxpayer's liability to income tax or GST prior to the issue of notices of assessment. In our opinion, those cases give rise to the same concerns.

49. Although there can be little doubt that a Court would have jurisdiction to grant declarations in appropriate cases before the issue of an assessment (see *Platypus Leasing Inc and ors v Commissioner of Taxation* (2005) 61 ATR

239), there are reasons why it will usually be prudent to await the issue of an assessment before invoking Court proceedings.

50. In *Bob Jane T-Marts Pty Limited v Commissioner of Taxation* (1999) 94 FCR 457 the Full Court of the Federal Court was critical of the parties for having attempted to resolve a sales tax dispute in proceedings for declarations. In *Forster v Jododex*, Walsh J said at 427:

> "In my opinion, when a special tribunal is appointed by a statute to deal with matters arising under its provisions and to determine disputes concerning the granting of rights or privileges which are dependent entirely upon the statute, then as a general rule and in the absence of some special reason for intervention, the special procedures laid down by the statute should be allowed to take their course and should not be displaced by the making of declaratory orders concerning the respective rights of the parties under the statute."

51. These considerations will apply in every case. Moreover, it will invariably be the taxpayer and not the Commissioner who would require an urgent determination of a dispute prior to the issue of an assessment. If a taxpayer were to demonstrate some good reason why the dispute should not await the issue of an assessment or a private ruling and the invocation of Part IVC of the *Administration Act*, then the Court might be persuaded to proceed with the matter. For the reasons discussed in *Platypus Leasing*, the parties' desire to ascertain the tax liability that would result from entering into a transaction or adopting a course of conduct would be sufficient to give rise to a justiciable controversy.

52. However it may be difficult for the Commissioner, as the moving party, to demonstrate why a dispute with a particular taxpayer should not await the issue of an assessment and the usual objection and appeal procedure. This

would be so even though, technically, the same justiciable controversy could be shown to exist as in the previous example. It is unlikely that the Commissioner's general policy about the application of a tax law would be sufficient reason to take a particular taxpayer's dispute outside the statutory objection and appeal process.

53. Aside from these considerations, such a course would require the Commissioner to assume an onus of proof which he does not otherwise bear (see sections 14ZZO and 14ZZK of the *Administration Act*). In our view this is an important consideration which should not be underestimated. Unless the Commissioner is in a position to state with certainty what the facts relevant to a taxpayer's liability are, he faces difficulty in establishing an entitlement to relief or, alternatively, it may be necessary to agree facts with the taxpayer in circumstances where the Commissioner has not had a full opportunity to determine all of the relevant facts himself.

54. Furthermore, there will always be some doubt as to whether the declaration, even if granted, will resolve all issues between the taxpayer and the Commissioner in any event. In proceedings under Part IVC of the *Administration Act* the Court (or Tribunal, as the case may be) will determine whether the assessment is excessive. Once the proceedings are concluded, the taxpayer's liability for tax for a year of income will have been ascertained.

55. However a declaration as to a particular item of income or a particular deduction will not always allow a conclusion to be drawn as to the amount of tax payable by a taxpayer in any given year. An example of this may be seen in *Commissioner of Taxation v ANZ Savings Bank Limited* (1994) 125 ALR

213. In that case, the Commissioner successfully defended an assessment on a basis quite different to the basis upon which the assessment had originally been issued. A declaration as to the "particular" of the assessment which was originally in dispute in that case would not, therefore, have been a reliable means of determining the taxpayer's liability for that year.

56. Furthermore, because of the discretionary nature of the remedy it will not always follow that the failure by the Commissioner to obtain a declaration will necessarily be because the Commissioner's view of the law is wrong. Relief may be refused for discretionary reasons without creating a binding ruling on the legal issue. In that case, the legal issue would remain to be determined in Part IVC proceedings.

Proposed Change of Position in Agribusiness Cases

57. We have also been asked to consider the Commissioner's approach to a possible change of position in relation to certain "agribusiness" schemes. In a current public ruling the Commissioner has stated that certain outgoings may be deductible under section 8-1 of the ITAA 97. The Commissioner has issued a draft ruling in which he has taken the view that those outgoings are not deductible.

58. In our opinion, this situation differs from the situation in *Indooroopilly*. Here, the Commissioner is proposing to alter his position by withdrawing a public ruling, something which is clearly contemplated by Division 358 of the *Administration Act*.

59. In our opinion, the Commissioner should not attempt to bring proceedings for a declaration to test the correctness of the view expressed in the draft public ruling. Such proceedings would almost certainly involve a hypothetical or advisory opinion: see *Young v Commissioner of Taxation* 2000 ATC 4133. Nor, in our opinion, for the reasons set out above, should the Commissioner attempt to seek declaratory relief in relation to an identified taxpayer who proposes to claim the kind of deduction in question.

60. To the extent that the Commissioner wishes to have his views in relation to the deductibility of certain outgoings tested in Court, the Commissioner should adopt the processes suggested in the earlier opinions to which we have referred. It is likely that the best course will be to identify a matter in which a ruling on the issue has been sought, to issue a ruling on the basis of the Commissioner's view and, in the event that the taxpayer objects against the ruling, conduct the resulting appeal under Part IVC of the Administration Act as part of the test case programme.

61. In an appropriate case it may also be possible to seek a direction from the Chief Justice pursuant to section 20(1A) of the *Federal Court of Australia Act* 1976 that the matter be determined by a Full Court, however that would be a matter for the Court. It would be essential in such a case that the Commissioner be in a position to prove all of the facts relevant to determining the question in issue or, alternatively and preferably, have an agreement with the taxpayer as to those facts. It would also be necessary that the question involved be a legal question of general importance.

62. There is, in addition to the general concerns outlined in this memorandum, a further reason why the Commissioner should not use declaratory proceedings to determine whether his proposed change of position in the agribusiness cases is correct, namely the desire to have this issue resolved, as far as possible, prior to the commencement of the 2008/2009 financial year. In any declaratory proceedings there is a risk that the Court will decline to grant relief on some discretionary basis and that the time spent in conducting the proceedings will therefore have been wasted.

63. Given the fact that the Federal Court will now generally allocate hearing dates for private ruling cases at the very first directions hearing and given also that the process of agreeing facts for the purpose of declaratory proceedings is unlikely to be any quicker than the process of making a ruling and invoking the provisions of Part IVC of the *Administration Act*, we do not consider that there is any reason to assume the risk inherent in declaratory proceedings that relief will be refused on a discretionary basis. On the contrary, we consider that these are reasons to invoke the more certain jurisdiction under the *Administration Act*.

Conclusions

64. In light of the above, we answer the questions as follows.

(a) What process should the ATO follow to challenge perceived incorrect views of the taxation laws expounded by the judiciary in a way that is consistent with the Commissioner's obligations to administer the law as interpreted by the judiciary?

65. The Commissioner should normally use private rulings or the issue of assessments, rather than declarations, in order to test interpretations of the tax law. Declarations have a number of limitations. They require a contradictor. They cannot be used to answer hypothetical questions and they are more easily sought by a taxpayer than by the Commissioner. They will not necessarily lead to a final determination about a taxpayer's tax liability.

66. The more important issue is that steps be taken quickly to identify a suitable case involving a private ruling or assessment to test a decision that is considered incorrect. If a suitable case can be found and proceedings by a taxpayer brought, at that stage there may be case management options such as a stated case or referral to the Full Court that may assist speedily to resolve the issue in an authoritative way.

(b) To what extent is the process suggested in previous joint opinions given by the Solicitor-General and Chief General Counsel consistent with the approach suggested by the Court in *Indooroopilly* and to what extent, if any, does the process need to be altered having regard to the Court's observations in *Indooroopilly*?

67. We do not consider that the recent decision in *Indooroopilly* requires us to change the views expressed in the earlier advice. The problem in *Indooroopilly* appears to have arisen from a perception that the Commissioner was clinging to an interpretation of the law that had been disagreed with by a number of single instance judges, and that prompt action had not been taken to have this issue resolved by the Full Court.

68. We do not consider that the critical comments of the judges in *Indooroopilly* can be taken as meaning that the ATO must always follow a single instance decision of a judge. For the reasons previously given, that is not required if there are good arguments that, as a matter of law, that decision is incorrect and action is being taken to clarify the position. That does not mean that in issuing private rulings the Commissioner is generally free to ignore judicial decisions. However, where there is a concern with a particular interpretation and the Commissioner intends to issue a ruling contrary to prevailing judicial opinion, we consider that an early test case is the appropriate procedure.

69. In *Indooroopilly*, while the ATO saw it as a test case, that was not how the Court saw it. This may partly have been because at the time of the ruling there were already a number of judicial decisions that had considered the issue yet the ruling had appeared to ignore or give little weight to them. It was probably the perception that the Commissioner stuck doggedly to his preferred interpretation, regardless of authority, that gave rise to the criticism by the Court in *Indooroopilly*. Whilst a quicker test of the issue should probably have occurred, even if that involved an appeal in a case that was not otherwise an ideal test case, it is unclear precisely what course should have been taken. In particular, we do not express any concluded view about whether *Essenbourne* or *Spotlight Stores* was necessarily the appropriate case for that purpose, or whether the observations of Edmonds J in relation to the appeal in *Essenbourne* at paragraph [47] of *Indooroopilly* are correct. Nevertheless, once there is a series of decisions expressing the same view it will always be more difficult to justify a private ruling that ignores those decisions even for the purpose of a test case, and legislative change may be necessary.

70. As indicated in the earlier advice, if the ATO considers that the interpretation of the tax laws in a given case is wrong, it is important that prompt action be taken to test the issue, that there be legal advice that supports the view that the decision is legally wrong and that the Commissioner publicly indicate the reason for his actions and his proposed course.

71. He should until the issue is resolved, so far as possible, avoid acting in a way affecting the affairs of similarly affected taxpayers that could give rise to accusations of inconsistency. This may involve putting assessments, rulings, objections or appeals on hold so far as possible pending resolution of the test case, advising affected taxpayers of the reasons for the apparent delay and explaining the steps being taken to resolve the legal issue in question. This course will not, however, be convenient to every taxpayer and it is possible that the Commissioner will have no choice but to continue with the objection and appeals process in relation to other taxpayers in any event: section 14ZYA of the *Administration Act*. Time limits applicable to the Commissioner may also require assessments to be issued notwithstanding the fact that the issue remains unresolved. These are practical considerations that can only be addressed case by case.

(c) Should the Commissioner use declaratory proceedings, as suggested by Edmonds J, or other types of proceedings to obtain a prompt determination by the courts of questions that the ATO thinks have been wrongly decided but for one reason or another the Commissioner has been precluded from appealing or decided not to appeal?

72. For the reasons already given, we consider that in most situations it will be inappropriate for the Commissioner to seek to use declarations as a way to test interpretations of the tax law he considers incorrect. In many cases, a declaration will not be available at all because the question will be hypothetical or advisory. There may conceivably be situations where a declaration will be appropriate but generally we consider that the use of private rulings or assessments will continue to provide the best way to test an issue.

73. The best way to test issues is to identify test cases quickly and use references to Full Courts or other case management procedures to enable an early hearing. It is important from a public perception point of view that test cases be brought not merely because the Commissioner considers a previous case to be wrong but only where he also has legal advice that suggests the decision is wrong as a matter of law. As earlier advice indicated, the legal advice can include advice from within the ATO. What is important, however, is that the legal advice look objectively at the issue in terms of available legal argument. It is not sufficient to conclude that the interpretation given by the courts does not accord with the original intent.

(d) Should the Commissioner use declaratory proceedings to determine whether his proposed change of position in relation to certain managed investment schemes in the agribusiness sector is correct?

74. Whatever course of action might be open to a taxpayer (as to which see paragraph 51 above), the Commissioner should not attempt to have this issue

resolved in proceedings for declarations. The Commissioner should instead adopt the course suggested in the earlier opinions, namely to identify a matter in which a ruling on the issue has been sought, issue a ruling on the basis of the Commissioner's view and, in the event that the taxpayer objects against the ruling, conduct the resulting appeal under Part IVC of the *Administration Act* as part of the test case programme. The Commissioner should then use appropriate case management procedures, including an application to have the matter determined by a Full Court if otherwise appropriate, in order to obtain an early resolution of the issue.

David Bennett QC
Solicitor-General
Tel: 02 6250 6020
Fax: 02 6250 5950
david.bennett@ag.gov.au

Henry Burmester QC
Chief General Counsel
Tel: 02 6253 7016
Fax: 02 6253 7317
henry.burmester@ags.gov.au

James Hmelnitsky
Selborne Chambers
Tel: 02 9230 0689
Fax: 02 9233 3902
jhmelnitsky@sixthfloor.com.au

18 June 2007

ATTACHMENT 3: DECISION IMPACT STATEMENT

Australian Government
Australian Taxation Office

Decision Impact Statement

Commissioner of Taxation v Indooroopilly Childrens Services Pty Ltd

This document is not a public ruling, but provides a statement of the Commissioner's position in relation to the decision and how the law will be administered as a consequence of the decision. Any proposals for changes in the law are matters for government and it is not appropriate for the Commissioner to comment.

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[2007] FCFCA 16
2007 ATC 4236
65 ATR 369

Venue: Full Federal Court, Brisbane
Venue Reference No: QUD 253 OF 2006
Judge Name: Stone, Allsop & Edmonds JJ
Judgment date: 22 February 2007
Appeals on foot: No

Administrative Treatment (Implication on current Public Rulings and Determinations)

Relevant Rulings/Determinations:
- PS LA 2007/2

Subject References:
Fringe Benefits Tax
Carers share plan
Employee benefit trust

Precis:

Outlines the Tax Office's response to this case which concerned whether FBT applied to the gift of shares to a trust established for the benefit of a class of employees.

Brief Summary of Facts

- The respondent applied for a private ruling under Part IVAA of the *Taxation Administration Act 1953* as to whether a liability for fringe benefits tax arose on the basis of a certain proposed arrangement set out in the ruling request.
- ABC Development Learning Centres Pty Ltd (ABC) is licensed to operate childcare centres. It licences or franchises Regional Management Companies (RMCs) to carry on the operation of the childcare centres. The RMCs employ their own staff. The respondent was one such RMC.
- ABC is the wholly owned subsidiary of ABC Learning Centres Ltd (ABC Public). ABC Public indicated an intention to: 1) establish an employee share plan scheme which would provide shares in ABC Public to current and future employees of the RMCs; 2) settle a trust - a Carers Share Plan (CSP) - with an arm's length trustee; 3) gift shares to the trustee of the CSP. The RMCs, including the respondent, were intended to have no role in the operation of the CSP.
- The initial share issue was to be calculated by reference to the number of employees of the RMCs who had signed AWAs, the length of employment with RMCs and other criteria. The issue was not to involve any specification as to the number or value of shares to which any individual employee would be entitled. The trustee would exercise its discretion to issue shares to particular employees at a later time having regard to matters such as their employment position and their years of service.
- The Commissioner ruled that the initial issue of shares by ABC Public would give rise to the provision of a fringe benefit in respect of the respondent's employees. The Commissioner relied on

his views in Taxation Ruling TR 1999/5. The respondent objected to the ruling and the Commissioner disallowed the objection. The respondent appealed to the Federal Court.

- The decision of Collier J was handed down on 14 June 2006. Her Honour decided that the view expressed in *Essenbourne Pty Ltd v. FC of T* 2002 ATC 5201, about how the law should apply, was not clearly wrong and should be followed. Her Honour also decided that the facts of the case were not relevantly distinguishable from *Essenbourne* .

- In *Essenbourne* , Kiefel J held that a benefit provided to a trust will not be a 'fringe benefit' unless it is provided in respect of the employment of a particular employee. This view has been followed in a number of later single judge decisions - *Walstern Pty Ltd v. FC of T* (2003) 138 FCR 1, *Spotlight Stores Pty Ltd v. FC of T* 2004 ATC 4674, *Caelli Constructions (Vic) Pty Ltd v. FC of T* (2005) 147 FCR 449 and *Cameron Brae Pty Ltd v. FC of T* 2006 ATC 4433.

- The Commissioner's view of the law, as expressed in TR 1999/5, was that a benefit provided in respect of the employment of more than one employee is a 'fringe benefit', notwithstanding that it is not provided in respect of a particular employee; alternatively, that a benefit provided in respect of more than one employee is provided in relation to each and every employee.

- The Commissioner appealed from the decision of Collier J

Issues decided by the Court or Tribunal

The court was unanimous in dismissing the Commissioner's appeal. Edmonds J provided reasons for decision, with which Stone and Allsop JJ agreed in separate judgements.

Edmonds J said that it was necessary, as Kiefel J had held in *Essenbourne* , to identify a particular employee in respect of whose employment a benefit is provided (paragraph 35). References to 'the employee' in the definition of fringe benefits support the view that there had to be a particular employee identified. Those references limited the term 'in relation to an employee' at the beginning of the definition.

His Honour also said that the requirement to identify a particular employee in respect of whom a benefit is provided is consistent with the identification of an 'associate' to whom a benefit is provided - in many cases it will not be possible to determine whether a recipient of a benefit is an associate of an employee unless the identity of the relevant employee is known (paragraph 36).

His Honour accepted that a benefit provided to a common associate of a number of employees, such as the trustee of a trust under which those employees are capable of benefiting, can be a fringe benefit provided that the identity of each employee who will take a benefit is known with sufficient particularity at the time that the benefit is provided (paragraph 37). However, the shares provided to the trustee in this case were not provided in respect of the employment of any particular employee nor all of the employees capable of benefiting who will in fact receive a benefit - only some employees may later benefit, and their identity is not known (paragraph 38).

His Honour said that his conclusion was consistent with his view that there is no discernable legislative policy 'to accelerate and bring to charge.... a benefit which the employee may never get as against a policy of deferring taxes on the benefit unless and until it comes home to the employee' (paragraph 39).

If he were wrong on the main construction point, his Honour concluded that paragraph (e) of the definition of fringe benefit would not apply because it did not appear that there was any arrangement between ABC Public and the respondent for the provision of the benefit (paragraph 40); however, he would have held that paragraph (ea) applied, the respondent participating in or facilitating a scheme or plan involving the provision of the benefit.

Allsop J criticised what he perceived as the Taxation Office administering the law contrary to the earlier single judge decisions of the court about the meaning and content of the definition of a 'fringe benefit'. If the Commissioner has the view that the courts have misunderstood the meaning of the law, his Honour pointed out that the proper course would be to appeal a decision, by 'prompt institution of other proceedings', or the executive can refer the matter for consideration of legislative change. Stone and Edmonds JJ agreed with his Honour's comments, the latter adding that the Commissioner could have earlier sought 'a declaration from the Court as to the proper construction' of the relevant law (paragraph 47).

Tax Office view of Decision

The Commissioner announced on 22 February 2007 that he would not be seeking special leave to appeal from the decision of the Full Court and that the ATO will be reviewing the FBT assessments associated with outstanding employee benefit arrangement cases that are affected by the decision of the Full Court. The decision has now been applied to the affected cases.

In view of the Court's critical comments the Tax Office sought further advice from the Solicitor-General on the appropriateness of our conduct and what avenues are available for using the declaratory powers of the Court to clarify the proper construction of the taxation laws in a more timely way as suggested by the Court.

The joint advice led by the Solicitor-General has been received and is linked to this statement here. The advice received refers to two previous advices, dated 15 December 2005 and 16 January 2006. Those advices can be accessed here and here.

Declaratory Proceedings

The Solicitor-General and counsel have advised that it would not usually be appropriate for the Commissioner to seek to use declaratory proceedings to resolve taxation disputes. In many cases, a declaration from the court would not be available to test an interpretation of the law because the question would be hypothetical or advisory. The advice confirms that the usual objection and appeal processes involving assessments and private rulings should be used to resolve issues between a taxpayer and the ATO.

Single Judge Decisions

The Solicitor-General and counsel have confirmed their earlier advice that the ATO is not required to follow a single judge decision if, on the basis of legal advice, there are good arguments that, as a matter of law, the decision is incorrect and prompt action is being taken to clarify the position. In the rare circumstances where the Commissioner does not appeal a decision which is considered incorrect, the ATO will seek to take prompt action to test the issue before the Full Court.

The Tax Office accepts that it would have been better if the FBT issue decided by the court in *Indooroopilly* could have been considered by the Full Court more promptly.

Administrative Treatment

Implications on current Public Rulings & Determinations

Taxation Ruling TR 1999/5 has been withdrawn.

The decision in the *Caelli Constructions* case supports the views that a trustee of a trust or a non-complying superannuation fund can be an 'associate' of an employee where the employee is capable of benefiting under the trust or fund, and that the payment of money by an employer to the trustee of a trust in respect of the employment of an employee is the provision of a property fringe benefit.

Implications on Law Administration Practice Statements

Paragraphs 82 - 89 of PSLA 2007/2 Management of Decisions of Courts and Tribunals are currently under review as a result of the joint advice now received. .

Your comments

We invite you to advise us if you feel this decision has consequences we have not identified, or if a precedential decision such as a Public Ruling or an ATO ID requires reconsideration or amendment. Please forward your comments to the contact officer by the due date.

Date Issued:	**1 September 2007**
Due Date:	**27 October 2007**
Contact officer:	**Steve Martin**
Email address:	**stephen.martin@ato.gov.au**
Telephone:	**02 9374 2622**
Facsimile:	**02 9374 2002**
Address:	**100 Market St Sydney**

After that date any comments on the consequences of this case for any ATO publication should be sent to the following mail box:

ato.coenmt@ato.gov.au

Legislative References:
Fringe Benefits Tax Assessment Act 1986

136(1)
definition of "fringe benefit"
definition of "in respect of"

Case References:
Essenbourne Pty Ltd v. Federal Commissioner of Taxation
[2002] FCA 1577
2002 ATC 5201
51 ATR 629

Walstern v. Federal Commissioner of Taxation
(2003) 138 FCR 1
(2003) 54 ATR 423
2003 ATC 5076

Spotlight Stores Pty Ltd v. Federal Commissioner of Taxation
[2004] FCA 650
2004 ATC 4674
(2004) 55 ATR 745

Caelli Constructions (Vic) Pty Ltd v. Commissioner of Taxation
(2005) 147 FCR 449
60 ATR 542
2005 ATC 4938

Cameron Brae Pty Ltd v. Commissioner of Taxation
(2006) FCA 918
2006 ATC 4433
63 ATR 488

Other References
Taxation Ruling TR 99/5
PSLA 2007/2

ATTACHMENT 4: THE RULE OF LAW – A CORPORATE VALUE

The rule of law: a corporate value

Speech by Michael D'Ascenzo, Commissioner of Taxation to the Law Council of Australia Rule of law conference, Brisbane, 1 September 2007

The challenges of a changing world are in steady supply. Our tax and superannuation systems are not exempt from the increasing interconnectedness and complexity of our society. If for example, taxation is the price we pay for a civilised society,[1] it is that society that acts as the price-setting mechanism.

Globalisation and the digital revolution have commoditised human experiences, integrated markets and spawned new business practices. Hybrid and stapled transactions and cloned relationships are for some the 'wonder of our brave new world'.

The rule of law provides an anchor for legislative regimes such as taxation and superannuation operating as they do in this choppy sea of change. Whilst this constancy safeguards rights and obligations, its ambulatory restrictions, the inherent vagaries of words, and the infinite variety of personal circumstances impose daunting difficulties on policy makers, legislators and administrators.[2] Where the law blurs into 'indeterminacy'[3] there are difficulties also for taxpayers and their advisers, and the potential for disputation increases.[4]

A shift in focus

The role of the Australian Taxation Office (ATO) is to administer legislative systems such as taxation and superannuation. Accordingly, our mission is to promote an environment where people have a reasonable understanding of their rights and obligations or can readily obtain adequate guidance; where in practice the law can be complied with voluntarily; where necessary the law is applied and enforced fairly; and where disputes about the law's operation can be resolved expeditiously.[5]

Our Strategic Statement 2006-10 reflects a change in emphasis. We have moved from 'optimising collections' to 'optimising voluntary compliance' with the range of laws we administer.[6] The desired relationship with the community is reflected in our corporate suite of documents[7] which highlight the values and approach to administration to which we aspire. For example, our Corporate Plan[8] outlines our key areas of focus for the next 12 month and the Taxpayers' Charter, a charter of taxpayers' rights, sets out the principals and values that guide our relationship with the community – one based on mutual trust and respect.[9] This approach is constructive and collaborative and based on an even-handed approach to both the interpretation of the law and the advice we provide Treasury and Government.

The distinction between guidance and the law

It would be unrealistic and inappropriate to paraphrase every section in the law in a way that assumes that such paraphrasing makes the legislative intent clearer than the words chosen by Parliament. In any event, no administration is likely to have the capacity to conceive of the myriad of actual activities that occur or might occur and which are best known to the participants themselves. It could never adequately explain how each section of the law may apply to those circumstances without the taxpayer providing the administration with the material facts.[10] In any event, if all this paraphrasing was to be binding on the community, and these binding opinions not tightly confined, such an approach would run the risk of usurping the rule of law and working against the interests of those in the community who have adhered to that law.

Nevertheless, in order to help people to comply with the law, the ATO does provide an extensive range of materials that suit different needs and audiences. Most of this is in the form of practical guidance tailored to the needs of particular segments of the community; some with broader application. They take a layered approach. Most of this material provides procedural guidance which does not carry a legal import, for example 'use this form', 'put your facts here' and so on. Other materials communicate changes to the law, or provide a layperson's summary, often in general terms, of aspects of the legislation that have been raised as giving rise to uncertainty. It would be confusing for many people if guidance and communication material of this type tried to cover every nuance of how the law might apply to all possible scenarios. The very purpose of these materials is to provide a simple guide or tips in general terms to help people to comply with the relevant law; or to alert them to things they should look out for or which they may need.

Sometimes, the guidance provided by the ATO is more expansive on a topic, and often a person can seek further, more detailed guidance in our publications or on our website. However, the focus of these materials remains on providing practical guidance and they are written in that way.

As the law is not prescriptive in some cases, that is its application is dependent on the facts,[11] it is inappropriate for an administrative product to do more, particularly where its intention is transparency or practical assistance. However, it would be consistent with the rule of law if a person who followed administrative advice, and was misled by that advice, was not subject to any penalty. On the other hand, it would be contrary to the rule of law if that person was not then required to comply with the law in the same way as others in the community have done. For example in the field of taxation, it is fair that a person misled by guidance from the administration should not be disadvantaged relative to other taxpayers; it is equally fair for other taxpayers that a taxpayer who was innocently misled should not profit from that honest mistake at the relative expense of other taxpayers.

The Australian taxation system provides this level of fairness to taxpayers. Where a person follows ATO guidance they have exercised reasonable care and they are not subject to culpability penalties.[12] Thus the law itself strikes a fair balance between the individual and the community as a whole.

The Australian taxation system goes even further and provides a level of certainty to taxpayers that is not rivalled anywhere in the world. Taxpayers who seek an 'assessment of tax liability or refund' on an existing or proposed transaction can do so by providing the ATO with the relevant facts and seek a binding and reviewable private ruling.[13] If dissatisfied with the private ruling the taxpayer has rights of objection and appeal. Further, the ATO is able to provide public binding rulings which provide certainty to a segment of the community on a particular interpretation of the law where that advice is favourable to the taxpayer. The original design of the binding public ruling regime was limited to a class of persons or a class of arrangements. In large measure it was the context of taxpayers' rights under the old assessment system,[14] and the limitations around the subject matter and circumstances that gave these binding rulings regimes, legislative exceptions to the rule of law, their legitimacy.[15]

The underlying assumption that goes to the legitimacy of these regimes is that such binding advice would be subject to appropriate checks and balances and extensive quality assurance processes, given their asymmetry in binding the community[16] but not the taxpayer.

Like private rulings, public binding rulings merely represent the Commissioner's view of the law; they do not bind the taxpayer. Their usual audience is the tax profession, who are generally looking for a high level of technical proficiency. They are written in legal terms both to meet the needs of their intended audience and the technical requirements of the law.

The processes in place for developing a public ruling provide an instructive example of the rigour that we think is necessary to safeguard community interests. The process starts with the initial identification of major issues that require further clarification as to our view of the law. Input can come from various sources, be they tax professional, industry representative bodies or ATO intelligence on emerging issues.[17]

A robust process is undertaken to settle the ATO view. The Public Rulings Panels, for example, are comprised of not only the most senior ATO technical experts but also include external experts.[18] I am not aware of any other jurisdiction in the world where this occurs.

The parties gathered around the public rulings table, whether they are ATO officers or external experts, are expected to be independent professionals searching for a sensible resolution of the issue within the framework of the tax law. They are not apologists for a particular view. The process for developing the ATO view is inquisitorial, and is informed by consultation with relevant external stakeholders and an understanding of the underlying policy.

Once a view is formed, the ruling is issued as a draft so further consultation can be achieved. The issue of draft rulings enables the Tax Office to consider community feedback on its preliminary views before finalising its views on major interpretative issues.

Interpretation of law

Our goal is to develop a view of the law which, to the extent allowed by the words used in the legislation, reflects the underlying policy and produces a coherent fabric of tax law for the community. This has been reiterated many times.[19]

Our approach to the application of the law to the particular facts of a case is to have regard to the words of the Act read in light of the scheme of the Act and the history and objects of the relevant provisions. Where the words of the Act and their statutory context allow, a view of the law that reflects the underlying policy is preferred. In legal terms this is referred to as a 'purposive' approach.[20] The role of the ATO is to administer the tax laws in accordance with the intent of those laws, tempered in the margins by a fair, reasonable and transparent application of administrative common sense. If more than one of the available interpretations promotes the policy intent, we will generally favour the interpretation that reduces taxpayer compliance costs.[21]

Justice Hill described the judicial approach to the interpretation of tax legislation as one where,

> *"The Courts will construe...legislation having regard to its context in the widest sense of that word with a view to adopting a construction which gives effect to the legislative policy to be found in the language which Parliament has used but having regard to relevant intrinsic materials."*
>
> *"...A construction will not be adopted which is absurd or irrational but even the literal meaning of the words used may be departed from if to do so is necessary to give effect to the purpose or objects of the legislation, but not merely because the interpretation to be adopted conforms to some personal theory of justice"*[22]

The ATO endeavours to be consistent with this approach. Nevertheless there is a lingering perception held by some that the ATO promotes a win-at-all costs culture and is overly legalistic and pro-revenue. The shift in emphasis in our Strategic Statement reaffirms a corporate approach that is more sophisticated than simplistic stereotypes. While the degree of subjectivity that is inherently involved in these processes poses a risk to the consistency of our approach, this risk is mitigated by skilling strategies, appropriate checks and balances[23] such as a precedent set,[24] the use of external experts on our Panels, team environments, peer review and quality assurance, and the use of external counsel on all major litigation.[25] This framework for tax technical decision making is likely to be more stringent and comprehensive than those used by other parties to a dispute.

When there are legitimate differences of opinion on interpretative issues in tax law between the ATO and a taxpayer, the taxpayer can seek to have the matter resolved by the Administrative Appeals Tribunal or the courts. The ATO approaches litigation in accordance with the Attorney-General's Model Litigant Guidelines.[26] We have a strong interest in having contentious areas of the law clarified in a sensible and coherent way consistent with the underlying policy of the law.[27] The Hon. Justice Beaumont noted in this regard that the "responsible professional attitude usually adopted by the Commissioner has expedited the flow of tax litigation considerably."[28]

Managed investment schemes

The ATO must be responsive to developments in the law and discharge its administrative responsibilities accordingly. At times, legal developments may require the ATO to change its view. For example, dicta in cases such as *Puzey*[29] led us to reconsider our view on the deductibility of investments in both forestry and non-forestry managed investment schemes.

As the matter is not free from doubt, it is best clarified by the courts. First however, there needs to be a dispute. While we can offer to fund such a case, it is up to the promoters of these arrangements to find a case and to commence such proceedings.

We have been working closely with industry and affected taxpayers to urgently identify and expedite a test case while allowing transitional relief in the interim. To expedite matters, we intend to seek (with industry consent) two motions in the Federal Court: an urgency motion to have the test case resolved quickly, and a request for a hearing by the Full Federal Court on the basis of importance and the public interest. In progressing this matter, the promoters could use a private binding ruling application on a real project that would be offered in the 2008/9 financial year as the basis for the test case.[30]

Indooroopilly and use of declaratory proceedings

In instances where the law is ambiguous, an appropriate avenue for resolution may be through the courts to obtain judicial clarification of the law. We took this approach recently with regard to deductions claimed in employee benefit arrangements. We consistently won these cases on the basis that the companies were not entitled to deductions under s.8-1 of the *Income Tax Assessment Act* 1997.[31] However, concerned by the possibility of the 'holy grail' of deductibility and no fringe benefits tax in relation to such schemes,[32] and armed with our understanding of the policy intent of the relevant provisions and a view that we had reasonable prospects of success, we sought to have the FBT issue tested by the Full Federal Court, notwithstanding decisions by single judges contrary to our submission. This course of action culminated in the Full Federal Court case of *Commissioner of Taxation v. Indooroopilly Children Services (Qld.) Pty. Ltd*.[33]

There is a long history to this matter which arose following the Court's decision in December 2002 in the *Essenbourne* case.[34] This case involved an employment benefit trust scheme in which the Court decided that the taxpayer was not entitled to a deduction for its contribution to an employee incentive trust. The Court also decided that the contribution was not subject to FBT.[35]

The Court in *Indooroopilly* criticised our course of action. The essence of the criticism being that we should have followed the single justice decisions or promptly initiated other court proceedings, such as seeking a declaration from the Full Court on the FBT issue.

It is important that we explore opportunities for improving the litigation process including particularly the timeliness of law clarification on important issues.

Following on from the comments by the Federal Court we obtained advice from the Commonwealth Solicitor-General, David Bennett QC, the Chief General Counsel of the Australian Government Solicitor, Henry Burmester QC and other legal counsel on the following matters:

- the use of declaratory proceedings to resolve taxation disputes; and
- whether the Tax Office must always follow a single instance decision of a judge.

The Solicitor-General and counsel's advice can be found on our website at http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion3.pdf

Declaratory Proceedings

The Solicitor-General and counsel have advised that it would not usually be appropriate for the Commissioner to seek to use declaratory proceedings to resolve taxation disputes. In many cases, a declaration from the court would not be available to test an interpretation of the law because the question would be hypothetical or advisory. The advice confirms that the usual objection and appeal processes involving assessments and private rulings should be used to resolve issues between a taxpayer and the ATO.[36]

Single Judge Decisions

The Solicitor-General and counsel have confirmed their earlier advice that the ATO is not required to follow a single judge decision if, on the basis of legal advice,[37] there are good arguments that, as a matter of law, the decision is incorrect and prompt action is being taken to clarify the position.[38] In the rare circumstances where the Commissioner does not appeal a decision which is considered incorrect, the ATO will seek to take prompt action to test the issue before the Full Court.[39] It is our intention in all such cases to act with "due propriety".

Law improvement and design

Where the law is clear, we have a duty to apply that law, even if it produces inconvenient outcomes for the community or for an individual taxpayer. We also see ourselves as having a responsibility to advise Treasury where the tax and superannuation laws do not give effect to their underlying policy, for example, where they produce unintended consequences, anomalies, or significant compliance costs inconsistent with the policy intent, or where a legislative solution may be needed to address an emerging compliance issue.

We have a number of processes in place to deal with these types of issues.

First, we have internal ATO processes to ensure that significant technical issues are escalated and given attention by our Tax Counsel Network. These issues can come from a range of sources. Some come from ruling requests or audits. Others come from our 50 plus consultative forums such as the NTLG sub-committees. Others emerge from our day-to-day experience in the care and management of Australia's tax and superannuation systems.

In some cases we may suggest a law change to clarify the law. Our goal in doing this is to promote administrable legislation that provides certainty for taxpayers.[40] We take an even-handed approach consistent with our Strategic Statement which emphasises the proper administration of legislative regimes. Consistent with the criterion whether the law operates in accordance with its policy intent, the descriptors 'pro-revenue' or 'helpful to taxpayers' are largely irrelevant in bringing matters to Treasury's attention.

In reviewing the range of recommendations to Treasury for law improvement over the last two financial years, it is clear that there has been an even-handed approach. For example, some changes to the consolidation regime were announced after they were initially raised at the NTLG Consolidation sub-committee. However, as this advice is essentially 'government in-confidence' it would be inappropriate for the ATO to divulge our efforts in this regard.

We have processes for discussing significant issues with Treasury. We have a formal ATO/Treasury protocol that outlines how the two agencies work together in the design and administration of taxation and superannuation laws The Taxation Policy Coordination Committee, comprising senior leadership of each agency, oversees the operation of the protocol.

The ATO works with Treasury from the time when tax policy is being developed until it is implemented. We provide input based on our administrative and interpretative experience in relation to tax and superannuation laws. This includes the administrative impacts of a proposal, revenue consequences of new tax proposals, and also what in our experience are likely to be the administration issues and compliance costs for taxpayers and their advisers.

After a Government decision has been made we work with Treasury on the design of the tax law to give effect to the decision. Treasury has primary responsibility for the design of tax laws and the Office of Parliamentary Counsel prepares draft legislation for introduction to Parliament. We are strong supporters of an integrated tax design process.[41]

Conclusion

> *"The focus of the rule of law is upon controlling the exercise of official power by the executive government. The foundational principle is that agencies and officers of government, from the Minister to the desk official, require legal authority for any action they undertake, and must comply with the law in discharging their functions."*[42]

I know of no public or private organisation other than the ATO that has the rule of law as one of its values. Understandably, there are thousands of years of history that, correctly or incorrectly, cast the 'humble tax gatherer' as self-interested and anti-social.[43] In a modern democracy such as Australia, and in respect of an organisation such as the ATO that administers a range of laws, ultimately designed to promote the wellbeing of Australians, wisdom would have it that the opposite to this stereotyped view should be the case. I believe that in the main it is.

Footnotes

1 Justice Oliver Wendell Holmes, *Compania General de Tabacos de Filipinas v Collector of Internal Revenue* (1927) 275 US 87, 100.

2 For example, the then Second Commissioner of Taxation, Brian Nolan referred to the *Income Tax Assessment Act* 1936 as a "vast cauldron of boiling spaghetti" in Editorial by David St L Kelly in 1993 reproduced in D Bentley, `Ten Years of the Revenue Law Journal", *Revenue Law Journal,* (2000) 10 *Revenue Law Journal* 4; The then Government responded by establishing the Tulip project intended to rewrite the income tax law to make it more easily understood by a wider audience. This gave rise to the *Income Tax Assessment Act* 1997. However, the continued existence of the *Income Tax Assessment Act* 1936 imposes additional complexity, particularly for lawyers and accountants. The Board of Taxation has been supporting a strategy that will ultimately consolidate the remaining parts of the 1936 Act into the 1997 Act, following on from its work on recommending the repeal of inoperative provisions.

3 M Burton, "Responsive Regulation and the Uncertainty of Tax Law - Time to Reconsider the Commissioner's Model of Cooperative Compliance?" (2007) 5(1) *eJournal of Tax Research* 71.

4 Under Australian tax law, a taxpayer who is uncertain as to the tax effect of an existing or contemplated transaction can seek a binding and reviewable private ruling from the ATO. The resulting reduction in indeterminacy promotes a reduction in the potential for disputation.

5 C Saunders and K Le Roy, "Perspectives on the Rule of Law", in C. Saunders and K. Le Roy (eds), *The Rule of Law* (Federation Press, Melbourne, 2003), 5.

6 M D'Ascenzo, `Creating the right environment: transparency, cooperation and certainty in tax' (Speech delivered to Financial Executives International of Australia, Sydney, 19 June 2007).

7 This includes the Strategic Statement, the Compliance Model and the 2007-08 Compliance Program. The Strategic Statement provides the direction and framework for Tax Office activities over the next three years. The Compliance Model is represented by a regulatory pyramid which seeks to encourage as many taxpayers as possible to the base of the pyramid - where there is self regulation and high levels of voluntary compliance. This contrasts with the more narrow apex which is characterised by a wilful minority who seek to abuse the tax system. The 2007-08 Compliance Program announces the compliance priorities for the current year. All these documents can be found on the ATO's website, http://www.ato.gov.au/.

8 Values we seek to demonstrate as listed in the Corporate Plan are; being fair and professional, applying the rule of law, supporting taxpayers who want to do the right thing and being fair but firm with those who don't, being consultative, collaborative and willing to co-design, including at a whole-of-government level, being open and accountable, and being responsive to challenges and opportunities.

9 Commissioner's online update commemorating the 10th anniversary of the Taxpayers' Charter.

http://www.ato.gov.au/corporate/content.asp?doc=/content/86369.htm.

10 Australia's binding and reviewable private ruling system gives taxpayers an opportunity to provide the tax office with their material facts to seek advice - free of charge - on how the law applies to their specific circumstances.

11 For example, what mark up in a related party transaction is grossly excessive? The answer depends on the facts of each case. The most an administration can do in these circumstances is to explain the legal principles and indicate the features of mark-ups that are likely to attract our attention in terms of possible adjustment. The latter reflects the fact that no tax administration is resourced on the basis that there will be a 100% checking of all taxpayers and transaction. If it were its activities would impose additional compliance costs on the community. An economically and socially more efficient approach for the community is for the tax administration to operate on the basis of risk management.

12 Taxpayers can also seek compensation under the Commonwealth non-statutory scheme for *Compensation for Detriment Caused By Defective Administration* (the CDDA scheme) if any damage is caused. See PS CM 2004/05 Handling compensation and similar monetary claims against the ATO.

13 *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*; TR 2006/11; *Australian Tax* Handbook (2007) Thomson, [48 110].

14 Under the assessment system, the Commissioner, having reviewed assessments up front, could not re-open an assessment merely on the basis of a mistake of law. However, the Commissioner could re-open an assessment if there was not a full and frank disclosure of material facts.

15 Otherwise, arguably, such regimes are contrary to the rule of law because they allow administrative decision-making to displace the rule of law.

16 Represented by the state.

17 The National Tax Liaison Group has a monitoring role over the ATO's Public Rulings Process, including ensuring that the highest priority issues are included on the program.

18 External experts on the Panel include: Ray Conwell, Kevin Burges, Kevin Pose, David Williams and Richard Shaddick, Richard Vann.

19 For example, M D'Ascenzo, "Along the Road to Damascus: A Framework for Interpreting the Tax law" (2000) *Journal of Australian Taxation* 384; M D'Ascenzo, `A unique taxation partnership for the benefit of the Australian community' (speech delivered by M D'Ascenzo and Steve Martin at the ATO/AGS/Counsel Workshop, 3 April 2004); M D'Ascenzo, `Working with business' (speech delivered by M D'Ascenzo to the Business Council of Australia, Sydney, 30 January 2006); See *Acts Interpretation Act* 1901(Cth), s 15AA.

20 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; "It was in the High Court case of *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1980) 147 CLR 297 that the High Court signalled a shift away from the literalist approach to a more purposive approach" in J Tretola,, "The interpretation of taxation legislation by the courts - A reflection on the views of Justice Hill", delivered at 18th Australasian Tax Teachers Association Conference 2006 *Old Taxes in a New World* (Melbourne Law School, University of Melbourne, Melbourne, 30 January 2006 - 1 February 2006); *Acts Interpretation Act* 1901 (Cth), s 15AA; M D'Ascenzo 2004, *op. cit.;* Kirby J in *Austin v The Commonwealth* (2003) 51 ATR 654, 723-724 said, "*That in the case of federal legislation, the purposive principle is supported by the Acts Interpretation Act* 1901 (Cth); Large business and tax compliance 2006, http://www.ato.gov.au/content/downloads/77898_N8675-08-2006_w.pdf .

21 Large Business and tax compliance 2006, http://www.ato.gov.au/content/downloads/77898_N8675-08-2006_w.pdf

22 J Tretola, "Some thoughts on the principles applicable to the interpretation of GST" *ATAX UNSW-15th Annual GST & Indirect Tax Conference*, April 2003`, at p 30, quoting Justice Hill and Hill J in "A Judicial Perspective of Tax Law Reform" (1998) 72 *Australian Law Journal* 685.

23 PS LA 2001/4 Provision of written advice by the Australian Taxation Office; The Public Rulings Manual is the Tax Office's main source of information about the processes involved in and rationale for the publication of its formal series of public rulings. It forms part of the Online Resource Centre for Law Administration (ORCLA) which sets out the policies and explains the processes and procedures governing the provision of written binding tax technical advice and objections; PS LA 2003/9 prescribes the mandatory use of ORCLA for Tax Office staff.

24 ATO Interpretative Decisions.

25 PS LA 2007/12 Conduct of Tax Office litigation in courts and tribunals.

26 The Commonwealth's obligation to act as a model litigant can be found in Appendix B of the *Legal Services Directions* 2005, issued by the Attorney-General pursuant to section 55ZF of the *Judiciary Act* 1903.

27 M D'Ascenzo 2004, *op cit.*

28 The Hon Justice B. Beaumont, "Anatomy of a Federal Court Tax Case", (2000) 23 (2) *UNSW Law Journal* 237 at 238; M D'Ascenzo 2004 *op. cit.*

29 *Puzey v FC of T* [2003] FCAFC 197; See also *Enviro Systems Renewable Resources Pty Ltd v. Australian Securities and Investment Commission* (2001) 80 SASR; and *Vincent v FC of T* [2002] FCAFC 291.

30 I am told that the promoters are adjusting their current offerings to address the arguments raised by the ATO to the effect that the payments by the investors are capital in nature. If these adjustments are effective in converting the investments to revenue account, that will set the new bar of what the law requires in relation to future arrangements. Clarification of what the law requires will be a good outcome.

31 *Essenbourne Pty Limited v Commissioner of Taxation* 2002 ATC 5201; *Walstern Pty Ltd v FC of T* 2003 ATC 5076; *Kajewski & Ors v FC of T* 2003 ATC 4375; *Cajkusic & Anor v FC of T* 2006 ATC 2098; *Cameron Brae v FC of T* 2006 ATC 4433.

32 *Walstern Pty Ltd v FC of T* 2003 ATC 5076, 5078 where Hill J said: "The ability of a private company employer to obtain unlimited deductions for contributions made to a superannuation fund benefiting employees who are directors and shareholders without either the trustee of the fund being liable to pay tax on the amounts contributed or the employer being liable to pay fringe benefits tax must be the holy grail for tax planners."

33 [2007] FCAFC 16

34 2002 ATC 5201.

35 On 14 March 2003 we published a fact sheet stating that we proposed to further test the Court's construction of the FBT law, explaining also that we did not appeal this aspect of the decision in view of the Court's findings that the payments were not in respect of employment, in which case FBT had no application, and because we had succeeded on our primary argument. In hindsight it may have been better to appeal, notwithstanding these reasons, if we had known that this was open to us.

36 See also Daryl Davies QC, `The relationship between the Commissioner of Taxation and the Judiciary,' *Taxation in Australia*, Volume 41, No. 10 May 2007, pp 630 - 633.

37 Legal advice provided by Solicitor-General Henry Burmester QC on 16 January 2006 advises that internal ATO legal advice provided by an appropriate officer would constitute sufficiently robust and credible advice for this purpose.

38 Legal advice available at http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion1.pdf ; http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion2.pdf; http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion3.pdf

39 D Davies QC, *op. cit.*

40 D St L Kelly, *op. cit.* p 7.

41 M D'Ascenzo, `Designing the delivery of legislative measures', (speech delivered to International Quality and Productivity Conference, Canberra, 17 May 2004); *Improving Australia's Tax Consultation System, report by Board of Taxation, Feb 2007; Recommendations in report endorsed by Treasurer Peter Costello in press release of 16 August 2007,* http://www.treasurer.gov.au/tsr/content/pressreleases/2007/076.asp

42 Prof J McMillan, "The Ombudsman and the Rule of Law' (speech delivered to Public Law Conference, Canberra, 5-6 November 2004).

43 One recalls the Pharisees saying to Jesus: "Why do you eat and drink with tax collectors and sinners?": Luke 6:5.

Last Modified: Monday, 3 September 2007

ATTACHMENT 5: CEO MEETING TALKBOOK – DECEMBER 2006

Strategic Planning for the Future of the Profession

Meeting Summary

Date: Monday, 4 December 2006
9.30am – 4.00pm

Venue: The Boat House
Menindee Drive, Barton, ACT

Meeting participants:

Michael D'Ascenzo	*Commissioner of Taxation*
Shane Reardon	*Deputy Commissioner*
Alison Lendon	*Deputy Commissioner*
Roger Cotton	*CEO, NIA*
Robert Duncan	*CEO, ATMA*
Geoff Rankin	*CEO, CPAA*
Noel Rowland	*CEO, TIA*
Ali Noroozi	*for Graham Meyer, CEO, ICAA*
Richard Francis	*Head, ACCA Australia and NZ*
Roger Booker	*Australian President, CIMA*
Tony Jones	*CEO, NTAA*
Michael Manthorpe	*Group Manager, Department Employment and Workplace Relations*
Murray Crowe	*Assistant Commissioner, Tax Practitioner Relations*
Karen Anstis	*Secretariat, Tax Office*

Apologies

Jennie Granger	*Second Commissioner*
Graham Meyer	*CEO, ICAA*

Key outcomes from the meeting

The meeting between the Commissioners and CEOs of the professional associations continued discussions on matters of strategic importance to the accounting service industry. The Department of Employment and Workplace Relations was represented at the meeting to share recent research on labour market trends in accounting employment. Possible implications of the industry trends were considered. Updates were provided by the Tax Office on initiatives to support tax agents.

Note: Action items are collated on page 5

Discussion topics

BAS Service Provider research

A presentation was delivered by Mathew Densten, TNS Social Research, on topline results from the quantitative phase of research exploring BAS Service Provider attitudes to possible regulation

State of the Industry research

An initial snapshot of early findings from the qualitative phase of State of the Industry research was provided by Mathew Densten, TNS Social Research

Initiatives for tax agents – progress report

Shane Reardon, Deputy Commissioner, provided further information on current Tax Office initiatives to support tax agent capability

Review of Forums

Alison Lendon, Deputy Commissioner, provided an update on the review of tax practitioner consultative forums

Labour market trends in accounting

Michael Manthorpe, Department of Employment and Workplace Relations, shared findings of recent research on labour market trends in accounting employment

Discussion on what the research is telling us about the issues related to sustainability of the tax profession

Joint discussions focussed on implications of the research findings

Introduction to meeting discussion

The Commissioner opened the discussion by welcoming CEOs members and guest participants. The Commissioner noted apologies from Graham Meyer and Jennie Granger, Second Commissioner.

Subsequent discussion focussed on five key areas:

1. The final phase of recent BAS Service Provider research exploring attitudes towards possible regulation
2. An early snapshot of co-designed State of the Industry research, with young accountants and migrant accountants
3. Tax Office initiatives for tax agents, including a new service pilot
4. An update on progress of the review of tax practitioner consultative forums
5. Labour market research on employment trends in accountancy, commissioned by the Department of Employment and Workplace Relations

1. BAS Service Provider research

Key results were presented from the quantitative phase of research with bookkeepers who provide BAS services to business[1]. The presentation covered:

•Research Context and Methodology. The sample comprised of 1400 randomly selected **BAS service providers** from a total population of approx 16,000, and 600 randomly selected **employee bookkeepers** from a total population of approx 122,000. Employee bookkeepers were included to obtain an indication of their potential interest in registration and for comparative purposes.

• Key Results:

➢Characteristics of the bookkeeping industry

➢Attitudes towards regulation

➢Views on administration of a regulation process

➢Bookkeeper interactions with the Tax Office

➢Implications and marketing recommendations for implementing a new regulatory regime covering BAS service providers

The findings of the research supported the earlier results from the qualitative phase, highlighting the significant diversity across the bookkeeping segment of the industry. The results confirmed that many bookkeepers are working in isolation with the majority of respondents reporting minimal contact with other bookkeepers, low awareness of bookkeeping organisations and low levels of membership of professional bodies.

Analysis and segmentation of research responses was undertaken, based on a composite model identified through 2005 research[2]. The model has been tested with bookkeeper industry representatives who have supported the model based on their knowledge and understanding of the BAS service provider segment. Responses were grouped using an index score ascribed to dichotomies in five characteristics, resulting in segmentation of bookkeepers based on degrees of professionalism. Note: A low score on one characteristic does not preclude a bookkeeper from scoring in the high professionalism category.

Attitudes and work practices vary, depending on the score on degree of professionalism. This is also the case with attitudes towards regulation. BAS service providers who demonstrate high scores on degrees of professionalism perceive more benefits of regulation, and fewer barriers. Segmenting the type of work being done by bookkeepers based on the services provided, and the level of supervision required may assist in building consumer awareness of how to identify a quality service provider.

Discussion of the research results highlighted that there is a lot of work to be done in relation to building and supporting capability in the BAS service provider para-profession, in the lead up to regulatory changes announced in the May 2006 budget. It was recognised that BAS service providers play a valuable role in supporting businesses and tax agents, and are an important source of capacity in the accounting service industry.

Action items

The Tax Office will provide an electronic copy of the research presentation to CEOs. Update: This has been completed.

2. State of the Industry research – early snapshot

Following suggestions made at the September CEO Meeting, State of the Industry research has been co-designed with representatives of the professional associations to better understand issues of sustainability of the tax profession. The intentions of young accountants, and the integration of migrant accountants are being explored, in addition to issues of capability and skilling within the profession, tax agent services in rural areas, rationalisation, and the value of practices.

Mathew Densten, TNS Social Research, provided a brief snapshot of very early findings from current State of the Industry research.

Based on early findings from one focus group in Perth, young accountants reported overall satisfaction with their work because of variety, outcomes from their work (client benefits), stability, continual learning, tangible skills, and challenging work, particularly tax planning. They were less satisfied with 'mundane' aspects of work particularly bookkeeping functions, requirements for more education (CA, CPA), and remuneration levels.

A shift has been noticed in the image of the industry, "accounting used to be seen as boring, now it is trying to be cool…advertising campaigns promoting a glamorous, cool lifestyle….very different to the old image of accountants".

Early finding from two focus groups of overseas trained accountants were presented. Participants reported they emigrated for two reasons:

- Personal/lifestyle - most saw the benefits of the Australian way of life
- Professional - develop skills in another country particularly Australia because of its good reputation

They were employed doing a range of work. Some were financial controllers, and others were working in private practice, consulting, tax, business advice and audit. They reported being generally satisfied with their job. However, they wanted greater recognition of their overseas qualifications and professional association membership.

3. Initiatives for tax agents

Shane Reardon, Deputy Commissioner and Chair of the Lodgment Working Party and ATPF, provided an update on progress of initiatives to support tax agents that were discussed at the last CEO Meeting. The focus groups with tax agents to seek feedback for the review of the lodgment program have recently been completed, with valuable input provided by the tax agents. Overall, the majority of tax agents considered that the lodgment program was working quite well and did not require a lot of change. The Lodgement Working Party will continue to progress this work, including more marketing of the one-for-one, like-for-like arrangements, and other aspects of the lodgment program.

New processes for deferrals will be implemented in February, based on a self-assessment approach. It is anticipated that there will be some exclusions, particularly at the large corporate end of the business market. Marketing of the new processes will be undertaken jointly, through the Lodgment Working Party in the first instance. It is expected that a broadcast will go out to tax agents in the near future. As mentioned previously, implementation will be monitored at a macro level to ensure the new processes work effectively as intended.

The Review of Advice project has made a number of recommendations to improve tax practitioner access to technical advice, including a number of self-help options and a possible booking service to access technical experts, within reasonable parameters and guidelines.

An update on a new model for enhanced tax practitioner services was also provided, with plans underway for a pilot early in 2007. This will involve an enhanced regional services approach with regional directors working closely with tax practitioners at the 'coalface'. The professional bodies expressed their support for the initiatives outlined, and their ongoing interest in participating in discussions and co-design.

Action items

The Tax Office will continue to provide updates to CEOs on the progress of the initiatives for improving services to tax agents.

4. Review of forums

Alison Lendon, Deputy Commissioner, provided an update on recent progress on the corporate review of consultative forums. A paper was provided to the ATO Executive in November, with recommendations for a range of improvements to forums including enhanced governance and issues management across the full range of around 80 stakeholder forums.

All governance recommendations were accepted, and the ATO Executive has requested more work be done to streamline and build links between forums, particularly industry partnerships. While the review did result in some rationalisation of ATPF sub-groups, many of the forums were considered valuable and were working well with a defined work program. Where possible, the lifespan of forums will be clearly specified. Recently, some new forums have been established as 'limited life' working parties, for example, the DIV7A Working Party with representatives from the professional associations.

Improvements are progressively being made to the stakeholder relations website and the publishing of forum information, charters and minutes. Issues management processes are being enhanced, and the Community of Practice of tax practitioner forum secretaries is functioning well. Forward planning is underway for more co-design with the tax profession on feature topics.

The Commissioner outlined his expectations that forum members actively disseminate communication messages to the broader community of tax practitioners. CEOs expressed an interest in receiving a map of the consultative forums, a list of members from their associations, and feedback on performance of their representatives.

Action items

The Tax Office will provide CEOs with a map of all the Tax Office consultative forums, and a list of their specific representatives. Update: Electronic and paper copies of the map have been sent to CEOs, and lists of members for each association provided to the respective CEO.

5. Labour market trends in accounting

Michael Manthorpe, Group Manager, Department of Employment and Workplace Relations (DEWR), attended the meeting to share findings from recently completed research to explore why the labour market in accounting was not correcting. It was noticed 12-18 months ago that persistent shortages were being experienced in some select occupations, including accounting.

Angela Southwell, TNS Social Research, was commissioned to undertake an extensive research project with employers, employees, training institutions and industry associations to understand the labour market from a number of perspectives.

Findings have confirmed there is widespread agreement that there is a 'chronic skill shortage' in the accounting profession. Skills gaps were prevalent, with employers reporting hiring people with inadequate skills and experience. The results indicate that measuring shortage based on unfilled vacancies alone under-estimates the extent of the impact of skills shortages on employers.

The shortage is most acute for experienced workers with 3-7 years experience. While attraction into the occupation, retention and filling vacancies were significant issues, the leakage out of the occupation within the first few years was a common problem.

Michael Manthorpe indicated that he did not expect that the situation in accounting was going to get any easier in the near future.

Key considerations are the extent to which the community and the tax system are 'dependent' on the accounting profession.

CEOs and the Commissioner agreed it was important to work together on sustainability. The Commissioner gave his support for a whole of industry approach, working in partnership with government on these challenging issues for which there are no easy answers. The Tax Office will work closely with the professional bodies and government over the coming year.

Leadership role and purpose of the CEO Meeting

During the meeting, the Commissioner and CEOs held frank and open discussions on issues reflecting on the leadership value of CEO Meetings, noting the apparent lack of communication in relation to the tax agent integrity line as a case in point.

The intention of discussions at the CEO level is to provide opportunities for the Commissioner and CEOs of the professional associations to discuss and collaborate on strategic industry matters of mutual interest.

Discussions should generally focus on outcomes for the future of the tax profession, and it is desirable that the meetings enable valuable leadership and direction for the tax profession and tax system.

Improvements have been made to increase the openness and transparency of CEO Meeting discussions, and meeting summaries are now published on the Tax Office website.

This then allows the Commissioner and CEOs to share with colleagues and staff the information, decisions and actions taken as a result of these joint meetings. In this way, the CEO Meetings can provide an effective leadership role in the profession.

Where issues arise, or communications are unclear, an invitation remains open for discussions to clarify matters of concern to any or all parties involved in the CEO Meetings.

Meeting dates for 2007 are:

Thursday 19 April (Brisbane)
Friday 8 June (Canberra)
Friday 31 August (Canberra)
Friday 23 November (Canberra)

Summary of all action items

The Tax Office will provide an electronic copy of the BAS service provider research presentation to CEOs.

Update: This has been completed.

The Tax Office will continue to provide updates to CEOs on the progress of the initiatives for improving services to tax agents.

The Tax Office will provide CEOs with a map of all the Tax Office consultative forums, and a list of their specific representatives.

Update: Electronic and paper copies of the map have been sent to CEOs, and lists of members for each association provided to the respective CEO.

References

1. Australian Tax Office, TNS Social Research, BAS Service Providers*: Quantitative Research,* 2006
2. Australian Tax Office, TNS Social Research, *Understanding the bookkeeping profession Vol 1: Research with bookkeepers*, June 2005

ATTACHMENT 6: CEO MEETING TALKBOOK – APRIL 2007

Strategic Planning for the Future of the Profession

Date: Thursday, 19 April 2007
9.30am – 4.00pm

Venue: Customs House
Queen Street, Brisbane

Meeting Participants:

Roger Booker	*Australian President, CIMA*
Annamaria Carey	*Assistant Commissioner*
Keith Clissold	for Robert Duncan, *CEO, ATMA*
Roger Cotton	*CEO, NIA*
Michael D'Ascenzo	*Commissioner of Taxation*
Jennie Granger	*Second Commissioner*
Tony Jones	*representing NTAA*
Graham Meyer	*CEO, ICAA*
Geoff Rankin	*CEO, CPAA*
Shane Reardon	*Deputy Commissioner*
Noel Rowland	*CEO, TIA*
Bruce Thompson	*Deputy Commissioner (acting)*
John Sullivan	*Secretariat, Tax Office*

Purpose of the meeting

The CEO Meetings provide opportunities for the Commissioner and CEOs of the professional associations to discuss and collaborate on strategic industry matters of mutual interest. Discussions at the CEO level focus on strategic outcomes for the future of the tax profession, as well as enabling valuable leadership and direction.

Discussion themes

Update on initiatives for tax agents – progress report
A discussion on current Tax Office initiatives to support tax agent capability, including a presentation from a 2010 perspective of an attractive and sustainable tax profession.

Tripartite roles
Joint discussion exploring the scope of tripartite roles between the Tax Office, professional associations and the Tax Agents' Boards in improving capability and regulation in the tax profession.

Simulation Centre Visit
Presentation on how the Simulation Centre brings together the Tax Office and users of the tax system to collaboratively develop interaction points of the tax system such as the Tax Agent Portal.

OECD project – tax intermediaries
Bruce Thompson, Deputy Commissioner (acting), led discussion and provided an update on the study on the roles of tax intermediaries.

Research program
Discussion led by Annamaria Carey, Assistant Commissioner, exploring possible future focus areas for the Tax Office tax practitioner research program.

ANAO report
Presentation on the ANAO follow-up audit of the Tax Office's management of its relationship with tax practitioners.

Introduction to meeting discussion
The Commissioner opened the discussion by welcoming CEOs, members and guest participants. There was agreement that the agenda process for this forum must be robust. The professional bodies plan to organise a phone hook-up in future to coordinate their response and feedback into future agendas.

Subsequent discussion focussed on six key areas
• Initiatives for tax agents
• Service Improvement Model for tax agents
• OECD project – tax intermediaries
• ANAO report
• Research program
• Tripartite roles

Initiatives for tax agents
The Deputy Commissioner, Tax Practitioner and Lodgment Strategy gave a presentation on what the tax profession may be like in 2010 and beyond.

Some of the key points highlighted in the presentation included:
• Effective tax administration also relies on the capabilities of practitioners as well as the Tax Office
• Effects of changes to the regulatory framework
• Service to tax practitioners – changes in Tax Office technology and culture
• Identification of areas where the Tax Office can work in partnership with the profession.

The group agreed that the roles of the profession and their associations may change over time and there may be discomfort with those changes. This will be discussed at future meetings. It is important that the Tax Office and the profession are 'travelling along the same path'.

The Commissioner commented that we need to take pride in the profession collectively because taxation and superannuation touches everybody. We should jointly approach universities with a view to demystifying the topics and promote them as future subjects. Making the profession an attractive option is vital for the future of the profession and education options are an important aspect.

The forum agreed to consider joint approaches to universities to promote tax and superannuation as a core component of law, accounting and business degrees. Work is also being conducted with the Tax Agents' Board in relation to approved courses.

Action items
The Tax Office will provide a copy of the presentation to each of the CEOs. Update: This has been completed.

Service Improvement Pilot
The new service arrangements are not designed to address everyday practice issues but to recognise the desire by practitioners for the Tax Office
• to understand and manage local/regional issues
• to provide more effective, reliable and targeted technical services, and
• to provide improved service responses.
A review and improvement of the Relationship Manager program is an integral part of the service improvement model. The Relationship Manager could provide the 'professional to professional' link between a firm and the Tax Office.

By developing a more personalised relationship with the community within a region, the Tax Office will be able to more quickly identify and address systemic issues, whether they be particular to a region or of national significance. It is a pilot program, and we'll evaluate whether it is making the impact that regional tax agents are looking for.

Leveraged communication
As a result of the recognised professional associations working with the Tax Office on communicating changes to automatic deferrals in their publications, there has been a high take up rate of the service. The professional bodies agreed to publicise Tax Office news in their electronic bulletins in future.

Action items
The Tax Office will provide a copy of the Service Improvement Model presentation to all CEOs. Update: This has been completed.

The Tax Office will provide a script on the new service model arrangements for inclusion in future professional body publications.

OECD project - tax intermediaries
The core group involved in the project includes representatives from UK, US, France, Netherlands, South Africa and Australia. The big 4 accounting firms have also provided input.

The outcome of the discussions is to review the approaches of worldwide tax administrations and ensure better tax administrations worldwide. The aim is to set standards across all tax authorities so that everyone is operating on a level playing field. It is envisaged that this will result in an overall reduction in compliance costs. It is not envisaged that the OECD work will result in a formal protocol.

As part of influencing future directions of the industry the Tax Office sees it as important to share its work in this area and therefore is seeking input from the CEO forum. Feedback is sought on what roles administrators and intermediaries play and whether there should be any differentiation in how authorities deal with the profession with an aim to provide comments back to the project group by October 2007.
The Tax Office may also facilitate meetings in the future with key stakeholders to obtain their feedback.

Action items
The Tax Office will provide a copy of the OECD Tax Intermediaries Study Update presentation to all CEOs (also to be available on the OECD website). Update: This has been completed.

ICAA to co-ordinate a single submission to the Tax Office.

ANAO Report
The Commissioner thanked the associations for working with the Tax Office to improve the 'approval rating' of the level of service provided by the Tax Office – as reflected in the ANAO report. This clearly shows the benefits of consultation and working in a tripartite arrangement.

There was discussion concerning the Tax Agents' Board (TAB) which had agreed to issue a letter setting out guidelines on the registration of interposed entities. Although the new legislative framework is targeted for release in April/May there are ongoing issues with the current registration requirements. There may be a need for this to be taken up with government.

Research
The meeting agreed that the Tax Office needed to conduct research
• to better understand the profession and
• to evaluate new initiatives.
Tax Office research is also of value to the associations and there is a desire for better co-ordination of research activities where it involves the tax profession.

Issues that the group would like to know
• qualitative research into the role and responsibilities of agents
• practice management issues such as the percentage of work seen as non-value added
• where Australian accounting graduates are going and countries of origin of graduates in Australia
• barriers to entry/retention in the tax profession

Some of these issues are being researched in the current *State of the Industry* survey. Topline results will be available for the next forum and will be shared with the CEOs.

It was agreed that there would be further engagement with the CEOs to progress future research directions and possibilities for joint research activities.

Tripartite arrangements

Focus on capability in the first instance

The focus for the tripartite approach is to assist tax practitioners become more capable, rather than disciplining them. Referral to the recognised professional associations provides another 'remedy' rather than relying purely on Tax Office or Tax Agents' Board regulatory action. Referral to the board would be the 'last step' after the association's processes were complete, except in the more blatant cases.

Secrecy

The issue of releasing certain information to recognised professional associations has been raised as part of the new tax practitioner regulatory framework. This would enable the Tax Office to raise problems with practitioners with the relevant professional association. However, under existing law the Tax Office is prevented from providing information to third parties. The Commissioner has written to Treasury on this issue as part of the review of the secrecy provisions.

Implementation

There was general agreement with the concept, subject to the detail being resolved by the new board, the associations and the Tax Office. Several practical issues were raised which need to be addressed as part of the implementation process including

- timeframes for association responses to referrals – an association review may not be able to be effected immediately
- the options for and limitations to the actions the recognised professional associations can take
- the likely workload of referrals to the associations
- communication of the new arrangements to practitioners
- ensuring technical issues such as providing natural justice to practitioners are resolved satisfactorily.

Simulation Centre

Brisbane was chosen as the location of this CEO meeting so that members could visit the Tax Office Simulation Centre during the morning.

The simulation centre is a Usability Lab operated within the Tax Office. It focuses on bringing designers and users of the tax system into a common space that provides creative support and the ability to share experiences.

The forum members were able to view co-design activities in progress and observe and ask questions on the principles and techniques being applied. A number of detailed questions were asked by the CEO's and one visitor even provided his own feedback on the products being tested at the time.

The group's feedback from their Simulation Centre visit was extremely positive as it provided them with a visible presentation of an investment in 'state of the art' technology, as well as a sense of the seriousness with which the Tax Office is prepared to consult, collaborate and co-design.