

**Follow up review into the
Australian Taxation Office's
implementation of agreed
recommendations in five reports released
between
August 2009 and November 2010**

A report to the Assistant Treasurer

**Inspector-General of Taxation
July 2014**

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25 July 2014

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

Dear Minister

Follow up review into the Australian Taxation Office's (ATO) implementation of agreed recommendations in five reports released between August 2009 and November 2010

I am pleased to present you with my report of the above review. The primary purpose of this review was to follow up the ATO's implementation of agreed IGT recommendations made in five of my reports published between August 2009 and November 2010.

This follow up review concluded that the recommendations either have been implemented by the ATO, in whole or part, have prompted ATO action toward the realisation of intended improvements or will be examined in later IGT reviews, such as the current *review into the ATO's administration of valuation matters*.

Recommendations made for the consideration of the previous Government appear in appendix 2. It should be noted that action has been taken in relation to three of these recommendations.

I offer my thanks to ATO officers who participated in this follow up review for their professional cooperation and assistance.

Yours faithfully,

[SIGNED]

Ali Noroozi
Inspector-General of Taxation

CONTENTS

EXECUTIVE SUMMARY	VII
CHAPTER 1 — BACKGROUND	1
Scope and focus of the follow up review	1
Incremental changes to the system.....	3
Broader impact of IGT recommendations.....	4
Re-emergence of systemic issues	4
Re-calibration of implementation actions.....	5
New ATO oversight arrangements	6
CHAPTER 2 — REVIEW OF THE TAX OFFICE’S ADMINISTRATION OF PUBLIC BINDING ADVICE	9
Introduction.....	9
Implementation of agreed recommendations	10
CHAPTER 3 — REVIEW INTO THE UNDERLYING CAUSES AND THE MANAGEMENT OF OBJECTIONS TO TAX OFFICE DECISIONS	15
Introduction.....	15
Implementation of agreed recommendations	16
CHAPTER 4 — REVIEW INTO THE NON-LODGE MENT OF INDIVIDUAL INCOME TAX RETURNS	33
Introduction.....	33
Implementation of agreed recommendations	34
CHAPTER 5 — REVIEW INTO ASPECTS OF THE TAX OFFICE’S SETTLEMENT OF ACTIVE COMPLIANCE ACTIVITIES	43
Introduction.....	43
Implementation of agreed action items	44
CHAPTER 6 — REVIEW INTO THE AUSTRALIAN TAXATION OFFICE’S ADMINISTRATION OF THE SUPERANNUATION GUARANTEE CHARGE	75
Introduction.....	75
Implementation of agreed recommendations	76
APPENDIX 1 — RECOMMENDATIONS WITH WHICH THE ATO DISAGREED IN WHOLE	87
Review into the ATO’s administration of the Superannuation Guarantee Charge.....	87
Review into the underlying causes and the management of objections to Tax Office decisions	88
Review into the Tax Office’s administration of public binding advice	88
APPENDIX 2 — RECOMMENDATIONS WHICH WERE MADE FOR THE PREVIOUS GOVERNMENT’S CONSIDERATION	91
Review into the ATO’s administration of the Superannuation Guarantee Charge.....	91
Review into the non-lodgement of individual income tax returns	93
Review into the underlying causes and the management of objections to Tax Office decisions	94
APPENDIX 3 — ATO USE OF THE FACTS AND EVIDENCE WORKSHEET	95
APPENDIX 4 — ATO RESPONSE	99
APPENDIX 5 — ABBREVIATIONS	101

EXECUTIVE SUMMARY

The Inspector-General of Taxation (IGT) undertook this review to examine the Australian Taxation Office's (ATO) implementation of those recommendations with which the ATO had agreed in the following five reports released between August 2009 and November 2010:

- *Review of the Tax Office's Administration of Public Binding Advice* (publicly released 7 August 2009);
- *Review into the Underlying Causes and the Management of Objections to Tax Office Decisions* (the Objections Review, publicly released 11 August 2009);
- *Review into the Non-lodgement of Individual Income Tax Returns* (publicly released 16 October 2009);
- *Review into Aspects of the Tax Office's Settlement of Active Compliance Activities* (the Settlements Review, publicly released 1 December 2009); and
- *Review into the ATO's Administration of the Superannuation Guarantee Charge* (publicly released 24 November 2010).

Such a review of the implementation of agreed recommendation is also referred to as a 'follow up' review. It involves consideration of a range of ATO materials, processes and management representations to assess the degree to which agreed recommendations have been implemented.

In these follow up reviews, the IGT does not seek to re-review the effectiveness of the recommendations which were not fully implemented or where the underlying systems, policies or law had subsequently and substantially changed. In such circumstances, broad community concerns may necessitate the conduct of a fresh review in the future.

Overall, the IGT has concluded that the agreed recommendations in the reports considered have either been implemented by the ATO, in whole or part, have prompted ATO action toward the realisation of intended improvements or will be examined in later IGT reviews.

The IGT has also listed the recommendations made for the previous Government's consideration in appendix 2 and has noted the action taken in relation to three of these recommendations.

It should be noted that no further follow up review is anticipated with respect to existing or future reviews as this function is now being performed by the ATO's Audit and Risk Committee whose members include independent professionals from the private sector. However, the IGT has reserved the right to conduct follow up or fresh reviews where concerns emerge with respect to the implementation of agreed recommendations.

CHAPTER 1 — BACKGROUND

SCOPE AND FOCUS OF THE FOLLOW UP REVIEW

1.1 This is the report of the Inspector-General of Taxation's (IGT) review into the Australian Taxation Office's (ATO) implementation of agreed recommendations made in five earlier IGT reports publicly released between August 2009 and November 2010, each of which is listed below:

- *Review of the Tax Office's Administration of Public Binding Advice* (publicly released 7 August 2009);
- *Review into the Underlying Causes and the Management of Objections to Tax Office Decisions* (the Objections Review, publicly released 11 August 2009);
- *Review into the Non-lodgement of Individual Income Tax Returns* (publicly released 16 October 2009);
- *Review into Aspects of the Tax Office's Settlement of Active Compliance Activities* (the Settlements Review, publicly released 1 December 2009); and
- *Review into the ATO's Administration of the Superannuation Guarantee Charge* (publicly released 24 November 2010).

1.2 An additional IGT report was publicly released during the abovementioned period, namely the *Review into Delayed or Changed Australian Taxation Office Views on Significant Issues* (the so-called 'U-turns' review). A separate follow up report on that review will be published.

1.3 In the five IGT reviews considered in this report, a total of 61 recommendations for improvement were made, of which 55 were directed to the ATO with the remainder for the Government to consider. The ATO agreed to implement 52 of the 55 recommendations directed to it in whole or in part. Table 1 below shows provides a breakdown of the recommendations made in each review and those which the ATO agreed to implement.

Table 1: Numbers of recommendations made in IGT reviews

Recommendations made	IGT Reviews					
	Public Binding Advice	Objections	Non-lodgement	Settlement	Super Guarantee	Total
ATO agreed recommendations (in whole, part or principle)	6	10	3	24	6	49
Recommendations made in part to the ATO (with which it agreed) and in part for the Government to consider	0	0	0	0	3	3
ATO disagreed recommendations	1	1	0	0	1	3
Recommendations made for Government to consider	0	1	3	0	2	6
Total	7	12	6	24	12	61

1.4 The main focus of this review was to investigate the extent to which the ATO had implemented the agreed recommendations.¹ Throughout the review, particular attention was given to:

- evidence of appropriate and effective implementation of agreed recommendations; and
- ATO management policies, procedures, systems and reporting which support the implementation these recommendations.

1.5 In assessing the implementation status of particular recommendations, or the sub-part of a given recommendation (as appropriate), the IGT has generally used the following terms:

- **Implemented** – the ATO has demonstrated that the particular agreed recommendation has been satisfactorily addressed either by completing all actions needed to implement the recommendation or partially completing all actions with an appropriate commitment to complete implementation in an appropriate timeframe.
- **Partly implemented** – the ATO has commenced implementation and made substantial progress toward completion.
- **Action taken is consistent with agreed principle** – the ATO did not agree to implement the recommendation but did agree with the principle underlying the recommendation and had taken action consistent with that agreed principle.
- **Action taken is consistent with aspiration** – although the ATO did not agree to implement the action item, it had agreed to do so as an aspiration and had taken action consistent with that aspiration.
- **Action not taken to give effect to the agreed principle** – the ATO has not taken action to give effect to the agreed principle which underlies the recommendation.
- **Issue subsumed by subsequent review** – the systemic issue targeted by the original IGT recommendation has either been examined in a subsequent IGT review and recommendation has been made as a result or will be examined in a later review.
- **Not implemented** – the ATO has not made satisfactory progress or is otherwise well short of implementing the agreed recommendation.

1.6 The ATO's response to this report of the follow up review is reproduced in Appendix 4.

1.7 For each of the five IGT reviews considered in this report, Table 2 below provides a breakdown of the recommendations with which the ATO agreed (in whole, in part, in principle or as an aspiration) by IGT review and by implementation status.

1 For completeness, Appendix 1 reproduces the recommendations the Australian Taxation Office (ATO) did not agree to and Appendix 2 reproduces those made for Government to consider.

Table 2: Numbers of ATO agreed recommendations by implementation status and IGT review

Implementation status of ATO agreed recommendations	IGT Reviews					Total
	Public Binding Advice	Objections	Non-lodge ment	Settlement	Super Guarantee	
Implemented	5	9	3	18	9	44
Partly implemented	0	0	0	2	0	2
Action consistent with agreed principle	0	1	0	1	0	2
Action consistent with aspiration	0	0	0	1	0	1
Issue subsumed by subsequent IGT review	1	0	0	2	0	3
Not implemented	0	0	0	0	0	0
Total	6	10	3	24	9	52

1.8 The ATO has responded to the 52 agreed recommendations by implementing, in whole or in part, 46 of these recommendations, taking action consistent with an aspiration to implement one of the action items and taking action consistent with the agreed principle underlying two of the recommendations as well as making related improvements in ATO administrative practices and approaches. Given the broad range of topics which were the subject of these reviews, and the number of agreed recommendations in each, there was great scope for significant improvements to be made for the benefit of taxpayers. The IGT considers that the ATO's implementation of agreed recommendations is a positive outcome and is welcomed.

1.9 The remaining three agreed recommendations have been subsumed by subsequent IGT reviews as the issues underlying those recommendations have been or will be examined in those reviews.

INCREMENTAL CHANGES TO THE SYSTEM

1.10 Each review, while addressing a discrete area of tax administration, yields both direct and incremental improvements. Although direct improvements may be more readily observed, the full benefit of a review may not always be immediately apparent. Examples of this include a broad cultural shift towards better engagement and dispute resolution across the ATO that had its origins in the IGT's Objections review and the increased adoption of the facts and evidence worksheet to enhance evidence gathering and decision making arising out of the Settlements review.²

1.11 Incremental changes of this kind underlie a number of IGT reviews and may permeate through other areas of the ATO's administration in the longer term when taken with other complementary activities undertaken by the IGT. As a result, such changes establish enduring improvements to the administration of the tax system.

² Inspector-General of Taxation (IGT), *Review into the Underlying Causes and the Management of Objections to Tax Office Decisions* (2009) p 25; IGT, *Review into Aspects of the Tax Office's Settlement of Active Compliance Activities* (2009) p 26.

BROADER IMPACT OF IGT RECOMMENDATIONS

1.12 While this review focuses on the implementation of agreed recommendations, systemic issues may persist where the ATO has disagreed or only agreed in part with the IGT's recommendations for improvement.

1.13 In some cases following disagreement, the ATO has undertaken improvement activities which are informed by IGT recommendations although those activities may not have been attributed as such. For example, the ATO's recently implemented independent review process for large business audits³ follows recommendations made earlier in IGT reviews into the ATO's administration of large business audits and later in the use of early and alternative dispute resolution as well as comments made by the IGT in his *Submission to the 2011 Tax Forum*.⁴

1.14 Moreover, in certain cases where the ATO has disagreed with an IGT recommendation, the IGT has noticed that other bodies have adopted and reiterated these recommendations to the ATO. Examples of where this has occurred include:

- Recommendation 114 in the *Australia's Future Tax System* review which reiterated the IGT's recommendation that the ATO disclose Treasury material on which it has relied to determine the purpose or object of the law or policy intent;⁵ and
- Recommendation 9 in the Joint Committee of Public Accounts and Audit (JCPAA) *Report 410 Tax Administration* which reiterated the need for greater transparency in the ATO's reported timeframes on the processing of private rulings.⁶

1.15 The adoption of IGT recommendations by other bodies highlights the important role of the IGT's work to improve tax administration for the benefit of all Australians. Furthermore, it illustrates the broader impacts of the IGT's reviews and provides opportunities for the ATO to revisit and reconsider IGT recommendations with which it has previously disagreed. Such an approach should assist to minimise the risks of systemic issues re-emerging.

RE-EMERGENCE OF SYSTEMIC ISSUES

1.16 It should be acknowledged that in certain cases, underlying systemic issues which have been the subject of IGT reviews, may re-emerge or appear to re-emerge. This may be due to a number of factors, including where the ATO has not fully implemented the recommendations or where the ATO has implemented the recommendation faithfully but

3 Australian Taxation Office (ATO), *Independent Review of Large Business and International Statement of Audit Position* (January 2014) <<http://www.ato.gov.au>>.

4 IGT, *Report into the Australian Taxation Office's Large Business Risk Review and Audit Policies, Procedures and Practices* (2011) p 45; IGT, *Review into the ATO's use of Early and Alternative Dispute Resolution* (2012) p 107; IGT, *Submission to the 2011 Tax Forum* (2011).

5 *Australia's Future Tax System* (Ken Henry, Chairperson), *Final Report* (AGPS, 2009) p 654; IGT, *Review of the Potential Revenue Bias in Private Binding Rulings Involving Large Complex Matters* (2008) Recommendation 2, p 9.

6 Joint Committee of Public Accounts and Audit, Parliament of Australia, *Report 410 Tax Administration* (2008) p 107; IGT, 'Revenue Bias in Private Rulings Review', above n 5, p 11.

the underlying systems, policies or law had subsequently changed. In such cases where the IGT considers that there would be broad community benefits in doing so, a new review may be undertaken.

1.17 An example of such action occurred following the completion of the IGT's *Review into the Tax Office's Administration of Public Binding Advice*⁷ which, amongst other things, sought to provide greater taxpayer clarity on the Commissioner of Taxation's (Commissioner) approach to general administrative practice (GAP). The stakeholder concerns regarding a particular aspect of that review, namely GAPs, continued to persist and ultimately lead to a direction from the then Assistant Treasurer that the IGT undertake a further review on changed or clarified ATO views—the so-called 'U-turns' review.⁸

1.18 The follow up of the ATO's implementation of recommendations from the so-called 'U-turns' review will be published in a separate report. This is due to a large number of stakeholders who approached the IGT with ongoing concerns in this area during the course of the follow up review. Moreover, a legal challenge⁹ that had been launched in relation to the ATO's administration of so-called 'U-turns' and related administrative processes warranted a separate reporting of the follow up for that review.

1.19 Concerns have also been raised with respect to a number of other themes, including the ATO's administration of penalties,¹⁰ audit timeframes¹¹ and litigation.¹² In the case of penalties, the IGT conducted a specific review that examined the issues across all ATO business lines (BSLs).¹³ In respect of audit timeframes and litigation issues, these were examined within the context of broader reviews focusing on specific BSLs¹⁴ or other ATO approaches.¹⁵

RE-CALIBRATION OF IMPLEMENTATION ACTIONS

1.20 Tax laws and tax administration are constantly evolving to respond to the changing legal and economic environment within which they operate. Moreover, they may also be affected by a range of other factors including international developments, changes in technology and the ATO's own internal management decisions. As it is not possible to account for or predict all eventualities at the time of the original review, the ATO may need to re-calibrate its implementation of IGT recommendations, where necessary, and work with the IGT in doing so. In this respect, the IGT is able to provide insight on changing

7 IGT, *Review into the Tax Office's Administration of Public Binding Advice* (2009).

8 IGT, *Review into Delayed or Changed Australian Taxation Office Views on Significant Issues* (2010) (the so-called 'U-turns' review').

9 *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCA 887; *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119.

10 IGT, *Review into the Tax Office's Administration of Penalties and Interest Arising from Active Compliance Activities* (2005).

11 IGT, *Review into Tax Office Audit Timeframes* (2005).

12 IGT, *Review into the Tax Office Management of Part IVC Litigation* (2006).

13 IGT, *Review into the Australian Taxation Office's Administration of Penalties* (2014).

14 For example, audit timeframes were examined in: IGT, 'Large Business Audit Review', above n 4; IGT, *Review into the ATO's Compliance Approaches to Small and Medium Enterprises with Annual Turnovers between \$100 million and \$250 million and High Wealth Individuals* (2012).

15 Aspects of the ATO's approach to litigation were examined in: IGT, 'Alternative Dispute Resolution Review', above n 4.

stakeholder and environmental concerns in a timely manner to assist in the ATO's re-calibration of its implementation where required.

1.21 One example which may give rise to a need to consider re-calibration of implementation work relates to the recommendations made in the IGT's LB&I¹⁶ and SME¹⁷ reviews. Since those recommendations were made the ATO has redistributed the responsibility for administering the compliance of publicly listed and privately held companies and replaced its Large Business and International (LB&I) and Small to Medium Enterprises (SME) BSLs with the Public Groups and International (PGI) and Private Groups and High Wealth Individuals (PGH) BSLs.

NEW ATO OVERSIGHT ARRANGEMENTS

1.22 Since November 2010, the IGT has worked with the ATO to develop a new process to provide assurance that agreed IGT recommendations have been effectively implemented. In contrast to the IGT's follow up review process, the ATO's Audit and Risk Committee will now monitor implementation of external scrutineer recommendations to ensure timely execution of implementation. This Committee is informed by quarterly updates from the relevant BSLs and ATO's Internal Audit group through reports on the status of implementation. When BSLs advise that recommendations have been implemented, Internal Audit undertakes a high-level assessment of the implementation of recommendations by comparing the BSL provided evidence against the implementation plans. The Committee is then informed of the number of recommendations accepted as implemented following this assessment.

1.23 To improve the transparency of the ATO's implementation of agreed IGT recommendations, amongst other things, the ATO has recently started to communicate these to the public. This is done primarily on the ATO website where each of the IGT's reviews, from November 2010 onwards, are listed together with the status of implementation of each agreed recommendation as well as short commentary on the action it has undertaken.¹⁸

1.24 The IGT welcomes these ATO oversight arrangements to ensure that agreed recommendations are appropriately implemented. Moreover, the IGT considers that public communication of this implementation serves to instil greater confidence in the ATO as a more transparent administrator. These arrangements should also ensure that any issues which emerge in implementation are raised and discussed with the ATO's Audit and Risk Committee in a timely manner and that matters are resolved before implementation is finalised.

1.25 Accordingly, there is a reduced imperative for IGT follow up reviews of this kind. However, the IGT will continue to engage with the ATO in the following ways to ensure that these ATO oversight arrangements are effective.

16 IGT, 'Large Business Audit Review', above n 4.

17 IGT, 'SME/HWI Audit Review', above n 14.

18 ATO, *Access, Accountability and Reporting – Inspector-General of Taxation* (January 2013) <<http://www.ato.gov.au>>.

1.26 First, the IGT provides the ATO with feedback on proposed implementation plans before the ATO commences action to implement the agreed recommendations. As part of this process, the IGT highlights potential risks and areas requiring further consideration as well as providing insight on the intent of the recommendation and the issues to be addressed. Working together in this way, the ATO is better able target its actions to address the underlying issues causing stakeholder concern in a practical and more effective manner for the benefit of both taxpayers and the ATO.

1.27 Second, through relationships with taxpayers, tax professionals, industry and professional associations and academics, the IGT is well placed to receive feedback on stakeholder experiences when dealing with the ATO in more sensitive or specific areas of concern. This feedback may be conveyed to the ATO in a more timely manner to augment its processes or, where the ATO has taken action to implement agreed recommendations, enhance these actions to address any ongoing taxpayer concerns.

1.28 Third, where the IGT considers that there would be benefits in a future follow up review, he reserves the right to do so. This is not expected to be commonplace. However, a follow up review may be conducted where, for example, stakeholders raise concerns with the ATO's implementation, where implementation may no longer be appropriate owing to the changing tax administration, economic environment, or otherwise where it is observed that the specific systemic issue that was sought to be addressed by a particular review appears to have re-emerged.

1.29 Accordingly, in view of the foregoing, this follow up review is not a full audit of the ATO's implementation of the agreed recommendations. The IGT has primarily relied upon the materials provided by the ATO and, where appropriate, ATO senior management representations obtained through the review process.

CHAPTER 2 — REVIEW OF THE TAX OFFICE'S ADMINISTRATION OF PUBLIC BINDING ADVICE

INTRODUCTION

2.1 The IGT's *Review of the Tax Office's Administration of Public Binding Advice*¹⁹ (Public Advice Review) arose from persistent representations to the IGT that the ATO's implementation of the recommendations in Treasury's 2004 *Review of Aspects of Income Tax Self Assessment* (ROSA review) had not resulted in the ATO making more legally binding advice for income tax publicly available. The IGT announced the terms of reference for his review on 12 October 2007.

2.2 The Public Advice Review examined whether the ATO met expectations by making its advice legally binding for a wider range of topics, while balancing appropriate risk management considerations with the aim of improving certainty. It also examined related concepts in the law such as 'general administrative practice' (GAP), 'general guidance' and 'legally binding advice'.

2.3 This review found that since the enactment of *Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005* (2006 ROSA Law Changes), the ATO had taken a number of positive steps to implement the recommendations in the ROSA review. These steps included issuing Practice Statement Law Administration (PSLA) 2008/3²⁰ which provides detailed guidance on the level of protection against the payment of penalties and interest afforded where various ATO documents are relied upon by taxpayers. Other positive measures included the issue of detailed separate public binding rulings regarding the public and private ruling systems. However, the Public Advice Review concluded that some ATO practices in relation to its public advice did not give full effect to the changes envisaged by Treasury's ROSA review. The IGT identified a number of areas for improvement, including:

- erroneous views that rulings could not be given on certain matters;
- the level of non-binding advice the ATO had issued since the 2006 ROSA Law Changes; and
- the ATO's views and approach on determining whether a GAP existed.

2.4 Importantly, the IGT observed that more certainty could be provided to taxpayers, with little risk to government revenue, if the ATO acknowledged that a considerable quantity of the ATO's high quality published non-binding advice represented a GAP. The IGT recommended that the ATO should acknowledge key examples of its published non-binding advice (such as the supplement to TaxPack and the annual guidebook on rental properties) represented a GAP under the law. By accepting that a GAP existed, the ATO would only apply a change to the practice prospectively, which amounted to giving the relevant document a legally binding status, unless it was exploited or had been the subject of

19 IGT, 'Public Binding Advice Review', above n 7.

20 ATO, *Provision of Advice and Guidance by the ATO*, PS LA 2008/3, 20 February 2014.

tax avoidance. The ATO did not share this view. It should be noted that issue of GAPS was examined further, amongst other things, in a subsequent IGT review, namely the *Review into Delayed or Changed Australian Taxation Office Views on Significant Issues* (the so-called 'U-turns' review).

2.5 In the Public Advice Review, the IGT made four key and three subsidiary recommendations. The ATO fully agreed with two key recommendations, partially agreed with one key and three subsidiary recommendations and disagreed with one key recommendation, which is reproduced in Appendix 1.

2.6 The then Minister publicly released the IGT's report on 7 April 2009.

IMPLEMENTATION OF AGREED RECOMMENDATIONS

2.7 The following section sets out the agreed recommendations and examines the ATO's implementation to that extent.

Key recommendation 1

The Inspector General recommends that the Tax Office should:

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

ATO position — implemented

2.8 The ATO agreed with this recommendation and acknowledged that its position in relation to these matters may not be sufficiently clear.

2.9 On 27 July 2011, the ATO updated Taxation Ruling (TR) 2006/10 *Public Rulings*²¹ to specifically reference each of the matters referred to in this recommendation. Similarly, TR 2006/11 *Private Rulings*,²² was updated on the same day to refer to discretions, safe harbours and tax risk management policies. It may be noted that the changes to TR 2006/11 do not directly comment on the ATO's ability to issue private rulings on matters involving

21 ATO, *Public Rulings*, TR 2006/10, 11 July 2012.

22 *ibid.*

the *A New Tax System (Australian Business Number) Act 1999* (the ABN Act). However, private rulings were not within the scope of this IGT review.

2.10 The ATO also updated its staff guidance material to provide greater clarity on the use of public rulings:

A public ruling may cover any matter involved in the application of the provision. Such matters may also include matters relating to ultimate conclusions of fact, the Commissioner's approach to discretions, risk management material and practices authorised under the powers of general administration (sometimes called 'safe harbours'). Further information about public rulings under Division 358 of Schedule 1 to the TAA is available in TR 2006/10.²³

IGT conclusion — implemented

2.11 The IGT considers that the ATO has implemented this recommendation.

Key recommendation 3

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

ATO position — implemented

2.12 The ATO agreed with the recommendation, noting that it was already informing the community of changes to its practice statements through various other communication channels, including 'alerts' to subscribers and the *Tax Agent Newsletter*. The ATO also stated that it would inform the community when changes to its practice statements have been made and would explore how previous versions could be made readily available.

2.13 Since that time, the ATO has advised that it has employed the use of third party information service providers to disseminate this information to the community, including news and alert services maintained by a number of accounting and law firms as well as tax, accounting and legal professional bodies and practitioners.

2.14 The ATO has advised that from mid-October 2009, materially amended practice statements would contain details of their amendment histories. Those details include the date of amendment, the relevant part that has been amended, a comment to explain the change, links to previous versions and the date on which prior versions were superseded. A review of a sample of practice statements issued after October 2009 confirms this advice. Only prior versions published after July 2011 are available electronically, any versions published prior to this date will be provided by the ATO on request.

IGT conclusion — implemented

2.15 The IGT considers that the ATO has implemented this recommendation.

23 ATO, 'Public rulings', internal ATO document, undated.

Key recommendation 4

The Inspector-General recommends that the Tax Office:

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

ATO position — implemented

2.16 The ATO agreed with the first three parts of this recommendation which relate to the ATO seeking independent legal advice on the meaning of the term GAP, ensuring that the advice deals directly with matters raised by the IGT and supplementing existing guidance on this matter, subject to the legal advice it has received. The ATO disagreed with the fourth part of the recommendation.

2.17 On 13 January 2010, the ATO received the requested legal advice on the meaning of the term GAP from the Australian Government Solicitor. As a result, the ATO publicly released Taxation Determination (TD) 2011/19 *Tax Administration: What is a general administrative practice for the purposes of protection from administrative penalties and interest charges* on 27 July 2011.

2.18 The IGT has viewed a copy of that legal advice and confirms that it dealt directly with the types of documents set out in the recommendation.

IGT conclusion — implemented

2.19 The IGT considers that the ATO has implemented this recommendation to the extent it agreed to do so.

2.20 It should be noted that the underlying issue leading to the recommendation, which concerned the degree to which ATO practice and guidance provides taxpayer certainty, has emerged in a number of subsequent IGT reviews, including the so called 'U-turns' Review²⁴ and the recent IGT *Review into Improving the Self Assessment System*²⁵ (Self Assessment Review), with further recommendations made as a result.

24 IGT, 'So-called 'U-turns' Review', above n 8.

25 IGT, *Review into Improving the Self Assessment System* (2013).

Subsidiary recommendation 1

The Inspector General recommends that the Tax Office should:

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

ATO position — implemented

2.21 The ATO agreed with the first two parts of the recommendation and disagreed with the third.

2.22 With respect to the agreed parts of the recommendation, the ATO has advised that from August 2009 every public ruling now includes a notation that the 'pdf' version of the document is the only authorised version of that ruling as well as providing a hyperlink to the 'pdf' version of the ruling. The ATO has also advised that it ensures that the web (or other) version of the ruling contains the same text as the 'pdf' version. A review of a sample of public rulings issued between 1992 and 2012 confirms this advice.

IGT conclusion — implemented

2.23 The IGT considers that the ATO has implemented this recommendation to the extent it agreed.

Subsidiary recommendation 2

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

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

ATO position — implemented

2.24 The ATO disagreed with part (a) of this recommendation and commented that although it agreed with the IGT that commitment statements should be consistent in their application to different versions of the same material, the ATO considered that this may not necessarily be achieved by having identical commitment statements.

2.25 The ATO agreed in principle with parts (b) and (c), commenting that it considered commitment statements should be clear as to their application, both in terms of categories of taxpayers and the material which is covered by the statements. However, the ATO disagreed with the IGT's observation that it was not clear that TaxPack was a public ruling only for individual self-preparers. Notwithstanding this disagreement, the ATO agreed that it would seek feedback on the issues raised by the IGT in relation to part (b) and (c) through its normal user acceptance testing processes to determine whether any changes to TaxPack were warranted.

IGT conclusion — issue subsumed by subsequent IGT review

2.26 The scope of this recommendation has been subsumed by the IGT's Self Assessment Review which examined, amongst other issues, the protections afforded to taxpayers for relying on ATO advice and guidance. As a result the IGT has made recommendations for further improvement.²⁶

Subsidiary recommendation 3

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

ATO position — implemented

2.27 The ATO agreed that its policy on the effect of misleading advice should apply consistently to all binding income tax rulings and noted that this was already being achieved. However, the ATO disagreed with the IGT's view that it had departed from this policy in two recently issued Miscellaneous Taxation Rulings (MT) dealing with administrative penalties (MT 2008/1 and MT 2008/3). Notwithstanding this disagreement, the ATO commented that it would endeavour to ensure protection statements provide the intended level of protection that is relevant to the material to which it relates, and that relevant parties would not suffer any detriment as a consequence. Since this recommendation was made, the IGT has not identified or been made aware of any further ATO departures from this policy.

IGT conclusion — implemented

2.28 The IGT concludes that the ATO has implemented this recommendation to the extent it agreed.

2.29 The IGT has also examined the broader issue of taxpayer protections where ATO advice and guidance is relied upon in a subsequent review, the IGT's Self Assessment Review, and has made recommendations for further improvement.²⁷

26 See IGT, 'Self Assessment Review' above n 25, Chapter 2.

27 *ibid.*

CHAPTER 3 — REVIEW INTO THE UNDERLYING CAUSES AND THE MANAGEMENT OF OBJECTIONS TO TAX OFFICE DECISIONS

INTRODUCTION

3.1 The IGT commenced his *Review into the Underlying Causes and the Management of Objections to Tax Office Decisions* (Objections Review) as a result of stakeholder concerns with the ATO's management of the statutory tax dispute resolution process which provides internal review of ATO decisions, namely the objections process. This review followed a previous IGT review,²⁸ which found that the ATO conceded or settled a significant proportion of disputed assessments in the taxpayer's favour after the objection process but before cases were heard in the Administrative Appeals Tribunal (AAT) or the Courts. Terms of reference for this review were announced on 18 January 2007.

3.2 The causes of objections were examined to determine whether disputes could be prevented or whether the costs associated with dispute resolution processes could be reduced. Furthermore, the review examined both the extent of and the reasons for the ATO conceding cases after it had finalised its objection decisions.

3.3 It was observed that the numbers of objections were not a good indicator of the level of disputation with ATO decisions as a significant proportion were initiated by taxpayers to address administrative matters (40 per cent) rather than involving an ATO-initiated action or decision, for example, the taxpayer seeking the exercise of the Commissioner's discretion to accept a request to amend their assessment outside of the statutory time limits. Using the objection process to address such matters was considered inefficient as it increased taxpayer and ATO costs as well as imposing constraints on the development of more efficient and effective dispute resolution processes.

3.4 Furthermore, of the non-scheme cases that were subject to AAT or Federal Court appeal but did not proceed to a hearing, a large majority (75 per cent) of these were either settled or the ATO conceded the case. These statistics suggested that the objection process was not working effectively to filter out many unsustainable decisions.

3.5 As a result, the IGT made a recommendation for the then Government to consider confining objections to cases of genuine dispute between the ATO and taxpayers. Eleven recommendations were also directed to the ATO with the aim of promoting more efficient, effective and timely objections processes and ATO work practices. The recommendations included promoting greater personal contact between the ATO and taxpayers as a way of resolving disputes, revising ATO performance standards for objections and remitting the general interest charge for ATO delays in finalising objections. The ATO agreed in whole with 8 of these recommendations, agreeing in part or in principle with two and disagreeing with one. The latter disagreed recommendation is reproduced in Appendix 1.

3.6 The then Minister publicly released the report of this review on 11 August 2009.

28 IGT, 'Litigation Review' above n 12.

IMPLEMENTATION OF AGREED RECOMMENDATIONS

3.7 The following section sets out the recommendations made by the IGT and examines the ATO's implementation of those recommendations to the extent that they were agreed.

Recommendation 1

3.8 This recommendation was made for the previous Government to consider and is reproduced in Appendix 2.

Recommendation 2

The Tax Office should finalise and issue a comprehensive public statement that sets out its philosophy on, and value-add approach to, objections including the outcomes it is seeking to achieve through its management and handling of objections. It should ensure that this public statement contains a clear commitment to the following critical elements:

- *a differentiated and risk-based approach to objections handling and management;*
- *an emphasis on resolving disputes as early as possible and narrowing issues for potential external review; and*
- *the Tax Office's business intent of optimising voluntary compliance and the role of an independent internal review.*

ATO position — implemented

3.9 The ATO agreed with this recommendation and noted that work was underway at the time the recommendation was made.

3.10 In October 2012, the ATO published a Dispute Management Plan 2012-13,²⁹ which covers tax and superannuation disputes, including objections. It provides high-level principles about dispute resolution, which includes working with taxpayers to:

- resolve disputes in the simplest and most cost-effective manner taking into account the merits and the risks;
- resolve disputes as early as possible [using] early engagement and direct negotiation [to avoid, minimise and resolve disputes early]; and
- clarify issues by listening to each others' views and considering all resolution options.

3.11 Furthermore, several ATO Online Resource Centre for Law Administration (ORCLA) documents now note the impact of ATO-taxpayer interactions on the taxpayer's attitude, behaviour and level of voluntary compliance. For example 'Tax officers must ensure their communications and actions enhance the willingness of a taxpayer to voluntarily

29 ATO, *Dispute Management Plan 2012-13* (2012) <<http://www.ato.gov.au/>>.

comply with their current and future tax obligations regardless of the outcome of the dispute.³⁰

3.12 The ATO's Dispute Management plan also notes the role of objections in independent internal reviews. This is further supported by the public ATO webpage 'Correct a mistake or dispute a decision – Dispute (object to) an ATO decision'.³¹

IGT conclusion — implemented

3.13 The IGT considers that the ATO has implemented this recommendation.

Recommendation 3

The Tax Office should continue to develop work practices and procedures that recognise and respect the role of objections within an end-to-end dispute environment and promote a culture consistent with the function of internal review. The Tax Office should ensure that its work practices and procedures incorporate the following measures to implement these arrangements.

- *The respective roles of the original decision maker and objection officer are set out to ensure that they are understood and adhered to.*
- *Objection officers promptly consider whether the Tax Office view is correct and supportable on the available facts and evidence.*
- *Objection officers consider whether alternative approaches to dispute resolution, such as settlement or mediation, may be appropriate, how the dispute could be resolved without recourse to litigation, when escalation should occur and when case-conferencing could be appropriate. This should also involve providing expertise to assist objection officers in determining what approaches to use with specific cases.*
- *A fast-tracked process to external review be made available that would allow an objection decision to be expedited where resolution of the dispute at the objection stage is unlikely as it deals with the Tax Office view of the law (as expressed in a ruling, determination or other interpretative advice) and the facts are agreed.*
- *Where an objection officer has sought input from the original decision maker on material facts, evidence or technical view, and the objection officer is likely to disallow the objection, the taxpayer is given an opportunity to respond on these material facts, evidence or technical view.*
- *Objection officers have the skills and authority to decide the objection, or the ability to access appropriate skills and escalate the case to a person of sufficient authority where required. Where the Tax Office's technical view is challenged, this should result in its reconsideration by a person of sufficient technical authority.*
- *Appropriate training is developed for objection officers in line with its philosophy and approach on objections in the context of its end-to-end dispute resolution system.*

30 ATO, 'Engaging with the Taxpayer', internal ATO document, undated; ATO, 'Integrated Approach to Dispute Resolution', internal ATO document, undated.

31 ATO, 'Correct a Mistake or Dispute a Decision – Dispute (Object to) an ATO Decision' (May 2013) <<http://www.ato.gov.au/>>.

ATO position — implemented

3.14 The ATO agreed with this recommendation and noted that work was underway at the time the recommendation was made.

3.15 The ATO's work policy, practice and procedures for objection officers is governed by PSLA 2003/9³² and mandates that all ATO officers involved in technical decision making must follow the policies set out in the ORCLA.

3.16 Following the IGT's review, the ATO revised ORCLA and the related policies.

Respective roles of decision makers

3.17 The ATO's internal ORCLA page, which is titled 'Independence', states that the objection officer is the ultimate decision maker acting as an agent of the delegate (being a Deputy Commissioner of the relevant business line). The original decision maker may be consulted by the objection officer to assist in providing the taxpayer with a seamless integrated experience. However, officers are expected to exercise judgment as to the degree of consultation to ensure they properly re-examine the issue without influence or bias. The public ATO webpage 'Correct a mistake or dispute a decision — How we process your objection' states that for objections '[w]e review the facts and evidence you provide and come to a decision'.

ATO officers to promptly consider correctness of ATO view and supportable on facts and evidence

3.18 The ATO's internal ORCLA page 'Identify issues and material facts' requires objection officers to identify the issues and material facts, and at the earliest opportunity, consider if the original decision is correct and supportable on the available facts and evidence. Furthermore, the public ATO webpage 'Correct a mistake or dispute a decision — How we process your objection' states that:

Within 14 days of receiving your objection, we:

- review your objection and, if necessary, contact you or your representative to discuss it
- request further information, if required, to allow us to make a decision
- advise you if your objection will take longer than usual to decide (particularly where the objection raises complex matters) and negotiate a new due date with you for us to make the objection decision.³³

Alternative approaches to dispute resolution and case conferencing

3.19 A number of the ATO's ORCLA pages support ATO officers to consider alternative forms of dispute resolution other than through the objection system. For example, the 'Case Conferencing' ORCLA page indicates that such a conference is an opportunity to resolve a dispute as close as possible to the original decision. A case conference is therefore suitable in both the audit and objection context. The 'Working together' ORCLA page highlights the occasions when it would be appropriate to engage early with specialists, which may include

32 ATO, *The Online Resource Centre for Law Administration*, PS LA 2003/9, 28 August 2013.

33 ATO, 'Correct a Mistake or Dispute a Decision — How we Process Your Objection' (January 2014) <<http://www.ato.gov.au/>>.

technical and case leaders within the business line, or technical experts within the Review and Dispute Resolution (RDR) business line. Furthermore, one of the aims of the ATO's Dispute Management Plan is:

To increase the number of people using dispute resolution processes such as negotiation, case conferencing, mediation and conciliation.³⁴

Fast-tracking to external review

3.20 The ATO's ORCLA page 'Value in proceeding to litigation' mandates the use of a 'Risk of litigation indicator' for all objections processed through its enterprise case management system, Siebel. For objections that are expected to be disallowed or allowed in part, the 'Litigation risk matrix' must also be used. Using the matrix facilitates the engagement of Legal Services Branch ('LSB', an internal ATO department)³⁵ which can provide more complete advice on the likelihood of litigation.

3.21 The abovementioned ORCLA page also highlights the types of dispute that are usually suitable for 'early resolution' (rather than litigation), such as those where the:

- issue in dispute only involves the application of penalties;
- amount of tax in dispute is relatively low;
- ATO position is uncertain because of insufficient facts or evidence;
- dispute carries a reputation risk;
- ATO view is new or uncertain and the case is unlikely to clarify the law; or
- facts of the case are unusual or complex so that they create uncertainty in the application of the ATO view.

3.22 The above types of disputes may likely be resolved without court or tribunal intervention, and officers could seek to minimise taxpayer costs by such resolution.

3.23 Nevertheless, the above ORCLA page recognises the right of taxpayers to seek external review in the courts or tribunal. Furthermore, it lists circumstances where litigation may be appropriate, such as where:

- there is uncertainty or contention about how the law operates;
- the issue is of significance to a substantial section of the public or has substantial commercial implications for an industry; or
- it is in the public interest for the issue to be litigated.

3.24 Where any of these circumstances are present, the ATO may also consider whether it is appropriate to provide test case funding.

34 ATO, 'Dispute Management Plan 2012-13' above n 29.

35 Now incorporated into the ATO's Review and Dispute Resolution business line.

3.25 Despite this guidance, however, there does not appear to be any indication of a fast-track mechanism to allow taxpayers to promptly proceed to external review where the resolution of the dispute at the objection stage is unlikely due to a fundamental disagreement with the ATO's view of the law, notwithstanding the facts of the case may be agreed.

Where objection officers seek input from original decision maker

3.26 The ATO's internal ORCLA page 'Engaging with the taxpayer' provides for the following process to ensure taxpayers are given an opportunity to respond to further input sought from the original decision maker:

Objections to be disallowed in full or part

The tax officer must contact the taxpayer when an objection is expected to be disallowed in full or, in part due to acquiring information that the taxpayer is unaware of, which:

- concerns material facts, evidence or a technical view, or
- provides a very persuasive explanation for the basis of the audit decision.

Additional information can be obtained from any source such as the audit decision maker, or subject or industry experts from either within or outside the ATO.

The tax officer must explain to the taxpayer how the additional information influences the ATO position and what information if any, would alter the ATO position. Giving the taxpayer an opportunity to respond to the additional information is treated as a request for further information.

Objection officers to have skills and authority to decide the objection or sufficient access to those who do

3.27 As mentioned earlier in this chapter, the ATO's 'Independence' ORCLA page states that objection officers are the ultimate decision makers, acting as agents of the relevant delegate. The 'Working together' ORCLA page highlights the occasions when it would be appropriate to engage early with specialists, which may include technical and case leaders within the business line, or technical experts within the Review and Dispute Resolution (RDR) business line. However, the page does not identify the situation where the 'Tax Office's technical view is challenged' as a particular reason to engage specialists.

3.28 It is also important to note that the ATO has recently moved to a risk-based approach to determine the engagement of Review and Dispute specialists. In the case of large complex matters, the ATO has instituted an independent review³⁶ process following from the IGT's *Tax Forum* submission and review reports as mentioned in Chapter 1. The ATO had advised that approximately half of the initial cases examined in this process have resulted in the ATO agreeing to the taxpayer's position. The ATO dispute process will be examined in more detail in the House of Representatives Standing Committee on Tax and Revenue's recently announced *Inquiry into Tax Disputes*.³⁷

36 ATO, 'Independent Review of Audit Position', above n 3.

37 John Alexander MP, 'Inquiry in Tax Disputes Launched' (Media Alert, 6 June 2014).

Appropriate training for objection officers

3.29 The ATO has indicated that all relevant training packages have been reviewed and rewritten to align with the changes made to its ORCLA content.

IGT conclusion — implemented

3.30 The IGT considers that the ATO work set out above addresses all parts of the recommendation with the exception of a fast-track mechanism to allow taxpayers to promptly proceed to external review. However, this mechanism has been considered further in a subsequent IGT review and recommendation made that the ATO engage with relevant stakeholders and provide greater clarity on the use of declaratory proceedings to provide such a mechanism.³⁸

3.31 As the implementation of this subsequent agreed recommendation is subject to review by the new assurance process discussed in Chapter 1, the IGT considers that the ATO has implemented aspects of this agreed recommendation for the purposes of this follow up review.

Recommendation 4

Over the next two years, the Tax Office should work towards revising its performance standard for the finalisation of objections from the current 70 per cent in 56 days to 85 per cent in 28 days in line with other relevant Taxpayers' Charter and Tax Office standards.

ATO position — not implemented

3.32 The ATO agreed in part with this recommendation, stating that although it was committed to improving its existing service standards, it was not in a position to implement the service standards specified in the recommendation. However, the ATO planned to have made appreciable progress over the following two years, depending upon a number of factors, including a law change which would remove from the objections process those objections which are essentially no more than taxpayer requests to change their self assessed tax return.

3.33 The ATO has since advised that it has not been in a position to implement this recommendation as originally envisaged, as the anticipated law change mentioned above has not been made. However, work had been undertaken to improve the way objections are handled, including:

- developing and deploying streamlined case activity plans to support differentiated handling of different levels of risk and complexity and a related education program on the proper use of its case management system, Siebel, in this respect;
- improving access to standard letters to lower handling time and provide more consistent communication;
- reviewing work practices and eliminating unnecessary activities;

38 IGT, 'Alternative Dispute Resolution Review' above n 4, pp 61–63, Recommendation 4.3.

- reviewing the policy governing the actioning of objections to ensure mandated activities achieved a high level of service and made good use of resources;
- conducting workflow analysis for objections to identify bottlenecks which could then be addressed;
- making improvements to the classification and routing of objections;
- undertaking benchmarking to support the identification of best practice and the assessment of improvement activities;
- providing case officers and team leaders with training on active case management; and
- improving the procedures used by case officers and the material which supports team leaders and approving officers in the management of workloads.

IGT conclusion — not implemented

3.34 The IGT agrees with the ATO that it has not implemented this recommendation in the manner originally conceived. However, the IGT recognises that the ATO has taken certain actions to make improvements.

3.35 The aim of this recommendation was to address ATO delays and inadequate communication during the objection process and to make the performance standards for completing objection decisions consistent with other ATO work, such as private rulings.

3.36 The original review identified that dealing with self amendments to tax returns in the objection process was one of the reasons for ATO delays. Recommendation 1 of that review sought to remove such disputes from that process³⁹ by asking Government to consider whether the law should be changed. However, such change has not eventuated.⁴⁰

3.37 The ATO also approached the IGT when it considered that it could not strictly implement the recommendation as agreed and proposed alternative measures to decrease the timeframes. As a result, the ATO's performance against the service standard has improved since the original IGT review as the number of objections completed in 2011-12 has more than doubled since 2007-08:

Table 3: Completion timeframes for objections

Year	Numbers completed	Percentage completed within 56 days
2007-08	14,106 (16,788)*	Not specified
2008-09	15,124 (18,638)*	46%
2009-10	19,349 (21,605)*	59%
2010-11	24,255	79%
2011-12	33,272	77%
2012-13	Not specified	84%

Source: *The Commissioner of Taxation's 2011-12 Annual Report indicates different objection totals for those years as indicated in brackets.

39 IGT, 'Objections Review', above n 2, para [2.69].

40 Nick Sherry (Assistant Treasurer), 'System for Taxpayer Objections to Tax Office Decisions to be Improved' (Press Release, 2009/28, 11 August 2009).

3.38 Notwithstanding these positive ATO improvements including a recent review of service standards, the relevant ATO performance measure for 2013–14 remains unchanged at '70 per cent of objections are finalised in 56 calendar days of receiving all necessary information'.⁴¹

3.39 The IGT may reconsider this issue if it is raised by stakeholders in future.

Recommendation 6

In the early stages of the objection process:

- *the Tax Office should continue to encourage objection officers to contact taxpayers with the view of exploring opportunities for early resolution of the dispute; and*
- *where it could be of some benefit in resolving a dispute, the Tax Office should continue to adopt the practice of case conferencing, in which the objection officer, the taxpayer and Tax Office technical experts discuss the issues in dispute.*

ATO position — implemented

3.40 The ATO agreed with the recommendation and that it was continuing implementation work.

3.41 As mentioned earlier, the ATO revised its ORCLA content and related policies after the IGT's review. The ATO now has the following relevant policy and tools in place to assist its staff:

- ORCLA guidance pages have been produced to encourage ATO officers to explore early and alternative dispute resolution processes. This includes the use of case conferencing, with a page outlining the benefits of case conferencing and how it should be conducted. Furthermore, there is a 14 day timeframe for ATO officers to contact the taxpayer to request more information which should ensure that a discussion on case conferencing can occur early in the process.
- A risk-based tool (the litigation risk matrix) has been developed for objections officers to assist them identify cases where ongoing disputation is likely and closer attention may be required. Detailed work processes in the Siebel case management system and the ORCLA also require tax officers handling such cases to engage earlier with those internal experts⁴² who could assist in considering alternative approaches which narrow or resolve issues in dispute.

3.42 The ATO's Dispute Management Plan, as noted earlier, also supports the use of case conferencing.

3.43 Furthermore, the ATO has advised that its approach to dispute resolution and the policies and practices in support have been communicated through internal and external communication channels.

41 ATO, *Current Year Commitments to Service* (July 2013) <<http://www.ato.gov.au/>>.

42 Including those from the ATO's Legal Services Branch, Tax Counsel Network and Dispute Resolution Network.

IGT conclusion — implemented

3.44 The IGT considers that the ATO has implemented this recommendation.

Recommendation 7

The Tax Office should continue with its development of the Integrated Quality Framework and ensure that the quality control system:

- *includes features to properly evaluate the quality of the Tax Office's end-to-end decision making process;*
- *is applicable to key objection work practices;*
- *includes mechanisms for objection officers to provide and receive feedback as a means to improving the decision making processes;*
- *identifies whether critical objection work practices that assist in the resolution of disputes are being followed and applied consistently across the business lines; and*
- *includes examination and analysis of further information requests to ensure that relevant information is sought at the earliest opportunity.*

ATO position — implemented

3.45 The ATO agreed with this recommendation.

3.46 The ATO has advised that since the IGT's original review it has put in place the essential Integrated Quality Framework (IQF) building blocks, together with the core processes, to evaluate the quality of the ATO's end-to-end decision making process. Furthermore, the key infrastructure is now operational for Interpretative Assistance products, including objections. Whilst these described processes and infrastructure items are now in place, the ATO states that the IQF is still in a 'bedding down' period, with many business areas remaining focussed on the detailed mechanics of the IQF processes. As a result, the ATO is currently examining a new model for quality control which is less dependent on ATO products, applicable to all ATO activities and focusses on more intuitive principles. In this respect, the IQF may not be the sole means to capture insights on potential improvements to end-to-end decision making.

3.47 Therefore, the ATO is currently working on establishing more formal feedback processes between objections officers, dispute resolution officers and audit officers as well as enabling the collection of intelligence to improve both audit and objection processes.

IGT conclusion — implemented

3.48 The IGT considers that the ATO has implemented this recommendation.

3.49 The IQF may currently be the primary means to capture improvement insights, as it was anticipated by the ATO during the original review. However, the ATO is in the process of rolling out a number of quality control points in the form of early resolution and intervention activities.

3.50 The recent insights from these control points have been captured and are driving an ATO emphasis on improving audit officer capability to identify and gather relevant facts and

evidence as well as to improve early dispute resolution functions. Further information is set out later in the ATO's position on Recommendation 10.

Recommendation 8

The Tax Office should continue to implement work practices and procedures that address the following:

- when asking for information during objections, the Tax Office should ensure that information requests are tailored to the dispute on hand by clearly articulating the type of information it is seeking and the purpose and relevance of the information to the issues under examination;*
- self represented taxpayers in particular should be provided with plain language advice on making objection applications and assistance in ensuring that all relevant information and evidence is before the objection officer for reconsideration of the earlier Tax Office decision; and*
- communications between the objection officer and the taxpayer should also be aimed at improving understanding of the reason for the objection to facilitate early resolution of the dispute.*

ATO position — implemented

3.51 The ATO agreed with the recommendation and noted that work was continuing with respect to its implementation.

3.52 The ATO advises that its 'Request for Further Information' letter now includes an explanation of why the information is needed and helps to ensure that only the information required is requested.

3.53 The ATO has also restructured and rewritten the publicly available information for taxpayers intending to object to their assessment. The ATO's Disputes Policy⁴³ directs taxpayers to the 'Correct a Mistake or Dispute a Decision' webpage of the ATO website, which provides simple instructions on 'How to object to a decision' and guidance on what information should be included in the objection.

3.54 The ATO has also revised its 'Acknowledgement' and 'Notice of Decision' letters for objection cases with the aim of improving communication, interaction and engagement with taxpayers.

3.55 In addition, the earlier mentioned risk-based tool, litigation risk matrix and supporting work practices, guide officers to engage with taxpayers to resolve disputes or at least narrow the issues in contention. For example, the ORCLA page 'Engaging with the taxpayer' highlights the importance of having discussions with the taxpayer:

Interaction with the taxpayer includes phone and face-to-face discussions and provides an opportunity to:

- ... request information necessary to reach a decision

43 ATO, *Disputes Policy* (undated) <<http://www.ato.gov.au/>>.

- communicate the ATO view of the relevant facts, evidence, application of the law and penalties
- give the taxpayer an opportunity to respond to the ATO view, in particular where the view is based on information the taxpayer may not be aware of
- actively listen to the taxpayer's arguments about facts and issues
- reach a common understanding or agreement, as early as possible on:
 - many aspects of the audit or objection
 - the facts and issues of the case, especially those that may form the basis of an ongoing dispute
- explore options for resolving the issues in dispute
- discuss the future management of the issues that remain in dispute, and
- reach finality sooner.

IGT conclusion — implemented

3.56 The IGT considers that the ATO has implemented this recommendation.

3.57 However, the IGT notes that taxpayers continue to raise concerns with the IGT relating to the adequacy of explanations for information requests and ATO officers' understanding of taxpayers' positions. Whilst the ATO may issue procedures that are directed at improving such explanations and understanding, the IGT considers that other measures may also be needed to sufficiently address these taxpayer concerns. These issues have been examined in subsequent IGT reviews, such as the *Review into the Australian Taxation Office's use of Early and Alternative Dispute Resolution (ADR Review)*.⁴⁴

Recommendation 9

Aligned with the Tax Office's philosophy, approach and agreed outcomes on objections, the Tax Office should continue to design, monitor and report against a broad range of indicators and measures that allow it to evaluate the quality, efficiency and effectiveness of the objections function within its end-to-end dispute process. Some of these measures and indicators should be reported externally, where appropriate, with consideration being given to:

- *the level of disputation in the tax system including the source, cause and nature of objections;*
- *all its service standards (completion and further information requests) included in the Tax Office's annual report;*
- *outcomes; and*
- *age profiles.*

44 IGT, 'Alternative Dispute Resolution Review' above n 4.

ATO position — agreed in principle

3.58 The ATO agreed in principle with this recommendation, indicating that it would consider reporting externally any indicators and measures as part of any improvements to its reporting.

3.59 Since the original IGT review, the ATO has developed an 'objections reporting cube' (Objections Cube) which supports the extraction and analysis of data on the source, cause and nature of objections. The Objections Cube has an interrogation and intelligence function in respect of which a set of standard reports have been developed for more routine analysis.

3.60 However, before the Objections Cube becomes a source of actionable intelligence, the ATO notes that more work is needed to resolve a number of issues, including:

- data which may enhance the intelligence yielded is not currently captured or included as part of the reporting cube; and
- data integrity issues, for example existing data fields are not always completed correctly by relevant officers.

3.61 The ATO has advised that additional work has been done to identify further information that could be used to better identify how the end-to-end process can be improved. Accordingly, the ATO is now capturing information regarding events that took place during the course of the audit which impact the objection as well as information regarding the major factors influencing the objection outcome.

3.62 The abovementioned standard reports also provide information regarding age profiles, stock on hand and objection outcomes. Ongoing consideration is also given to what is suitable for external publication.

3.63 To provide further information regarding the end-to-end process, the ATO has also published three issues of a publication, *Your Case Matters*, which provides some data and analysis on ATO litigation over recent years which includes data on objections.⁴⁵

IGT conclusion — action taken is consistent with agreed principle

3.64 The recommendation aimed to increase transparency of the nature, level and management of disputation in the tax system.

3.65 There is limited public information on the age profile of objections or their outcomes, although such information is reported internally on a routine basis.

3.66 The ATO's development of the Objections Cube (an internal reporting tool) also facilitates a better understanding of trends and areas that may require a particular focus. The Objections Cube has potential to increase management awareness of the underlying causes and levels of objections.

3.67 The IGT considers that once the Objections Cube is refined to provide reliable information on the causes, outcomes and aging, the ATO will be better positioned to externally report more detailed information about objections. Accordingly, the IGT considers that the ATO action outlined above is consistent with the agreed principle.

45 ATO, *Your Case Matters* (3rd ed, 2013).

Recommendation 10

The Tax Office should adopt a more corporate emphasis and better analyse the trends and outcomes of objections and litigation as a source of improvement of its end-to-end dispute resolution process and feedback to both objection officers and primary decision makers. This analysis should include the identification of potential systemic issues in the end-to-end dispute resolution process and the effecting of improvements.

ATO position — implemented

3.68 The ATO agreed with the recommendation and work continues with its implementation.

3.69 As part of the response to the recommendation, the ATO conducted the 'Objections Review project' to determine underlying causes and opportunities to improve upstream (review and audit) work processes. This review project provided findings such as:

- Better ongoing communications with taxpayers, both verbally and in writing, would have assisted staff to obtain the right information during the audit phase and would have reduced objection rates and allowed-in-full rates.
- Better audit communications to coherently explain our substantive and penalty decisions may have also minimised objections.
- In some cases, our reason for decision (both substantive and penalty) as seen on the case file, could have been clearer and more coherent.
- Increased efforts aimed at improved informal and formal information gathering during audits are required.
- Constant messaging to taxpayers and tax professionals around providing timely, relevant information during audits to prevent costly disputes, may have had a positive impact on objection numbers.⁴⁶

3.70 Particular areas for ATO officer training were identified as a means to improve work practices to minimise objections. For example, it has rolled out 'Active Case Management' training to relevant compliance staff.

3.71 In addition to the above work, the ATO has advised that the Interpretative Assistance Capability and Improvement Unit staff have processes in place to analyse information captured for formal reporting. The ATO has also developed a series of standard reports, as mentioned earlier, for use by business lines in respect of their cases. These reports cover financial reporting, such as stock on hand and finalised stock, and reporting on drivers for objections, such those that are audit sourced, client sourced or corporate drivers.

3.72 Since November 2013, the ATO has used an 'early assessment and resolution' process when large corporate taxpayers appeal ATO decisions (as part of the Siebel system and work processes mentioned earlier). This process involves a senior ATO dispute resolution officer working with the business line officers and the taxpayer and/or their

46 ATO, '2011-12 Objections Review – June 12 Update', internal ATO document, September 2012.

representatives to narrow issues in dispute. The ATO advises that formal feedback arising from this process has been provided to original business line decision makers and resulted in the resolution of over 50 per cent of cases prior to formal hearing.

3.73 Following the early assessment and resolution processes, the ATO had also identified an opportunity to improve the evidence identification and gathering capability of compliance officers more broadly. As a result, the ATO is considering embedding several RDR officers with litigation experience within compliance teams dealing with more complex large business audits. It is envisaged that such officers will provide on-the-ground early guidance with respect to the relevance and robustness of evidence sought by compliance staff. The ATO has also advised that, on a six-monthly basis, it intends to review the insights drawn from its early assessment and resolution processes to identify further improvement work.

3.74 Furthermore, following the IGT's ADR Review,⁴⁷ the ATO had trialled a project in which trained ATO officers may be called upon to assist taxpayers and ATO compliance officers resolve disputes at the objection stage – known as 'in-house facilitation'. As a result of the success of this pilot, the ATO advises that from April 2014 in-house facilitation will be extended to disputes arising during audits and in any area of the ATO.

IGT conclusion — implemented

3.75 The IGT considers that the ATO has implemented this recommendation. The ATO has completed work in implementing and refining processes to capture information, such as the Objections Cube and the improvement work identified by the ATO's Objections review project.

Recommendation 11

The Tax Office should review its current audit work practices and training programs in relation to the role of original decision makers to ensure that they align with the Tax Office's philosophy and approach to end-to-end dispute resolution and that they conform appropriately to the Administrative Review Council Best Practice Guides. In particular, the Tax Office should identify critical audit work practices that can have significant implications for dispute resolution at the objection and litigation stages. It should also encourage open and direct communication between the parties and the timely exchange of information and views.

ATO position — implemented

3.76 The ATO agreed to conduct a review of existing audit work practices and training programs to consider the matters raised in the recommendation.

3.77 Since that time, the ATO has advised that it is continuing towards fully implementing the recommendation as work practices are further refined. Although the ATO did not strictly conduct a formal review of the audit work practices, it did conduct the earlier mentioned Objections Review which identified areas for improvement in some of the critical audit work practices.

47 IGT, 'Alternative Dispute Resolution Review' above n 4, Recommendation 3.6.

3.78 As a result of the IGT's recommendation, the ATO has developed, deployed and is further refining the facts and evidence worksheet as a key tool supporting the gathering, documentation and consideration of facts and evidence throughout the life of the audit. This worksheet has been mandated for cases that are more likely to be complex or contentious to assist the original decision maker to arrive at a decision that is sustainable, timely and well-documented.

3.79 The ATO has advised that for certain business lines, it is currently developing a suite of pre-populated elements for the facts and evidence worksheets to improve productivity. An example of pre-populated facts and evidence worksheet templates are the Indirect Tax (ITX) business line's templates that have been developed as a consequence of *Commissioner of Taxation v Multiflex Pty Ltd*.⁴⁸ An Information Technology (IT) solution is also being investigated in an attempt to achieve productivity improvements in relation to the use of the facts and evidence worksheets. The ATO has stated that ongoing work is underway to review the quality and effectiveness of its use of the facts and evidence worksheet, with a focus on improving case decisions and resolving disputes earlier.

3.80 The ATO has developed and conducted training programs and packages across business lines as well as continuing to refine and improve its training materials. For example, the ATO's Learning and Development team is also reviewing the facts and evidence worksheet training packages, with a particular focus on evidence gathering.

3.81 Furthermore, the ATO considers that the Dispute Management Plan should foster a common understanding between taxpayers and ATO officers (whether review, audit or objection officers) by raising awareness of the impact of improved communications at the time of the original decision. For example, the ORCLA page 'Engaging with the taxpayer' encourages ATO officers to make phone or face-to-face contact.

3.82 From 1 July 2012, the ATO started rolling out its dispute risk procedures (after being piloted) as 'business as usual' within the active compliance business lines. These procedures are designed to assist ATO officers in the early identification of a likely dispute and manage that risk through certain procedures such as specific documentation and engagement of experts. The procedures have been incorporated within the active compliance case product procedures. The dispute risk documents have also been published onto the ATO's Work Processes intranet site.

IGT conclusion — implemented

3.83 The IGT considers that the ATO has implemented this recommendation.

48 [2011] FCAFC 142.

Recommendation 12

The Tax Office should continue with its development of the Integrated Quality Framework and ensure that the quality control system:

- *adequately measures and provides for the continuous improvement of the overall quality of original decision making;*
- *includes identifying whether critical audit work practices and processes are being followed and applied consistently across business lines;*
- *assesses how well original decision makers have identified and considered the issues, the relevant facts, the reliability and weight of evidence supporting the findings of facts and the application of the law; and*
- *includes a causal analysis of quality in relation to the end-to-end process, so that comparisons between audit and related objection decisions can be undertaken, including an evaluation of the effect of internal review on original decision makers so as to minimise the potential negative effects of internal review.*

ATO position — implemented

3.84 The ATO agreed to this recommendation and has advised that the essential IQF building blocks are now in place, the core processes implemented and key infrastructure operational for active compliance products.

3.85 Findings from these IQF processes are intended to be used to continuously improve the quality of audit decisions as they are designed to evaluate the quality of audit decisions and adherence to key audit work practices in relation to a range of quality assessment criteria. For example, the 'Administrative Soundness' criteria for active compliance work assesses conformance to work practices:

Any potential questions on the administration of the case/decision making process must be defensible. The manner in which decisions have been arrived at must follow all relevant administrative law, policy and directions. To ensure a case is administratively sound, staff are required to consider and follow as directed:

- practice statements including relevant penalty decision policies and record keeping requirements.
- sub plan, capability, line and project practices and procedures.

3.86 Business line capability development processes and assessment moderation activities are designed to ensure that assessors are appropriately skilled to undertake field assessment work. Where assessment data indicates that some non-adherence has occurred, it is provided to relevant case participants and made available for analysis at a systemic level.

3.87 The ATO has advised that work is also underway within its business lines to establish more formal feedback between objections officers and audit officers as well as to enable collection of systemic intelligence to improve both audit and objection processes. An example of this is found in the IQF community involvement process, where the ATO has increasingly seen the uptake of opportunities to assess casework from audit through to corresponding objection during the past two years. Another practice favoured by community representatives is to include officers from both active compliance and interpretative

assistance (where objections officers are located) on the same quality assessment panel, for the expertise they bring and for the potential learning opportunities this provides.

3.88 According to the ATO, the implementation of IQF processes to date have provided business lines with additional sources of intelligence as well as core quality management infrastructure. The next step will be for business lines to fully utilise this intelligence and infrastructure as part of disciplined analysis and improvement activity.

3.89 The earlier mentioned Objections Cube will also assist the ATO to understand the reasons why original decisions are reversed or modified on objection.

IGT conclusion — implemented

3.90 The IGT considers that the ATO has implemented this recommendation.

CHAPTER 4 — REVIEW INTO THE NON-LOGGEMENT OF INDIVIDUAL INCOME TAX RETURNS

INTRODUCTION

4.1 In this review, the IGT examined the ATO's management of the non-lodgement of individuals' personal income tax returns. The review was undertaken in response to stakeholder concerns that large amounts of non-lodged tax returns may pose a risk to the integrity of the tax administration system. The issues that the IGT identified in independent research were also a factor in deciding to conduct this review. Terms of reference for the review were released on 12 October 2007.

4.2 The review observed that every year between 1.2 and 1.5 million individual taxpayers failed to lodge their tax return by the required dates. However, it also noted that this taxpayer failure was not attributable to ATO mismanagement but rather a function of the self assessment system in which nearly all taxpayers are required to lodge annually and where the ATO's resourcing does not permit it to pursue all non-compliance. The IGT noted a key reason for the large accumulation of outstanding tax returns was that the Commissioner has limited powers to exempt individuals from lodging returns.

4.3 The review observed that while a significant number of returns are not lodged annually, these returns did not represent a high risk to revenue or the integrity of the tax system. Furthermore, these non-lodging taxpayers were of a low risk, based on their profile and the ATO had strategies to identify taxpayers of higher risk.

4.4 Accordingly, the IGT's review found that, at the time, the ATO was managing the non-lodgement of individual returns well and with sophistication within the legislative framework. Notwithstanding this finding, the accumulation of outstanding low-risk tax returns can create an incorrect impression that a risk exists that needs to be addressed. The independent research, conducted at the time of the review, also found that 'the community expects the [ATO] to maintain individual non-lodgement at a slightly better level' than it was achieving at the time.⁴⁹

4.5 The IGT's review identified a number of areas for ATO improvement, including the need for the ATO to enhance its public reporting on the levels of non-lodgement, clearer identification of high and low risk non-lodgers on ATO systems and increasing the use of default assessments in appropriate circumstances. The IGT also considered that the findings of the review and the research could usefully be considered in the *Australia's Future Tax System* review, which had sought input on income tax return simplification, including the removal of the requirement for certain taxpayers to lodge. The IGT also made recommendation for the previous Government to consider whether support for the ATO's use of third party data to identify non-lodgers should be increased and whether the failure-to-lodge penalty regime, particularly for high-risk taxpayers, should be strengthened.

4.6 In all, the IGT made six recommendations, three of which were directed to the ATO. The ATO agreed with all three recommendations. The remaining three recommendations, key recommendations 1, 3 and 5, were made for the previous Government to consider.

4.7 The then Minister publicly released the report for this review on 16 October 2009.

49 IGT, *Review into the Non-lodgement of Individual Income Tax Returns* (2009) p 4.

IMPLEMENTATION OF AGREED RECOMMENDATIONS

4.8 The following section sets out the agreed recommendations and examines the ATO's implementation to the extent that they were agreed.

Key Recommendation 1

4.9 This recommendation was made for the previous Government to consider and is reproduced in Appendix 2.

Key Recommendation 2

The Inspector-General recommends that the Tax Office supplement its current reporting on lodgement compliance by a periodic report on the broader outcomes and impacts being achieved on the level of non-lodgement in the community.

ATO position — implemented

4.10 The ATO agreed with the recommendation, noting that the Commissioner would create an income tax lodgement report each financial year. The report would draw from existing data sources and other ATO research to provide an analysis of 'lodgement on time', 'late lodgement' and 'not lodged returns'.

4.11 Accordingly, the ATO adopted a number of initiatives to supplement its reporting on the level of non-lodgement in the community, the impacts of non-lodgement and the outcomes achieved through the ATO's compliance work in this area. Specifically, these initiatives are the:

- income tax lodgement annual overview;
- enterprise reporting program of work for trusted reporting;
- targeted risk report; and
- use of external consultancy reports; and
- community perception surveys.

Income Tax Lodgement Annual Overview

4.12 In December 2010, the ATO produced its first Income Tax Lodgement Annual Overview report (the 2010 Report). This internal report provided an overall picture of the lodgement trends between 2004-05 and 2008-09 (inclusive) by drawing on statistical trend data in lodgement activity from a number of different sources. The 2010 Report also provided a broad overview of the ATO's compliance work to address non-lodgement.⁵⁰

4.13 The general observation arising out of the 2010 Report was that there appeared to be an upward trend in lodgements than those required to lodge and also in lodgements being

50 ATO, 'Income Tax Lodgment – July 2009 – June 2010', internal ATO document, undated.

made on time. The 2010 Report also measured the ATO's compliance strategies in relation to lodgement compliance across a number of taxpayer segments as well as supporting future directions to enhance lodgement compliance.

4.14 Since 2010, the ATO has included these statistics in the annual Income Tax Health of the System Assessment (HOTSA) process.⁵¹ The HOTSA process draws on a number of different resources to provide a structured mechanism to identify and assess risks in different areas of the ATO and make decisions regarding operational shifts to address these risks.

Enterprise Reporting Program of Work for Trusted Reporting

4.15 In early 2011, the ATO commenced the 'Enterprise Reporting Program of Work for Trusted Reporting'. One of the reports produced as part of this program was the Lodgment Performance Income Tax Report⁵² which is intended to provide a high level summary of two key measures for lodgement performance, being:

- lodgements as a percentage of anticipated population; and
- lodgements on time.

4.16 From July 2013, the ATO incorporated an Income Tax Return Not Required Analytical Model (the Model) into the enterprise lodgement reports to identify the expected or 'anticipated' population of taxpayers required to lodge income tax returns. This Model predicts those taxpayers not required to lodge and removes them from the statistical analysis of outstanding returns to enable a more accurate picture of non-lodgement risk.

4.17 The Model's use and outputs are discussed further below in relation to Key Recommendation 4.

Targeted Risk Reporting

4.18 As part of its risk management process, the ATO also undertakes specific targeted reporting which focuses on lodgement performance in the individuals' market segment for both income tax returns and business activity statements. The results of this monthly reporting are contained in the 'Individuals Segment Lodgment Performance Report', which includes information regarding:⁵³

- the number of active taxpayers and returns lodged;
- comparative data for returns lodged on time and those lodged late using an age basis (for example, 28 days after due date and 90 days after due date); and
- comparative data for returns lodged on time and lodged late using the percentage of returns that resulted in credit, debit or nil assessments.

4.19 This internal ATO report also presents data on different performance levels between self-preparers and those lodging through tax practitioners who may have access to extended lodgement timeframes. The ATO considered that such reporting provides better data

51 ATO, 'Income Tax Lodgement Approach and Treatment', internal ATO document, undated.

52 ATO, *Lodgment Performance Income Tax Report* (August 2012).

53 ATO, *Individuals Segment Lodgment Performance Report* (11th ed, May 2011).

regarding the categories of non-lodgers and the corresponding risks posed by their non-lodgement of returns.

External consultancy reports

4.20 In May 2010, the ATO engaged a consultancy firm to research the attitudinal and behavioural drivers of lodgement, examining such things as community perceptions on consequences for non-lodgement, the ATO's effectiveness in detecting non-lodgement and qualitative differences between taxpayers who lodged on time and those who did not.⁵⁴

4.21 Another research study commissioned by the ATO found, amongst other things, that 72 per cent of survey participants believed they would be 'caught by the ATO' if they did not lodge their tax return. This percentage had decreased slightly from when a similar survey was conducted in 2006.⁵⁵

4.22 The ATO has advised that at present no further research of this kind is planned.

Community Perceptions

4.23 The ATO also gauges community perceptions on a range of issues including perceptions on lodgement obligations⁵⁶ as part of its Annual Research Program. However, the survey does not specifically seek to understand community perceptions on the ATO's work in relation to enforcing non-compliance in relation to lodgement obligations.

IGT conclusion — implemented

4.24 The IGT considers that the ATO has implemented this recommendation.

Key Recommendation 3

4.25 This recommendation was made for the previous Government to consider and is reproduced in Appendix 2.

54 DBM Consultants, *Compliance with Income Tax Return Lodgment Obligations Research Final Report* (June 2009) <<http://www.ato.gov.au/>>; DBM Consultants, *Compliance with Income Tax Return Lodgment Obligations Research Tax Agents and Businesses Quantitative Study* (June 2010) <<http://www.ato.gov.au/>>; DBM Consultants, *Compliance with Income Tax Return Lodgment Obligations Research Individuals Quantitative Study* (August 2010) <<http://www.ato.gov.au/>>.

55 Colmar Brunton, *Tracking the Individuals Segment* (October 2009) p 75 and 76 <<http://www.ato.gov.au/>>.

56 See for example: ATO, *Community Perceptions Survey 2012* (June 2012) p 48 <<http://www.ato.gov.au/>>; ATO, *Micro Business Perceptions Survey 2012* (June 2012) p 8 <<http://www.ato.gov.au/>>.

Key Recommendation 4

The Tax Office should flag low-risk non-lodged returns in its systems and should identify them as a separate category in its management reports to enable a clearer focus on higher risk non-lodged returns.

ATO position — implemented

4.26 The ATO agreed with this recommendation.

4.27 In response to this recommendation, the ATO has made progress towards flagging and separating low-risk non-lodged returns so that focus may be directed towards higher risk non-lodged returns. In doing so, the ATO has:

- continued the testing and refinement of the Model; and
- implemented an Assessed Low Risk population table and an Assessed Low Risk accounting treatment indicator on the ATO's system.

Income Tax Return Not Required Analytical Model

4.28 In 2009, the ATO commenced the development of new reporting capability based upon implementation of the Model. As discussed earlier, the Model was developed to identify, amongst other things, whether a taxpayer was either required to lodge (R2L) or not required to lodge (NRQL)⁵⁷ and enable the ATO to identify and exclude from the non-lodgement population those taxpayers who are not required to lodge. The aim was to provide a more accurate picture of individuals' non-lodgement and a clearer focus on higher risk non-lodged returns.

4.29 The ATO has advised the IGT that it has completed the development of the Model and has evaluated its effectiveness by comparing actual lodged overdue returns (between March 2012 and June 2012) against the original risk scores allocated to the particular taxpayer by the Model. In doing so, the evaluation sought to validate whether the Model had correctly predicted a taxpayer as either being required to lodge or not required to lodge.

4.30 The ATO evaluation also examined both strike rates and miss rates. Strike rates assessed the extent to which the Model correctly classified the taxpayer. Miss rates assessed the extent to which the Model misclassified a taxpayer. The ATO has provided statistics on the combined strike rates for R2L and NRQL for each of these taxpayer groups at the 'client' and 'form' levels. The client level strike rate indicates the effectiveness of the models to accurately determine whether a particular taxpayer is required to lodge in a given year. The form level strike rate indicates the effectiveness of the models to accurately identify whether certain income tax returns need to be lodged.⁵⁸

4.31 The two types of strike rates are necessary and complimentary as a given taxpayer may be associated with multiple non-lodged income tax returns which may not be required to be lodged owing to the different capacities or roles the individual may be performing – for example, a partner in a partnership.⁵⁹

57 ATO, 'TPALS NRQL Analytical Model Evaluation', internal ATO document, September 2012.

58 ATO, communication to the IGT, 14 May 2013.

59 *ibid.*

4.32 Lastly, the evaluation examined both R2L and NRQL in relation to a range of taxpayer segments including individuals, companies, superannuation funds, taxable trusts, non-taxable trusts and partnerships. Moreover, it applied relevant risk designations based on the quantum of tax payable or refundable on the return. The ATO set a baseline benchmark of an 80 per cent strike rate and measured the Model's performance against this benchmark.

4.33 The ATO's statistics on the strike rates are set out in Table 4 and Table 5 below.⁶⁰

Table 4: Required to Lodge (R2L) strike rates at the client and form levels

Client Type	R2L Strike Rates at the Client and Form Levels (%)					
	Individuals	Companies	Superannuation Funds	Taxable Trusts	Non-Taxable Trusts	Partnerships
Client Level	72	67	70	22	47	66
Form Level	70	62	71	22	43	59

Source: ATO

Table 5: Not Required to Lodge (NRQL) strike rates at the client and form levels

Client Type	NRQL Strike Rates at the Client and Form Levels (%)					
	Individuals	Companies	Superannuation Funds	Taxable Trusts	Non-Taxable Trusts	Partnerships
Client Level	78	87	97	92	92	87
Form Level	81	89	96	94	94	91

Source: ATO

4.34 In line with the above figures, the ATO's evaluation acknowledged that, while the R2L strike rate was better than random selection, some further improvements were warranted.⁶¹ Steps were taken to improve the Model's strike rate and, in July 2013, the Model was incorporated into the current reporting framework on low risk taxpayers. This framework is part of the ATO's annual HOTSAs process⁶² and provides an enterprise-wide view of the lodgement population and associated lodgement risks.

Assessed Low Risk population table and Assessed Low Risk accounting treatment indicator⁶³

4.35 In implementing this recommendation, the ATO initially used existing analytical models and business rules to identify an Assessed Low Risk population which was used to populate a table in the ATO's Enterprise Data Warehouse. This Assessed Low Risk population table enabled the Tax Practitioner and Lodgment Strategy (TPALS) business line to report on lodgement compliance for identified low risk taxpayers. This table was not used for reporting purposes.

4.36 Since March 2012, the ATO deployed an Assessed Low Risk accounting treatment indicator within the Integrated Core Processing system, which may be applied against a taxpayer's file for a given specified period. This indicator enabled automatic and manual identification of Assessed Low Risk taxpayers. These taxpayers were then excluded from compliance activity for the specified time period.

4.37 The ATO has advised, however, that the ability to manually invoke the Assessed Low Risk accounting treatment indicator required further testing and evaluation before

60 ATO, 'Model Evaluation', above n 57.

61 *ibid*, p 23.

62 ATO, communications to the IGT, 12 October 2012 and 4 March 2013.

63 ATO, communication to the IGT, 12 October 2012.

being employed for more general operation. However, this further work was put on hold in February 2013 while the ATO focused on finalising the evaluation and deployment of the Model discussed earlier.

4.38 Following this evaluation the ATO concluded that the continued use of the Assessed Low Risk population table in the Data Warehouse was not warranted as the Model, combined with annual data matching, identifies and excludes low risk taxpayers from compliance activities with a sufficient degree of accuracy.

4.39 Where it is determined that the taxpayer does not have a requirement to lodge for a particular year, a Return Not Necessary (RNN) indicator is applied against the taxpayer's file. Taxpayers identified as having an RNN indicator are then excluded from compliance activities in relation to that return.

IGT conclusion — implemented

4.40 The IGT considers that the ATO has implemented this recommendation.

Key Recommendation 5

4.41 This recommendation was made for the previous Government to consider and is reproduced in Appendix 2.

Key Recommendation 6

The Tax Office should progressively increase, where appropriate, the use of default assessments to further support lodgement compliance.

ATO position — implemented

4.42 The ATO agreed with this recommendation and, in response, commenced its work in relation to issuing default assessments for:⁶⁴

- all micro enterprises, small to medium enterprises and individual taxpayers that fall under the Risk to Revenue project in 2010-11;
- child support agency clients;
- superannuation funds; and
- cash economy businesses.

4.43 The ATO also refined and expanded the default assessment process following the IGT's review.⁶⁵ The ATO uses this process as part of an end-to-end treatment strategy for persistent non-lodgers. The current process for considering and issuing such default assessments is outlined in Figure 1 below.

4.44 Relevantly, Figure 1 illustrates that the ATO will issue a default assessment warning letter where data exists to create a default assessment and the taxpayer has failed to respond to lodgement enforcement activity, such as ATO reminder letters and telephone enquiries. This letter sets out the amount of the default assessment and the applicable penalties.

64 Ibid, p 9.

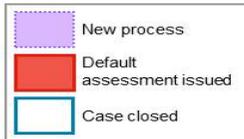
65 ATO, communication to the IGT, 9 December 2013.

Figure 1: Default assessment process map



Default Assessments Process Map

LEGEND



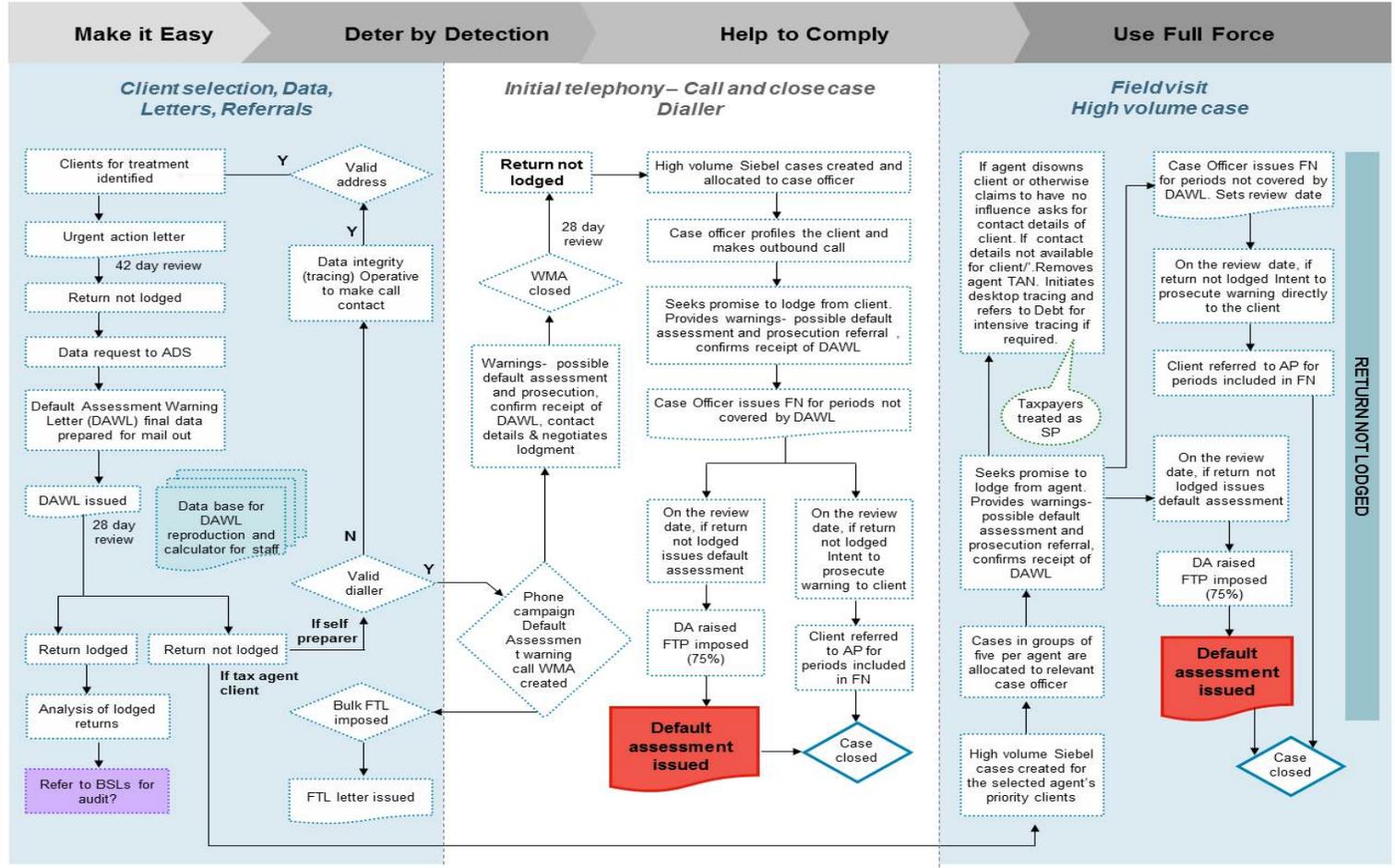
GLOSSARY

DA	Default Assessment
DAWL	Default Assessment Warning Letter
SP	Self Preparers
FTL	Failure to Lodge penalty
FTP	Failure to Provide
OA	Operational Analytics
WM	Siebel Work Management
CM	Siebel Case Management
WMA	Work Management Activity

Siebel cases can be closed any time during the lifecycle of the case if lodgments are obtained

Cycle time frame of Siebel Call and Close cases – 9 days

Cycle time frame of Siebel default assessment case product – 120 days



Process map current as at Friday 5 October 2012

Source: ATO

4.45 The ATO has advised that approximately 50 per cent of taxpayers who receive this warning letter respond by lodging their return. It also recognises that a proportion of taxpayers are not contactable.

4.46 The remaining group of taxpayers may be issued default assessments, depending on the resources available to manually create these default assessments and deal with subsequent taxpayer contact and objections. The ATO intends to automate this process and, therefore, envisages that it will be able to issue greater numbers of these assessments in future.

4.47 To illustrate trends in its use of default assessments, the ATO has provided the IGT with the numbers of default assessments issued between the 2008–09 financial year to 2012–13 year to date (YTD), as at 14 May 2013⁶⁶ across three taxpayer groups, being companies, individuals and superannuation funds. These are outlined in the Table 6 below.

Table 6: Number of default assessments issued between 2008–09 to 2012–13 YTD

Client Type	Number of default assessment raised in various financial years					Total
	2008–09	2009–10	2010–11	2011–12	2012–13 YTD	
Companies			144	1496	279	1919
Individuals	66	55	392	1067	796	2376
Superannuation Funds	3	4	126	110	6	249
Total	69	59	662	2673	1087	4544

Source: ATO

4.48 The ATO attributes the increase in the default assessments it issued over the 2009–10 to 2011–12 financial year period to the expansion in scope and capability of its use of third party data to identify instances of unreported or under-reported income.⁶⁷

4.49 In the 2012–13 year, the ATO planned to issue approximately 60,000 default assessment warning letters. Based on previous experience, it anticipated that 30,000 taxpayers would lodge after receipt of the letter and that 22,500 taxpayers may then be subject to default assessments. However, the YTD (as at 14 May 2013) data suggests there has been a decrease in the number of default assessments issued. This decrease may be due to a number of different factors, including the ATO's expanded use of data matching activities and associated compliance treatments as well as higher proportions of taxpayers responding to default assessment warning letters.

IGT conclusion — implemented

4.50 The IGT considers that the ATO has implemented this recommendation.

4.51 The IGT notes that with increased automation, the ATO's lodgement compliance work may become more efficient and address the risk of non-lodgement in a more timely manner.

4.52 The IGT also acknowledges that with greater use and expansion of the ATO's data matching program, opportunities may exist for the ATO to identify and engage with taxpayers through different compliance approaches other than default assessments.

⁶⁶ ATO, communication to the IGT, 14 May 2013.

⁶⁷ *ibid.*

CHAPTER 5 — REVIEW INTO ASPECTS OF THE TAX OFFICE'S SETTLEMENT OF ACTIVE COMPLIANCE ACTIVITIES

INTRODUCTION

5.1 The IGT commenced his *Review into Aspects of the Tax Office's Settlement of Active Compliance Activities* (Settlements review) as a result of concerns raised by industry, tax practitioners, the public and the Parliament which related to the ATO's settlement of active compliance activities. Community criticism and media attention regarding the ATO's settlement activities reflected a range of perceptions, including a lack of transparency in the conduct of settlements, large taxpayers getting 'better deals' and settlement activities being used to 'quarantine' matters that might otherwise erode the ATO's public position on issues. The terms of reference for this review were announced on 12 October 2007.

5.2 The review examined information, systems and processes that related to the ATO's settlement activities of 15,637 active compliance cases over a five-year period (2003-04 to 2007-08 income years). The review examined the reasons for the ATO's departure from initial audit positions in settlement activities and why those settled positions were not reached earlier in the audit process. The review specifically examined files relating to 2,773 cases involving a total reduction of \$3.6 billion to the ATO's initial active compliance position to agreed liabilities of \$1.56 billion in settlement.

5.3 The IGT considered all stages of the ATO's settlement process and administration, including the impact of upstream processes on settlement activities in the context of the ATO's broader dispute management process. Whilst the ATO had a substantial framework of policies and procedures for the conduct and finalisation of active compliance activities, it could improve the transparency and taxpayer experience as well as minimise delays and taxpayer compliance costs.

5.4 The IGT found that the issues and potential improvements to the ATO's settlement processes fell into two broad categories being 'code of settlement' processes and 'active compliance' processes. For example, areas requiring improvement included communication of decisions, the robustness of initial ATO views and auditors' application of those views as well as auditors' decision making on primary tax and penalties.

5.5 As a result, the IGT recommended 24 'action items' which were aimed at improving:

- the administration of settlement activities;
- settlement and audit processes and their transparency; and
- the correctness and consistency of audit and settlement decisions.

5.6 The report of this review was publicly released by the then Minister on 1 December 2009.

5.7 During this follow up review, the original ATO business lines were the subject of a restructure and renamed to reflect those changes. The main changes are noted below:

- the Law and Practice (L&P) unit was subsumed into the Review and Dispute Resolution (RDR) business line; and
- the Large Business and International (LB&I) and Small and Medium Enterprises (SME) business lines were reorganised into the Public Groups and International (PGI) and Private Groups and High Wealth Individual (PGH) business lines.

5.8 This chapter refers to the former names of the relevant ATO units and business lines for the benefit of consistency with the original IGT report.

IMPLEMENTATION OF AGREED ACTION ITEMS

5.9 The original Settlements review report used an agreed 'action item' structure rather than a recommendation structure. The following section sets out these action items and examines the ATO's implementation of them. The ATO agreed to all action items, either in full or in principle.

Action item 1

With the aim of improving the quality of settlements recording, the Tax Office will complete a six-month body of work that commenced in February 2009 that focuses on putting in place 'immediate next step' improvements to raise the quality of settlement register recording (in terms of completeness and accuracy) and reporting to Parliament for the 2008-09 year.

ATO position — implemented

5.10 The ATO agreed with this action item and commenced the 'Standard Settlements Recording' (SSR) project which was completed prior to the public release of the IGT's initial Settlements review report. The key aims of the SSR project were to improve the accuracy, completeness and consistency of data recorded on the settlement register through standardisation of recording and reporting practice as well as the provision of supporting infrastructure for all ATO settlements. The project implemented the following 10 deliverables:

- centralisation of the settlement recording function within each business line;
- improved Statements of Compliance;
- integrity measures on the timeliness of data recording post 1 July 2009;
- reconciliation of Settlement Register data with source data on all settlements between 1 July 2008 and 30 June 2009;
- ensuring all finalised settlements between 1 July 2008 and 30 June 2009 were recorded on the register;
- establishing a reconciliation process for settlement records post 1 July 2009;

- ongoing improvements to the settlements register;
- engaging internal audit to review and assure the business line centralised recording processes;
- comprehensive settlements reporting to compliance and law executives; and
- reporting to the Technical Quality Assurance Forum (TQAF) at key milestones.

5.11 The ATO has also put in place processes to ensure future settlement data entry is timely, accurate and complete. Business line Settlement Coordinators are responsible for ensuring timely, accurate and complete data entry into the Settlements Register. In this regard, the Settlement Coordinators must complete both an integrity checklist for each entry within the Settlement Register (which also ensures that pre-settlement and settlement positions are recorded) and report on a quarterly basis to the L&P Settlements team.

5.12 The ATO's integrity checklist for Settlement Register states:

The primary accountability for the integrity and accuracy of the Settlement Register data for each business line (BSL) rests with the manager/team leader who completes the Statement of Compliance. As a secondary measure each business line has a Settlement Coordinator who is responsible for ensuring that processes are in place within their line to ensure that all settlements/agreements are captured on the settlement register in a timely and accurate manner. An integrity checklist for each settlement/agreement is to be completed and included in the settlement register.

The integrity checklist provides the mechanism for the Settlement Coordinator to confirm that all data has been entered in a timely manner and that details entered onto the settlement register have been signed off by the manager/team leader and correctly reflect the settlement activity. In most cases it would be reasonable to expect that the integrity checklist is completed within 14 calendar days of the settlement being recorded on the register. There will be occasions when exceptions to meeting this timeframe occur and the BSL Settlement Coordinator is to email the LIB Settlements Team if this occurs.

The primary entry of data on the Settlement Register can be undertaken by either the case officer responsible for the matter that has been settled or the BSL Settlement Coordinator.⁶⁸

5.13 Additionally, the L&P Law Infrastructure Branch (LIB) team has an overarching monitoring and assurance role for entries on the Settlements Register which involves sampling to ensure their timeliness, accuracy and completeness against integrity measures. Results of this sampling are included in a quarterly and annual report to the ATO's Integrity Adviser.

5.14 Since the conclusion of the original review, the ATO has decommissioned the standalone Settlements Register as this settlement information is now recorded directly within the ATO's enterprise case management system, Siebel.

IGT conclusion — implemented

5.15 The IGT considers the ATO has implemented this action item.

68 Australian Taxation Office, internal document, Updated Integrity Checklist attached to Office Minute dated 9 August 2010 from Acting AC, LIB to NPMs regarding the Settlements Improvement Project.

Action item 2

With the aim of improving the integrity checks on data recording, the Tax Office will reduce the number of accountability points involved in the settlement registration process and centralise the settlement register's management within the Law Infrastructure Branch in Law and Practice.

ATO position — implemented

5.16 The ATO agreed with this action item and, in response, centralised the settlement recording functions within the Settlement Coordinator in each business line, thereby reducing the number of accountability points. The reduced accountability points are reflected in the 'Settlement register roles and responsibilities' page on the ATO's intranet.

5.17 The ATO has also advised that the 'Settlements Improvement Project' has addressed the following issues with respect to the number of accountability points:

- an overarching governance framework, defining the accountabilities of business line Settlement Coordinators, National Program Managers, LIB Settlements team and the Assistant Commissioner, Law Practice Support (LPS);
- a quarterly integrity and assurance reporting cycle on recorded settlements post 1 July 2009, to capture data integrity issues on a systematic and regular basis, and to report any concerns across the organisation at a high level;
- a regular monthly (previously fortnightly) networking process for business line Coordinators to raise any concerns or questions concerning specific settlement data matters; and
- a formal data integrity reporting mechanism between the Assistant Commissioner, LPS and the ATO's Integrity Advisor's office.

5.18 As mentioned earlier, the primary accountability for the integrity of Siebel system settlement data rests with the Settlement Coordinators within each business line who also complete an Integrity Checklist for each settlement recorded. This is supported by the random sampling of settlement cases by the LIB Settlements team and the reports to the Integrity Adviser.

IGT conclusion — implemented

5.19 The IGT considers the ATO has implemented this action item.

Action item 3

With the aim of improving management reporting on settlements, the Tax Office will increase the management reporting in relation to the settlement register information.

ATO position — implemented

5.20 The ATO agreed to this action item and developed a suite of additional settlement reporting mechanisms as part of its 'Settlements Improvement Project'. As a result, the reporting framework specifically requires the following reports to be generated:

- the 'settlement quarterly report' which is a detailed summary of LIB data integrity sampling across a range of settlements recorded on the register each quarter, as validated by Integrity Checklists and National Program Manager certifications. These reports highlight each business line's compliance with specific integrity aspects of settlement data recording and identify systemic issues that need to be addressed either with a particular business line, or more broadly;
- the 'custodian report' which is a high level summary from the Assistant Commissioner, LPS to the ATO Integrity Advisor. These reports assess each business line against the integrity measures of timeliness, accuracy and completeness in their settlement recording activities, together with a record of remedial action undertaken;
- the 'special interest reports' which are ad hoc reports generated either by LIB Settlement staff identifying particular issues or specific requests from the Assistant Commissioner, LPS; and
- regular summary reporting for the Second Commissioner's Senate Estimates briefings.

5.21 The ATO has provided the IGT with a sample of the above management reports generated from settlement register data. These reports included:

- a 'settlement quarterly report';
- a 'custodian report';
- a 'special interest report'; and
- two summary reports for the Second Commissioner.

IGT conclusion — implemented

5.22 The IGT considers the ATO has implemented this action item.

Action item 4

With the aim of improving understanding of respective roles and responsibilities for officers involved in settlement administration, the Tax Office will clarify accountabilities, roles and responsibilities in relation to settlement administration.

ATO position — implemented

5.23 The ATO agreed to this action item and implemented a Corporate Custodian role for settlements which has support from senior executive officers within each business line. The custodian role is responsible for the overarching integrity and assurance for settlement decision making and administration. The ATO has advised that this has led to a streamlining of settlement registration process in line with Action Item 2.

5.24 Furthermore, as mentioned earlier, the LIB assures the integrity of settlement register data (in the form of oversight and testing the integrity of Settlement Register data). The integrity checklist outlines that the primary responsibility for settlement registration rests with manager/team leader who completes the Statement of Compliance. 'Part B' of the Statement of Compliance requires the case officer to confirm that the settlement details have been completely and accurately recorded on the Settlement Register. This is consistent with the practice that the case officer is primarily responsible for entering this data on the Register at first instance.

5.25 The ATO has stated that these roles and responsibilities have been made overt in various Office Minutes, on its intranet and are regularly reiterated at monthly Settlement Coordinator conferences. The ATO has also published on its intranet website, material to improve officer understanding of the roles and responsibilities of various officers and teams in the settlement registration process.

IGT conclusion — implemented

5.26 The IGT considers the ATO has implemented this action item.

Action item 5

With the aim of improving the quality of settlements decision-making and administration, the Tax Office will promote an integrated approach to the identification, monitoring and actioning of quality issues arising with settlements decision-making and administration, and identify continuous improvement opportunities through Integrated Quality Framework (IQF) implementation.

ATO position — implemented

5.27 The ATO agreed to this action item. The ATO has advised that the LIB in consultation with business line representatives have designed the Integrated Quality Framework (IQF) model for the 'settlement product'.

5.28 The IQF for the settlement product was fully implemented and evaluated on 30 September 2010. At present, opportunities for improvement are centrally recorded by the Law Practice Management Unit. The improvement opportunities are prioritised with assistance from the Settlements Improvement and Assurance Forum and form part of the

ATO's forward work program for Settlements. The Settlements Improvement and Assurance Forum also has a role in the implementation of this work program.

5.29 The ATO has provided documentation with respect to its settlement work program which describes 28 areas for improvement that were identified through the IQF. Since that program of work, the ATO's IQF processes have identified further areas for improvement, for example, ensuring the administrative soundness and transparency of settlements.⁶⁹

IGT conclusion — implemented

5.30 The IGT considers the ATO has implemented this action item.

Action item 6

To facilitate improvements in dispute resolution (including the avoidance of disputes), the Tax Office will implement a framework for ongoing analysis of reasons for differences between initial Tax Office positions communicated to taxpayers and settled positions. The Tax Office will also implement mechanisms to drive improvements in upstream processes that are identified in this analysis. For cases ending in settlement this will include:

- *recording the initial Tax Office position communicated to the taxpayer and the settled position; and*
- *analysis of the specific reasons why the settled position was not reached in the initial Tax Office position, with the aim of identifying improvements that would help to avoid the potential for disputes arising, including:*
 - *the specific reasons for the material differences between the two recorded positions (that is, an explanation of the reasons for the change in quantum between the positions); and*
 - *the specific reasons why the settled position was not reached in the initial Tax Office position (including reasons which fell outside of the Tax Office's control, such as taxpayers' failure to provide requested information).*

ATO position — agreed in principle

5.31 The ATO agreed in principle with this action item due to the ATO's system limitations at the time. However, the ATO has taken the actions described below to address the aim of this action item.

5.32 First, the ATO has developed clearer guidance for officers via various guides published on its settlements intranet page including 'ATO's pre-settlement position', 'What is not a settlement' and 'Settlements register user guide'. The ATO expects ongoing improvement to these resources and additional guides over time.

5.33 Secondly, the ATO has replaced the Settlements Register with corresponding functionality in Siebel and is expected to provide better data capture for end-to-end case analysis. Organisational capacity to undertake more robust analysis of reasons for differences in pre and post settlement amounts is also expected to develop over time once the new system is bedded down. However, the ATO has noted that it does not consider

69 ATO, 'Quality Improvement and Assurance — Biannual Report', internal ATO document, 12 May 2011.

increasing organisational capacity to analyse settlement variations on an individual case-by-case basis to be a priority at this time.

5.34 Thirdly, the implementation of the IQF for settlements now facilitates greater analysis of decisions across business lines and, over time, will add to the ATO's corporate capacity to better understand the reasoning behind the variance between pre and post settlement amounts with a view to identifying opportunities for improvement.

5.35 Lastly, new corporate reporting (for example, those reports mentioned earlier in relation to Action Item 3) should provide an increased degree of analysis and identification of improvement opportunities over time. The ATO also expects that other reports that follow from Settlement Register's integration into the Siebel system, including the implementation of the IQF and the dispute risk indicator process (being undertaken by the Dispute Resolution Project within L&P), should increase the ATO's capacity to both undertake more rigorous examination of pre and post settlement positions and to better inform business lines undertaking similar data reviews.

5.36 The ATO has also advised that it reports on settlement variances from the original audit position (by market segment and component liability) and monitors and investigates trends or anomalous results where appropriate. This data is primarily used for regular Senate Estimates briefing reports. Where there is significant variation, the relevant settlement cases are investigated in order to determine the reasons for the variances and to ensure the integrity of the outcome.

IGT conclusion — action taken is consistent with agreed principle

5.37 The IGT considers that the ATO has taken action in line with the agreed principle. The IGT recognises that the ATO has made significant progress in relation to recording the pre-settlement position communicated to the taxpayer and the settlement position, however, it appears that the level of analysis is currently limited. Importantly, the ATO does expect the level of analysis to increase over time and the IGT supports that continued expansion.

Action item 7

Entries on the settlement register should clearly record the evidentiary basis for asserted compliance with paragraphs 25 and 26 of the Code of Settlement Practice.

ATO position — implemented

5.38 The ATO agreed in principle with the action item as the Settlement Register, at the time, had technical limitations which prevented the entry of data relating to compliance with paragraphs 25 and 26 of the Code of Settlement Practice (Code). The ATO had also advised the IGT that compliance with the Code was already met by the Settlement Submission template which all case officers are required to complete.

5.39 Since the initial review, the ATO's Settlement Register has been incorporated into the Siebel system. As a result, all documents relating to the settlement are now attached to the Siebel system. These documents include records of discussion, settlement submissions, settlement deeds, statements of compliance and integrity checklists. Additionally, the settlement process may be conducted within the overarching case type, for example the audit

or objection case. Accordingly, all preliminary material and the history of the case are available for decision makers or reviewers.

IGT conclusion — implemented

5.40 The IGT considers the ATO has implemented this action item.

Action item 8

Revised and improved user documentation will be made publicly available and required to be followed by Tax Office officers in relation to the following:

- *what does and does not constitute a matter appropriate for consideration for settlement (that is, when is it appropriate for the Tax Office and taxpayers to settle a matter), including the principle that settlements would not generally be appropriate where the Tax Office concedes a material change to its precedential view or the application of the precedential view to the facts and evidence of the case in question – this should be done by quicker and less costly means, such as allowing the objection and subsequently updating the precedential view, rather than through settlement;*
- *practical guidance for application of settlement criteria, such as 'genuine uncertainty as to the proper application of the law to the facts' (this will form part of any assessment by the Tax Office as to whether settlement of a case is appropriate);*
- *settlement terms in settlement deeds should relate only to the subject matter that affects the basis on which the quantum is settled and any obligation to comply in future in relation to that particular subject matter (and not broad commitments to being compliant taxpayers on non-related matters generally, agreeing to raise all potential tax-relevant transactions with the Tax Office in the future, nor matters under dispute but which do not directly affect the basis on which the quantum is settled); and*
- *the Tax Office will revise PS LA 2007/5 and 2007/6 to provide improved linkages and reference points to the Code of Settlement Practice.*

ATO position — implemented

5.41 The ATO agreed with this action item. In response, the ATO published a number of documents on the internal 'Settlement' intranet page as guidance for staff dealing with settlement cases. These documents include:

- what is not a settlement;
- determining the ATO pre-settlement position;
- an improved Statement of Compliance certificate;
- a more robust settlement submission template; and
- the settlement register user guide.

5.42 The ATO has noted that following the IGT review, linkages were added to material available on the intranet which provides guidance on specific sections of the Code.

5.43 The ATO has also published on the intranet a 'Guide for Determining Settlement Parameters for Compliance staff'.⁷⁰ The guide quotes the Code in relation to what is and is not appropriate for settlement. The guide also provides extensive guidance to officers in determining litigation risk and the reduction in primary tax for settlement purposes. The guide provides a range of criteria to take into account when determining litigation risk including legal risk, which encompasses uncertainties in relation to law interpretation and factual analysis.

5.44 The ATO has not made the above guidance material publically available as it was of the view that it was of low priority. However, the ATO advises that it is now undertaking a project to reform their internal and external settlement documentation, with the aim of improving the clarity of guidance and to align the documentation with the ATO's Dispute Management Plan. As part of this project, the ATO advises that it will consult externally during July 2014 on what material it should make publicly available, amongst other issues.

5.45 The ATO has also restructured its management of technical issues as a result of the ATO's 'Transforming tax technical decision making project'. This project resulted in a replacement of a 'precedential view', as a determinative factor for the escalation of technical issues to senior technical officers, with a wider risk management framework to the management of technical issues.

5.46 Other significant changes arising from this project also included the movement of senior technical officers from the ATO's Centres of Expertise into its compliance teams as well as the updating of its procedural instructions for escalating technical issues. For example, PSLA 2004/4⁷¹, which previously required escalation of precedential issues to the Centres of Expertise and the Tax Counsel Network, was replaced by PSLA 2012/1⁷² which sets out the requirements to engage tax technical officers within the ATO's Law and Practice Group.

5.47 To assist staff, the ATO has also published on its intranet the 'Guide to managing high risk technical issues' to support the PSLA 2012/1 and advised its compliance officers of the revised escalation requirements in an internal communiqué published on the ATO's Work Processes intranet site.

IGT conclusion — partly implemented

5.48 Whilst the ATO has undertaken work consistent with the aims of this action item, the IGT considers that three aspects of this action item remain unaddressed at present.

5.49 First, whilst the ATO's internal documentation describes what does not constitute a settlement, its description of matters that are appropriate for settlement is limited. Furthermore, no other guidance exists for ATO officers which describe matters appropriate for settlement.

70 ATO, 'Guide for Determining Settlement Parameters for Compliance Staff', internal ATO document, 4 December 2013.

71 ATO, *Referral of Interpretative Issues to Centres of Expertise for the Creation of the Precedential ATO View, and Early Engagement of Internal Technical Specialists in Active Compliance Cases*, PSLA 2004/4, 17 October 2007, withdrawn 18 May 2012.

72 ATO, *Management of High Risk Technical Issues and Engagement of Officers in the Tax Counsel Network*, PSLA 2012/1, 10 April 2012.

5.50 Secondly, whilst PSLA 2007/5 *Settlements*⁷³ and PSLA 2007/6 *Guidelines for settlement of widely-based tax disputes*⁷⁴ both refer to the Code in general terms, they make limited references and linkages to the Code.

5.51 Lastly, the ATO's internal guidance material is not publicly available.

5.52 Notwithstanding these remaining aspects, the ATO has commenced a project to redraft its settlement documentation and externally consult on that documentation. Accordingly, where the consultation process allows interested parties to surface and raise issues for ATO's consultation and appropriately actioned, including the identification of any areas for further clarification, this action item may be implemented at that later time.

5.53 The IGT may reconsider this issue if stakeholders raise concerns with the guidance on settlement matters following the outcomes of the abovementioned consultation process.

Action item 9

Templates for settlement deeds will be amended to ensure fairness and consistency of treatment in certain settlements over time, so that taxpayers have an option to reopen a settled case where the Tax Office subsequently changes its view of the law on which the settlement was based, in a way that would have achieved a better outcome for the taxpayer, subject to the following conditions:

- *this applies to settlements that resolved only one matter in dispute (and not multiple issues – 'global settlements');*
- *the taxpayer has requested that the settlement be reopened;*
- *the timeframe is limited to the relevant amendment period; and*
- *the settlement was concluded after the public release of this report.*

ATO position — implemented

5.54 The ATO agreed with this action item and conducted extensive consultations with internal staff and external parties (via the Legal Practitioners Working Party (LPWP) sub-group of the National Tax Liaison Group (NTLG)) in response. Based on consideration of all the relevant implications and external feedback, the ATO concluded that there was no clear consensus on settlement deed wording that would give effect to the IGT recommendation. Therefore, the ATO will continue to monitor and report on the types of cases where settlement agreements are sought to be reopened by taxpayers.

5.55 The ATO has provided guidance to staff to assist with seeking the support from Law and Practice officers. The guidance, contained in an office minute on the ATO's Settlements intranet page (from the First Assistant Commissioner, Law and Practice, to Deputy Commissioners and Settlement Network members (27 June 2012)), directs staff to contact the Settlements LPS Team mailbox prior to making a response to, or otherwise providing advice to, a taxpayer regarding any proposals to re-open a settlement.

73 ATO, *Settlements*, PS LA 2007/5, 21 February 2007.

74 ATO, *Guidelines for settlement of widely-based tax disputes*, PS LA 2007/6, 21 February 2007.

IGT conclusion — implemented

5.56 The action item envisaged that the agreed amendment to the settlement deed be the mechanism which provides fairness and consistency of treatment in those circumstances where the ATO changes its view of the law on which a settlement was originally based. As a result, taxpayers could access a better outcome by reopening the settlement in those circumstances.

5.57 The ATO has confirmed that it will re-open settlements in the circumstances as set out in the envisaged action item, but that the standard wording in its model settlement deed due to the above difficulties in obtaining broad agreement on the wording is not the best place to achieve that outcome at this time based on consultation.

5.58 Notwithstanding these difficulties, the ATO has advised that it will continue to support the action item by publicly affirming in its revised settlement code that settlements may be re-opened where taxpayers are seeking to address the unfairness, as outlined in the action item. Accordingly, the IGT considers that the ATO's commitments of public affirmation have addressed the original recommendation's intention.

Action item 10a

Although the Tax Office has existing mechanisms aimed at providing a quality of taxpayer experience and ensuring probity of the settlements process, there remains room for further improvement. The Tax Office will develop and implement mechanisms to:

- *improve the taxpayer experience in relation to the settlement process and access to settlement by providing a 'circuit breaker' or 'reference point' for taxpayers with the aim of:*
 - *drawing on significant alternative dispute resolution and settlement experience; and*
 - *providing a fresh set of eyes for decisions to access the settlement process or disputes arising in the settlement process.*

ATO position — implemented

5.59 The ATO agreed to this action item. In response, the ATO's Dispute Resolution project team developed and improved the ORCLA⁷⁵ intranet pages to support an integrated approach to dispute resolution which seeks to resolve disputes as early as possible. Relevant ORCLA pages include:

- integrated approach to dispute resolution;
- engaging with the taxpayer;
- clarify an issue;

75 Online Resource Centre for Law Administration

- value in proceeding to litigation; and
- case conferencing.

5.60 The ATO has also developed a litigation risk tool which requires case officers and their manager to assess whether alternative approaches to dispute resolution would be beneficial in appropriate cases. The ATO has advised that this process has been implemented across all business lines and is supported by numerous ORCLA pages.

5.61 One such ORCLA page titled 'Case Conferencing' outlines the role of ATO facilitators. These officers are to be independent of the matter in dispute and their role is to guide the parties through their discussion ensuring the participants focus on the purpose of their work together. Their purpose may be to resolve or clarify an issue.

5.62 An ATO 'Settlement Process Map' also outlines the various steps in the settlement process as well as opportunities for alternative dispute resolution.⁷⁶

5.63 The ATO further identified a range of 'circuit breaker' mechanisms whereby ATO officers not involved in the original compliance activity or objection can assist with the process, including the following processes and services:

- The independent review process is available to large corporate taxpayers where there is disagreement with all or part of the ATO's Statement of Audit Position. The review entails a senior officer from the RDR business line, having not been involved in the audit process, to review the technical merits of the issues in disagreement.⁷⁷ This process is consistent with Recommendation 9.3 of the IGT's *Report into the Australian Taxation Office's Large Business Risk Review and Audit Policies, Procedures and Practices (LB&I Review)*⁷⁸ for large taxpayers by the ATO's RDR officers.
- The ATO's in-house facilitation service is used to assist taxpayers and ATO officers to 'identify issues in disputes, develop options, consider alternatives, and attempt to reach an agreement'.⁷⁹ This follows a successful pilot of the service consistent with Recommendation 3.6 of the IGT's ADR Review. Taxpayers, advisers and ATO officers may access this service via email.⁸⁰
- The early assessment and resolution process is followed where smaller taxpayers seek review in the AAT.
- 'Trigger points' identified in audit processes also require ATO officers to consider possible alternative dispute resolution approaches, such as direct discussions, negotiations or mediation.

IGT conclusion — implemented

5.64 The IGT considers that the ATO has implemented this action item.

76 ATO, 'Settlement Process Map (v5.4)', internal ATO document.

77 ATO, 'Independent Review of Audit Position', above n 3.

78 IGT, 'Large Business Audit Review', above n 4.

79 ATO, *Facilitation Process* (March 2014) <<http://www.ato.gov.au/>>.

80 *ibid.* For further details about the ATO's in-house facilitation pilot refer to recommendation 3.6 in IGT, 'Alternative Dispute Resolution Review' above n 4.

Action item 10b

Although the Tax Office has existing mechanisms aimed at providing a quality of taxpayer experience and ensuring probity of the settlements process, there remains room for further improvement. The Tax Office will develop and implement mechanisms to:

- *prevent inappropriate use of settlements by implementing a probity check with the aim of:*
 - *minimising unnecessary cost and delay by providing 'real-time' assurance of the probity of settlements and the use of the settlement process;*
 - *ensuring that material changes in the Tax Office position are communicated to relevant taxpayers;*
 - *ensuring that entry into settlement is appropriate;*
 - *drawing on significant experience in settlement matters; and*
 - *providing a fresh set of eyes on significant probity decisions in the settlement process.*

ATO position — implemented

5.65 The ATO agreed to this action item. The ATO's Law Practice Management Unit has been investigating opportunities, through the Siebel system, to identify cases where either the settlement did not proceed or negotiations are ongoing. The ATO considers that once this reporting is in place it will be able to make details of these cases available to business lines for use in the ATO's IQF process.

5.66 The ATO is also currently revising the Siebel system procedures to ensure that 'communication of material changes to the ATO's position' are emphasised in those procedures. Changes to these procedures will also be scheduled for discussion at the Settlements Improvement and Assurance Forum and in an upcoming review of the Code.

IGT conclusion — implemented

5.67 Action item 10b sought to prevent inappropriate use of settlements by making improvements to the probity of the settlement process with reference to specific issues. Since the original review, the ATO has undertaken a body of work aimed at improving the quality of decision making in compliance activities and resolving disputation which is consistent with the observations and recommendation made in subsequent IGT reviews. For example, the ATO's 'Transforming tax technical decision making project, mentioned earlier in relation to Action Item 8, resulted in senior technical officers moving from the Centres of Expertise into compliance teams. As noted in relation to Action Item 10a, the ATO has also deployed independent review, in-house facilitation and early assessment and resolution.

5.68 The IGT considers that communication of such material changes to ATO positions assists taxpayers and reduces informational disadvantage, whereby the true ATO position on the matter is not fully known to them. In this respect, the ATO has advised that it is further revising the Siebel system procedures and taking steps to ensure this aspect is emphasised.

5.69 PSLA 2011/27 *Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively* also requires ATO officers to consider a range of factors when deciding whether a changed ATO view

should be only applied prospectively. The application of this practice statement has been examined in a separate IGT follow up review.⁸¹

5.70 Accordingly, the IGT considers that the ATO has implemented this action item.

Action item 11

The Tax Office will develop and implement a redesigned business model dealing with disputes over tax liabilities as an end-to-end process, including improving the linkages between settlements and its upstream and downstream processes.

ATO position — implemented

5.71 The ATO agreed to this action item. In response, the ATO's Objections Review Project delivered a working model for the end-to-end dispute resolution process, including improved linkages between settlements and its upstream and downstream processes.

5.72 In line with the recommendations of the National Alternative Dispute Resolution Advisory Council⁸² and the strong support and encouragement of the then Attorney-General, the ATO developed and published its Dispute Management Plan (DMP) in October 2012.⁸³ This is a public document which outlines the ATO's principles and approaches to all disputes, not just those relating to tax liabilities. It provides high-level principles which support an end-to-end dispute resolution approach.

5.73 The principles contained in the ATO's DMP are applied through specific ATO staff guidelines published in the ORCLA.⁸⁴ These guidelines require ATO officers, particularly those dealing with objections, to attempt to:

- resolve the dispute at early as possible;
- come to a common understanding of each parties' view of the facts and law; and
- confine the issues subject to ongoing dispute.

5.74 The ATO's intranet page, 'Integrated approach to dispute resolution', also recognises these objectives:

As an organisation, our objective is to reduce the time we take to resolve disputes and lower the costs both for the taxpayers and the ATO. We aim to avoid, minimise and resolve disputes as early, cooperatively and collaboratively as possible by adopting dispute management principles, strategies and techniques.

Early engagement and direct negotiation are our primary means of avoiding, minimising and resolving disputes early, resulting in a more responsive end-to-end dispute management. It is

81 IGT, 'Follow up Review of the Review into Delayed or Changed Australian Taxation Office Views on Significant Issues', (unpublished at time of drafting).

82 The National Alternative Dispute Resolution Advisory Council was an independent non-statutory body established in October 1995 that provided expert policy advice to the Attorney-General on the development of alternative dispute resolution and promoted its use until its conclusion in late 2013.

83 The DMP was updated in January 2014.

84 Online Resource Centre for Law Administration

envisaged that these actions would create a positive experience for taxpayers making them less likely to object or litigate and would encourage their future voluntary compliance.

Successful dispute management begins with timely identification of emerging disputes during the original decision making point, such as an audit or private ruling. This ensures that points of contention, which may lead to ongoing disputation, are identified and resolved, or narrowed, when and as they arise.

Each downstream activity from the original decision point involves additional costs and prolongs uncertainty. Actions taken at any point in the process have the ability to influence these additional costs. Consequently, early dispute resolution is to be considered in each component of the end-to-end process, which is before:

- making the original decision
- making the objection decision, and
- during litigation.

Our intent of resolving disputes at the earliest stage possible is also supported by the *Civil Dispute Resolution Act 2011* (Cth) which is aimed at ensuring prospective litigants, including government agencies and their clients, take genuine steps to resolve disputes prior to litigation.

5.75 Furthermore, the ATO's Siebel system assists in recording the end-to-end management of disputes as it records most information regarding disputes. The Siebel system's reports, however, are currently only produced for high level statistics and not granular case details.

5.76 The ATO has also developed the Objections Cube which is used to facilitate analysis of the drivers of objections by examining upstream processes, such as the audit decision and how the decision was reached.

5.77 The ATO performs 'case debriefs' at the conclusion of every independent review held in the LB&I business line whereby the independent reviewers give feedback to the original compliance teams with a view to improving original compliance decisions. Outcomes of such debriefs have highlighted the need for compliance officers to improve the quality of evidence gathering and more effectively address the taxpayer's contentions before original compliance decisions are finalised. As a result, the ATO advises that it will trial the embedding of ATO officers with litigation experience within LB&I compliance teams to assist those teams in more effectively considering and gathering relevant evidence.

5.78 The ATO also conducts early assessment and resolution activities for LB&I cases prior to being heard in the AAT. Although improvement opportunities have been captured during these activities, the ATO has advised that there is currently no feedback process in place.

5.79 In addition, as noted in Action Item 10a, the ATO makes 40 trained facilitators available at the request of taxpayers or ATO officers if other direct means of discussing and resolving a dispute have failed.

IGT conclusion — implemented

5.80 The IGT considers the ATO has implemented this action item.

Action item 12

Before entering and during settlement negotiations, the Tax Office will ensure that it discloses changes to its approach which would reduce the range of settlement points and not allow taxpayers to labour under misconceptions about their likely 'out of pocket' liability.

ATO position — implemented

5.81 The ATO agreed to this action item. In response to the IGT's action item, the Dispute Resolution project team developed and improved the internal ORCLA pages to support an integrated approach to resolve disputes as early as possible. Relevant pages include:

- integrated approach to dispute resolution;
- engaging with the taxpayer;
- clarify an issue;
- value in proceeding to litigation; and
- case conferencing.

5.82 The ATO has also developed the litigation risk tool that requires case officers and their manager to assess whether alternative approaches to dispute resolution would be beneficial in appropriate cases. The ATO advised that this process has been implemented across all business lines and is supported by numerous ORCLA pages.

5.83 The ATO has also stated it has released an internal communiqué to active compliance staff stating requirements with respect to taxpayer engagement, escalation of issues, ongoing communications and early dispute resolution.

IGT conclusion — implemented

5.84 The IGT considers the ATO has implemented this action item. The IGT also notes that further integration of these principles into the ATO's Work Process, in addition to the ORCLA, may also be beneficial.

Action item 13

The Tax Office will extend to all multiple taxpayer or 'leveraged' active compliance cases, implementation of the agreed recommendation C in the IGT's fourth report of its major, complex issues review (namely to undertake adequate field work to identify the issue and to differentiate categories of taxpayers' circumstances, and to test the quality of Tax Office information that was provided to taxpayers to help them meet their obligations before a compliance strategy is designed and commenced). 'Leveraged' active compliance cases are those cases that involve the same compliance concern or technical issue — such as groups of cases that are the subject of a particular Tax Office active compliance project

ATO position — implemented

5.85 The ATO agreed to this action item. The ATO has stated that the IGT's action item has been embedded into its active compliance work processes and also inserted into the companion documents to the Corporate Management Practice Statement (CMPS) for Risks &

Issues. In this regard, the ATO has published a revised 'risk owner expectations' policy on the Work Processes intranet site to reflect this recommendation. The communiqué requires all risk owners of major compliance activities to ensure:

- adequate field work is undertaken to identify the issue and differentiate categories of taxpayers' circumstances;
- direct communication takes place with affected taxpayers and/or their advisers;
- regular reappraisal is made of compliance and revenue risk and costs; and
- the quality of information provided to taxpayers to help them meet their obligations is tested before a compliance strategy is designed and commenced.

5.86 The communiqué also advised risk owners to 'be prepared to demonstrate compliance with these expanded expectations'.⁸⁵

5.87 The ATO has also updated its Risk Treatment Plan template⁸⁶ which is to be used by Risk Owners and Risk Managers to, amongst other things, specify any different types of 'risk participants' and consider whether different 'treatment methods' should be applied. Appendix 1 of the Risk Treatment Plan template contains a quality review checklist sourced from a previous IGT review.⁸⁷ The checklist requires ATO officers to consider what and how it will communicate to taxpayers, and to ensure they consider different risk treatment options for different levels of identified risk. The checklist also requires ATO officers to anticipate taxpayer behavioural responses and the evidence to support such views in designing its compliance risk assessment tools.

IGT conclusion — implemented

5.88 The IGT considers that the ATO has implemented this action item.

Action item 14

In multiple taxpayer or 'leveraged' active compliance cases, the Tax Office will ensure that the Centres of Expertise or Tax Counsel Network assures the correct application of the view to the facts (representative of the types of facts involved) before issuing amended assessments.

ATO position — implemented

5.89 The ATO agreed in principle with this action item. The ATO considers that satisfactory measures are in place to meet the intent of this action item.

5.90 As mentioned earlier in Action Item 8, a number of senior technical officers in the Centres of Expertise and Tax Counsel Network had been moved into compliance teams and

85 ATO, 'Risk Owner Expectations', internal ATO document, September 2013.

86 ATO, 'Risk Treatment Plan (template)', internal ATO document, February 2014.

87 IGT, *Review into Aspects of the ATO's use of Compliance Risk Assessment Tools* (2013) app 12.

PSLA 2004/4,⁸⁸ which previously required escalation of precedential issues to the Centres of Expertise and the Tax Counsel Network, was withdrawn. The engagement of tax technical officers within Law and Practice is now governed by PSLA 2012/1⁸⁹ which applies a wider risk management framework to the management of technical issues.

5.91 The ATO has advised compliance officers of the revised escalation requirements in an internal communiqué published on the ATO's Work Processes intranet site. Furthermore, the ATO reiterated the requirement to consider each case on its merits in another communiqué to Compliance officers which has also been published on the Work Processes intranet site.

5.92 The ATO advises that it seeks to differentiate 'treatment methods' in order to account for different types of 'risk participants' as part of the updated Risk Treatment Plan template⁹⁰ which is used by Risk Owners and Risk Managers.

IGT conclusion — action taken is consistent with agreed principle

5.93 The IGT considers that the ATO has taken action to improve its differentiation of compliance treatments between differing types of taxpayers within multiple or 'leveraged' active compliance cases consistent with the intent of the original recommendation.

Action item 15

Although the Tax Office has processes and policies that require officers to communicate changes to the Tax Office's view, the Tax Office will ensure that any changes to its view are transparently communicated to affected taxpayers and their representatives.

ATO position — implemented

5.94 The ATO agreed in principle with this action item and advised the IGT that it is confident that adequate processes are now in place to meet the recommendation.

5.95 The ATO has also stated that the work continues in the implementation of the IGT's recommendations arising from the *Review into Delayed or Changed Australian Taxation Office Views on Significant Issues* (the so-called 'U-turns' review) which will further enhance its focus on ensuring changes of view are effectively communicated to affected taxpayers in a timely manner.

IGT conclusion — issue subsumed by subsequent IGT review

5.96 The scope of this recommendation has been subsumed by the IGT's follow up of the U-turns review. Recommendations 2 and 4 of that review sought to develop ATO practices to deal with a change of the ATO view.

5.97 Accordingly, the 'U-turns' follow up review will consider the underlying issues raised by this action item.

88 ATO, 'Referral of Interpretative Issues to Centres of Expertise for the Creation of the Precedential ATO View, and Early Engagement of Internal Technical Specialists in Active Compliance Cases', PSLA 2004/4, 17 October 2007, withdrawn 18 May 2012.

89 ATO, *Management of High Risk Technical Issues and Engagement of Officers in the Tax Counsel Network*, PSLA 2012/1, 10 April 2012.

90 ATO, 'Risk Treatment Plan (template)', above n 86.

Action item 16

The Tax Office will improve discipline surrounding the requirement for a sound evidentiary basis for active compliance decisions on primary tax and penalty decisions, including improvements in:

- *determining the material facts and the relevant evidence;*
- *testing conflicting facts and evidence; and*
- *determining the strength of relevance and admissibility of the facts and evidence.*

ATO position — implemented

5.98 The ATO agreed with this action item and implemented a facts and evidence worksheet. On 27 February 2012, the ATO released an office minute mandating the use of the facts and evidence worksheets for particular cases for each business line for both the substantive tax decisions and administrative penalty decisions.

5.99 The ATO has stated that officers involved in the relevant classes of cases are both trained or continue to be trained to ensure they are aware of the need to maintain good facts and evidence handling practice and related recording. Additional training and on-the-job coaching is ongoing to reinforce the ATO's expectations of staff (particularly those moving from high volume work areas to more complex case work) and best practices for identifying and recording facts and evidence.

5.100 The ATO has also stated that ongoing quality checks are required to make sure that facts and evidence are being appropriately recorded in the Siebel case management system across all active compliance areas. This is due to IQF reports that revealed that some 'bedding down' is required to ensure outcomes are delivered.

5.101 The ATO has also rationalised and simplified work processes on penalty guidance for staff. However, IQF statistics reveal that penalty decisions require ongoing attention to assure their quality is appropriately maintained or otherwise addressed.

5.102 The ATO's requirements for the use of the facts and evidence worksheet are set on a business line by business line basis. Each business line also sets specific circumstances as to when officers must use the worksheet.

IGT conclusion — implemented

5.103 The IGT considers that this action item has been implemented. The IGT notes, however, that the facts and evidence worksheet is not mandated for all compliance activities, but only those compliance activities prescribed by each business line. Each business line uses different criteria, and whilst most business lines mandate the worksheet's use for lower volume, higher complexity and higher risk compliance activities, there does not appear to be a consistent principle across the business lines. Extracts of each business line's criteria are contained in Appendix 3.

5.104 The IGT may reconsider this issue if stakeholders raise concerns with the evidentiary basis for compliance decisions in future.

Action item 17

The Tax Office will ensure that compliance case management systems and IQF processes reinforce Tax Office rules for auditors to cite the correct Tax Office precedential view in all compliance cases.

ATO position — implemented

5.105 The ATO agreed with this action item and advised the IGT that it considers that satisfactory measures are in place to meet the intent of this action item through the implementation of the Siebel system initiatives and the IQF for active compliance.

5.106 The ATO has also confirmed that the function to ensure correct citation of Active Compliance cases now rests in the ATOLaw database. This means that when a case officer discovers a precedential ATO view, the respective citation can then be exported to the Siebel system case. However, the Siebel system itself does not automatically assure the citation of precedential ATO views in active compliance cases. The ATO has advised that whilst the LB&I business line has not detected any instances of case officers incorrectly citing the ATO view, some of these instances were identified in the Indirect Tax (ITX) and SME business lines.

5.107 The ATO had also stated that its LPS team had in place a rolling program of research and analysis concerning ATO precedential views. Initial work under this program had reviewed a number of precedential documents relevant to commonly visited webpages on the Register of Private Binding Advice. However, as previously mentioned, the ATO has changed the way it deals with significant technical issues as a result of the ATO's more recent re-organisation of its technical resources and re-engineering of supporting internal ATO processes. Consequently, the ATO no longer uses the term 'precedential view' as a determinative factor in allocating its technical resources. The ATO now takes a broader risk based approach in this respect.

IGT conclusion — implemented

5.108 The IGT considers the ATO has implemented this action item. As noted in other IGT reviews, the new ATO risk based technical decision-making arrangements were expected to take some time to implement fully. Accordingly, the IGT may re-examine this issue in future where concerns are raised with the technical discipline of ATO auditors.

Action item 18

During the review, the Tax Office improved its ability to record:

- by liability component (such as primary tax, losses, penalties and interest) and by Tax Office functional area (such as LBI, GST and ATP), the liabilities raised against taxpayers before the formal settlement processes were triggered under the code;*
- by liability component and by Tax Office functional area, the settled position; and*
- the specific reasons for the material differences between the two positions (those differences which underlie the difference in quantum between the two positions).*

Action item 18 (continued)

It also improved its ability to analyse the reasons for difference between the liability components actually imposed pre-settlement and those finally imposed. In light of the above, the Tax Office will facilitate public understanding of the revenue impact of settlement cases, by publicly reporting on an ongoing basis (for settled cases):

- the aggregated amounts of liability actually imposed pre-settlement and that finally imposed, by liability component (such as primary tax, losses, penalties and interest) and by Tax Office functional area (such as LBI, GST and ATP); and*
- a summary of key findings of its analysis for the differences between the liability components actually imposed pre-settlement and those finally imposed.*

ATO position — implemented

5.109 The ATO agreed to this action item and has advised that it continued to enhance the regular analysis and reporting of settlement data as well as the identification of opportunities to improve its dispute resolution processes. In this respect, the ATO has completed the Settlements bi-annual report for the period July-December 2009 (2009-10) and included settlement information in Annual Reports from 2009-10.⁹¹ This information includes a summary on settlements which provide a market segmentation breakdown of pre-settlement liabilities compared with settled liabilities. However, these summaries do not indicate the components of these liabilities by primary tax, losses, penalties and interest as envisaged by the action item. Furthermore, whilst the ATO analyses the main reasons for settlements and provides commentary each year, this information is not always presented in the Annual Reports.

5.110 The ATO publication, *Your Case Matters*, also describes tax and superannuation litigation trends. The second edition of *Your Case Matters* contains a breakdown of settlements according to its components (primary tax, penalties, interest, credits and notional tax on losses) in addition to a market segmentation breakdown.⁹² The third edition of *Your Case Matters* contains a year by year breakdown of pre-settlement positions, and variances.⁹³ It does not indicate the amounts that are attributable to primary tax, losses, interest and penalties. The market segment breakdown only distinguishes between micro businesses, individuals and 'other', and only breaks down figures by the number of settlements, not the variation amounts.⁹⁴

5.111 The shortcomings noted above by the IGT in relation to the reporting improvements made to date, have been raised with the ATO and management have advised that the next edition of *Your Case Matters* will address these outstanding matters.⁹⁵

91 See pages 31, 106, 93 and 58 of the 2009-10, 2010-11, 2011-12 and 2012-13 Annual Reports, respectively. These reports are available from www.ato.gov.au.

92 ATO, *Your Case Matters 2012* (2nd ed, 2012), p 9.

93 ATO, *Your Case Matters 2013* (3rd ed, 2013), p 8.

94 *ibid.*

95 ATO, communication to the IGT, April 2014.

IGT conclusion — implemented

5.112 The IGT recognises that the ATO has made considerable headway in relation to the action item's objective. Given the ATO's commitment to address the residual shortcomings identified above, the IGT considers that this action item has been implemented. The IGT notes that the public reporting of such information may be provided via website and need not be limited to a particular publication.

Action item 19

Publicly reporting a more comprehensive and detailed picture of the net contribution to revenue of compliance actions by the Tax Office is hindered at present by the following.

- *The regulatory framework around the running balance account and the resulting Tax Office data framework make it difficult to track, over time, active compliance liabilities for taxpayers.*
- *The current data recording structures do not identify amounts raised through active compliance activities at the entry and exit points for the data (for example, the Tax Office estimates that between 40 and 60 per cent by number of all objections are self-amendments rather than disputed liabilities raised in active compliance activities – whether the liabilities raised were as a result of active compliance activities or not is not recorded in objection cases).*
- *The current priorities of the Change Program are focused on delivering new transactional processing arrangements, which is a substantial body of work. The Tax Office advises that its reporting tools and processes will evolve over time once the new transactional arrangements have been bedded down.*

In recognition of the above, the IGT will, at least two years after this report, review the Tax Office's progress towards the goal of internally recording and publicly reporting, by market segment, the aggregate amounts of tax (with losses specifically identified) reduced from original Tax Office compliance-raised liabilities for each category of case including objections, appeals (including those resolved by withdrawing from litigation or entering consent orders) and settlements.

ATO position — implemented

5.113 The ATO agreed to this action item as aspirational due to system and process limitations as well as other Change Program demands at the time. In response to the IGT's action item, the ATO has advised that the item is part of a regular ongoing review process and addressed in that manner without the need to consider it as a separate initiative as such.

IGT conclusion — action taken towards aspiration

5.114 The IGT considers that the ATO has taken action consistent with the aspiration of the action item as the 2009–10 and 2010–11 Commissioner of Taxation Annual Reports provide a breakdown of settlement cases by market segment, pre-settlement position, settled position and variance.⁹⁶

96 Commissioner of Taxation, *Annual Report 2009–10* (2010) p 31; Commissioner of Taxation, *Annual Report 2010–11* (2011).

5.115 It should also be noted that the ATO reporting aspects has been considered in other reviews, for example, in the recent penalties review.⁹⁷ Substantial analysis was undertaken in that review to provide a comprehensive and detailed picture of the sustainability of penalty decisions and their revenue impact and assessed in that context.

Action item 20

With the aim of promoting early and comparatively less costly resolution of disputes and providing the Tax Office with reasonable assurance that the taxpayer is not hiding any relevant facts, the Tax Office will replace the wording 'full and true disclosure of all relevant facts' in its model settlement deed with wording that makes the settlement conditional upon the taxpayer having revealed all material facts known by them at the time of settlement and requiring them to disclose any further material facts which may become known after the execution of the deed of settlement.

ATO position — implemented

5.116 The ATO agreed with this action item. In response, the ATO held consultations through its key legal and tax practitioner forums. In this regard, comments were sought from the LPWP and the NTLG. In addition, a discussion paper was presented at the October 2010 LPWP meeting.

5.117 The ATO has advised that although external stakeholders appeared comfortable with 'true and correct' disclosures, there was significant concern with an ongoing obligation to disclose into the future. Furthermore, initial consultation raised questions about the efficacy of a model deed approach. The ATO's L&P unit considered a principles-based approach to designing settlement deeds, which was not supported by internal stakeholders.

5.118 The ATO sought internal legal advice on aspects of this action item, particularly with respect to the ongoing disclosure clause. Detailed information was provided by LSB, including extensive recommended changes to the wording used in the model settlement deed.

5.119 The ATO published the final model deed with the relevant wording extracted as follows:

The taxpayer warrants that to the best of its knowledge and belief it has made a true disclosure of all relevant and material facts to the Commissioner which relate to the issue, prior to entering into this deed.⁹⁸

IGT conclusion — implemented

5.120 The IGT considers the ATO has implemented this action item.

97 IGT, 'Penalties Review' above n 13.

98 ATO, *Model Settlement Deed* (December 2013) <<https://www.ato.gov.au/>>

Action item 21

During the review, the Tax Office improved its linkage between the active compliance and debt collection functions by involving its debt collection function in the active compliance design of project-based compliance activities. The Tax Office has improved its guidance to those officers tasked with approving active compliance decisions. It has also improved its independent checks to ensure that there is appropriate evidence to support the decision. Although these improvements have been made, there remains room for further improvement in relation to the following circumstances and tension points in administration that may arise in active compliance activities.

- *Taxpayers may 'disengage' from the Tax Office, or refuse to communicate with the Tax Office in whole, or for a period. In these circumstances, the Tax Office will need to determine a course of action on the best available evidence. This may result in the issuing of an assessment and the raising of a tax liability that may be in excess of an amount that would have been raised if the taxpayer had not disengaged from the Tax Office and had provided the best evidence available to them.*
- *In the absence of taxpayer engagement, debt collection action is generally appropriate to collect the liability.*
- *Where taxpayers seek to re-engage with the Tax Office during debt collection action or earlier, the Tax Office's processes should accommodate this re-engagement where taxpayers are seeking to provide better evidence in reducing the liability amount. However, taxpayers may perceive unfair Tax Office treatment when debt collection action is being taken at the same time as taxpayers are seeking to provide this evidence. This perception is likely to be compounded where taxpayers become aware that the Tax Office is considering settlement to resolve the dispute.*
- *Delays in determining objections may mean that debt collection action is taken on liabilities that are based on evidence that is not as accurate as evidence that has been provided by taxpayers in the objection.*
- *The Tax Office's functional separation of debt collection and tax liability dispute resolution may also result in missed opportunities to successfully re-engage with the taxpayer to resolve the matter efficiently. These missed opportunities may increase costs, by pursuing a debt that may be in excess of that ultimately determined, and promote perceptions of unfair treatment in the circumstances.*

Where assessments are issued in the above circumstances, the Tax Office will aim to promote future voluntary compliance behaviours and avoid the potential for perceptions of unfair treatment, by ensuring that it:

- *clearly explains to the taxpayer why it is raising such assessments and the role that the available evidence has played in the decision, and gives an indication of which further evidence would likely affect the taxpayer's liability;*
- *ensures that tax officials (including debt collection officers) are alert to signals that the taxpayer is seeking to re-engage on the liability issues by providing better material evidence;*
- *where the taxpayer seeks to re-engage on the liability issues by providing better material evidence, explores this re-engagement as an opportunity to efficiently and effectively resolve the dispute; and*

Action item 21 (continued)

- *quickly reassesses the liability on the basis of this further evidence (for example, as a fast-tracked objection, or as the audit area reconsidering the basis for liability and withdrawing the amendment and reissuing another, where appropriate) before further debt collection action is taken.*

ATO position — implemented

5.121 The ATO agreed to this action item and has scoped and designed improved work practices and procedures to manage the interaction between the debt function and the active compliance function. This work covers collecting debts raised from active compliance activities.

5.122 To inform the design of practices and procedures between these functions, the ATO conducted a pilot between the SME and Debt business lines. The SME business line arrangements were also expanded to introduce a formal quarterly forum which provided a whole-of-active compliance opportunity to improve the open and active exchange of information, including case-based information and better practices. These practices include a reference to situations where taxpayers seek to re-engage with the ATO after active compliance assessments are raised.

5.123 The Debt business line and the Active Compliance group, which includes the ATO's business lines responsible for the compliance function, worked to agree revised protocols and working principles by developing an overarching Memorandum of Understanding (MOU). The ATO provided an intranet link to *Joint Compliance – Debt Instruction – Debt Collection and Dispute Resolution* (Compliance – Debt instruction) outlining the improvements sought by the action item:

As tax officers, we need to be mindful that disengaged taxpayers may want to re-engage with us to clarify matters and resolve a dispute after an Active Compliance amended assessment issues.

Where we have raised assessments, including default assessments, where taxpayers have become disengaged during the audit process, we will:

- clearly explain to the taxpayer why we raised such assessments and the role that the available evidence has played in the decision, and give an indication, where possible, of what further evidence would likely affect the taxpayer's liability
- ensure that Compliance and Debt officers are alert to signals that the taxpayer is seeking to re-engage with us about their liability by providing better material evidence. Taxpayers may approach Compliance or Debt officers or team leaders.

- where a taxpayer seeks to re-engage with us about their liability by providing better material evidence, we must explore this re-engagement as an opportunity to efficiently and effectively resolve the taxpayer's dispute, unless we have good reason to believe the approach is not genuine or there is a risk assets will be dissipated, and
- where possible, aim to quickly reassess their liability on the basis of any further credible evidence they supply.⁹⁹

5.124 The ATO issued the completed agreed protocols, practices, procedures and processes to its staff, including senior executives, as well as publishing them on its intranet. In addition, the ATO advised that a workshop with representatives from the debt and active compliance functions was held in December 2010. Key outcomes of the workshop were:

- establishment of the active compliance/Debt network;
- intelligence and strategic information and tools to be shared across active compliance areas and Debt;
- debt to be considered at the earliest stages of active compliance activity;
- auditors to be provided with advice and assistance regarding Debt to assist in 'closing the gap';
- all active compliance audit finalisation letters to include a 'debt paragraph'; and
- auditors to actively use existing protocols, principles and procedures to manage the debt following an audit, including putting payment arrangements in place where appropriate and early referral of cases to Debt.

5.125 The ATO has also updated internal staff instructions to require ATO officers to consider the interaction between the debt and active compliance functions, such as the use of 'collection deferral requests, particularly in cases where payment conversations are taking place as part of ongoing compliance action.'¹⁰⁰

IGT conclusion — implemented

5.126 The IGT recognises that the ATO has undertaken work consistent with the aims of this action item and therefore considers the ATO has materially implemented this action item. However, the IGT has some residual concerns as to the process for staying debt recovery action where a reconsideration of additional relevant evidence provided by a taxpayer who has re-engaged after the issue of amended assessments arises. The IGT may reconsider this issue in the IGT's *Review into the ATO's Approach to Debt Collection*

Action item 22

Where there are significant internal or external signals that the Tax Office's existing precedential view may need to be at least reviewed, the Tax Office will require officers to escalate the matter to the Centres of Expertise or Tax Counsel Network for their decision.

99 ATO, 'Joint Compliance – Debt Instruction – Debt Collection and Dispute', internal ATO document, undated.

100 ATO, 'Overarching Principles: Active Compliance and Debt', internal ATO document, January 2014.

Action item 22 (continued)

Where there are significant internal or external signals that the Tax Office's existing compliance approach (for example, its approach to calculating an arm's length amount for a particular set of circumstances being reviewed in a number of cases) may need to be at least reviewed, the Tax Office will require officers to escalate the matter to the appropriate senior tax official (for example, the SES Risk owner) for their decision.

If there is a change to that existing precedential view in a given compliance approach, the Tax Office will ensure:

- it fully informs those known impacted taxpayers at the earliest possible time; and*
- it undertakes quick, complete and transparent rectification action with those known taxpayers where appropriate.*

Examples of 'significant internal or external signals' would include:

- a tribunal or court decision which materially affects the basis for the Tax Office's view of the tax law – such as a decision on trust law which may affect treatment of income under Division 6, or a tribunal decision which indicates the tribunal's preferred approach to findings of fact; and*
- internal reconsideration of a Tax Office approach to a compliance issue that indicates a need to materially alter the approach for a particular factual matrix.*

ATO position — implemented

5.127 The ATO agreed to this action item. In response, it incorporated a document into its active compliance work processes, *Key Active Compliance requirements relating to: Taxpayer engagement, escalation of issues, on-going communications and early dispute resolution*, ('Key Active Compliance requirements'). This document requires ATO staff to comply with Action Item 22 and indicates that compliance will be checked through the IQF process.

5.128 The ATO has confirmed that their escalation processes are in place and mandatory for all staff. The requirement to escalate technical issues and possible changes to the ATO view are also outlined in other ATO documents, such as the ORCLA pages 'Working together' and 'Guide to managing high risk technical issues',¹⁰¹ as well as practice statements such as PSLA 2012/1,¹⁰² PSLA 2003/3¹⁰³ and PSLA 2011/27¹⁰⁴ which require tax technical experts from the Tax Counsel Network to be engaged on a risk basis or where a precedential view is to be changed.

5.129 As noted earlier, an ATO organisational restructure took place after the conclusion of the Settlements review which resulted in the relocation of several Centres of Expertise and Tax Counsel Network officers to the active compliance business lines. As a result the

101 ATO, 'Guide to managing high risk technical issues', internal ATO document, undated.

102 ATO, 'Technical Issues Management Practice Statement', above n 89.

103 ATO, *Precedential ATO View*, Practice Statement PS LA 2003/3, 23 April 2014, para [13].

104 ATO, *Matters the Commissioner Considers when Determining whether the Australian Taxation Office (ATO) View of the Law Should only be Applied Prospectively*, Practice Statement PS LA 2011/27, 13 January 2014, para [33].

engagement of tax technical officers within Law and Practice is now governed by PSLA 2012/1¹⁰⁵ which applies the ATO's wider risk management framework to the management of technical issues.

IGT conclusion — partly implemented

5.130 This action item sought to ensure that lower level officers who applied senior technical officers views would quickly alert those technical officers and seek their reconsideration of views where there were signals that those views may not be sustainable. What was sought to be avoided were the costs and long delays in escalating issues to senior technical officers as they may not have been made aware of the need to reconsider their views on issues unless there was significant disputation involved, such as litigation. Substantial delays raise the risk that lower level officers may apply a senior technical officer's view to taxpayers' arrangements which is later altered after reconsideration. The IGT considered it important for the ATO to alert taxpayers of the alteration and take action and rectify the application of the previously held view, in circumstances where that view would not have been applied if the view was reconsidered shortly after significant signals indicated that the view was unsustainable.

5.131 Although the ATO no longer uses the term 'precedential view' as a determinative factor in escalating issues to senior technical officers, it does continue to escalate issues to those officers using a risk based approach. Notwithstanding this change in terminology and the factors relevant to escalation, the IGT considers the principles underlying this recommendation remain relevant.

5.132 The IGT considers that the ATO has partly implemented this action item for the reasons described below.

5.133 The IGT considers that the ATO has implemented the requirement to escalate such matters for senior technical officer review through the various ORCLA pages and practice statements referred to above.

5.134 The abovementioned Key Active Compliance requirements document requires officers to inform taxpayers of changes to ATO views or approaches and undertake appropriate rectification action. This document is accessible from two supporting policies¹⁰⁶ incorporated within two work procedures¹⁰⁷ via a hyperlink under the heading 'Further information'. In one of these procedures, there are more than 30 documents listed as further information. It is unclear whether officers must read and comply with the contents of any further information listed in these procedures. Furthermore, no evidence has been provided to indicate that the IQF process has checked compliance with these requirements.

5.135 Practice Statement PS LA 2011/27¹⁰⁸ may address ATO views which change a previous ATO facilitated industry practice. However, the practice statement will not address those circumstances in which views or compliance approaches were previously advanced during compliance activities, but are now changed due to signals (such as those set out in the action item above) that the previous ATO view was unsustainable. As noted in the original IGT review, such circumstances may arise during ATO compliance projects involving audits

105 ATO, 'Technical Issues Management Practice Statement', above n 89.

106 'Engaging with taxpayers' and 'Settlements'.

107 'Dispute risk procedures' and 'Integrated approach to dispute resolution'.

108 ATO, 'Prospective Application of the Law Practice Statement', above n 104.

of multiple taxpayers on the same tax issue. Furthermore, the operation of this practice statement is the subject of IGT follow up review which will be reported separately.

5.136 The IGT is of the view that the links to the Key Active Compliance requirements document do not appear to be incorporated within the procedural requirements specified in the relevant ATO work procedures and that compliance with these requirements is not monitored. Accordingly, the IGT considers that the ATO has not implemented part of this recommendation.

Action item 23

The Tax Office will move towards implementing its good communication practices across all its active compliance cases, including:

- *clearly explaining to taxpayers the role that the evidence has played in the decision, including, in relation to conflicting material evidence, the reasons why certain evidence was preferred; and*
- *in circumstances where taxpayers fail to provide material evidence, explaining to taxpayers the impact that not providing the information will have on the compliance decision in their particular case, and following a reasonable opportunity for taxpayers to respond, quickly finalising these cases.*

ATO position — implemented

5.137 The ATO agreed to this action item. The ATO advised that it has embedded the IGT's action item into its active compliance work processes ahead of finalising the integrated approach to early dispute resolution. Leaders in active compliance were instructed to conduct activities in accordance with the action item. New practices and procedures were addressed through the Active Compliance Steering Committee. The ATO has also made significant progress in this area through the roll out of 'Active Case Management' training for compliance staff.

5.138 The ATO has advised that the IQF has been designed to assess compliance with its endorsed processes.

IGT conclusion — implemented

5.139 The IGT considers that the ATO has implemented this action item.

Action item 24

Although the Tax Office has processes and policies concerning valuations, there remains room for further improvement in resolving disputes over valuations. The Tax Office will, within one year, examine recent settled cases that involved disputes over valuations, in order to:

- *identify the relevant facts, the events that indicated the dispute was imminent, how the dispute was resolved and why the dispute was ultimately settled;*

Action item 24 (continued)

- *identify early dispute resolution opportunities; and*
- *develop and test strategies that will minimise the time and cost to both the taxpayer and the Tax Office in resolving disputes over valuations.*

ATO position — implemented

5.140 The ATO agreed to this action item and provided all data from the settlements register concerning settlements over disputed valuations for the 2009–10 year to the Active Compliance Capability Leader and the Disputes Resolution Project team.

5.141 The ATO held consultations between the Active Compliance Capability Leader and the Disputes Resolution Project team with two external experts on valuations who provided advice on early dispute resolution and endorsed the ATO's drive in the audit stage to resolve valuation disputes and on resolving the key matters 'not agreed'.

5.142 The ATO has stated that on the basis of the above advice from an experienced tax-valuation expert, all team leaders managing valuation disputes in active compliance will be required to pursue appropriate agreements on relevant matters with taxpayers before active compliance audit cases are finalised to minimise time and cost to both the taxpayer and ATO.

IGT conclusion — issue subsumed by subsequent IGT review

5.143 The area of valuations and taxpayer concern continued to persist in relation to ATO practices. As a result, the IGT announced a review into valuations. Accordingly, the scope of this recommendation has been subsumed by the IGT's *Review into the ATO's Administration of Valuation Matters*.

CHAPTER 6 — REVIEW INTO THE AUSTRALIAN TAXATION OFFICE'S ADMINISTRATION OF THE SUPERANNUATION GUARANTEE CHARGE

INTRODUCTION

6.1 The IGT's *Review into the Australian Taxation Office's Administration of the Superannuation Guarantee Charge* arose as a result of concerns expressed by stakeholders with the general level of Superannuation Guarantee (SG) compliance and, in particular, the ATO's timeliness and responsiveness to employee complaints regarding the non-payment of SG. Concerns were also expressed about the adequacy of the ATO's enforcement action and monitoring as well as the level of outstanding Superannuation Guarantee Charge (SGC) collected. Terms of reference for this review were announced on 2 June 2009.

6.2 The review examined the ATO's processes for identifying the level of SG non-compliance and also assessed the ATO's non-compliance detection mechanisms and approaches taken following that detection. Furthermore, the review considered the ATO's risk assessment strategies and its implementation, communication strategies with employee, the timeliness of actioning employee notifications, the level of information provided about the collection of unpaid superannuation and timeliness in collecting unpaid SGC.

6.3 The review found that the people most at risk with the current SG system were the employees who were least empowered or who were incorrectly classified as 'independent contractors'.

6.4 The recommendations outlined in the report sought to improve the SG system and the ATO's administration by:

- minimising the time period between the non-payment of an SG entitlement and the ATO's awareness of it;
- improving the ATO's ability to proactively identify high-risk cases and trigger a compliance response;
- improving aspects of the ATO's compliance and debt collection processes;
- improving the deterrence or penalty effect on those employers that did not lodge SGC Statements and the delayed or non-payment of SG entitlements; and
- better protecting SG entitlements where an employer became insolvent.

6.5 Overall, the IGT directed seven recommendations in full and three recommendations in part, to the ATO. The remainder were made for the previous Government's consideration. The ATO fully agreed with nine of the recommendations directed to it and disagreed with one of those recommendations – the latter is reproduced in Appendix 1.

6.6 On 24 November 2010, the then Minister publicly released the report of this review.

IMPLEMENTATION OF AGREED RECOMMENDATIONS

6.7 The following sections set out the agreed recommendations and examine the ATO's implementation to that extent.

Recommendation 1

Given the identified barriers to quantifying the level of non-compliance, to better detect SG non-compliance the ATO should determine the current and accessible information and data required for a more sophisticated analysis of the SG population so as ascertain a more complete picture in relation to the level of non-compliance and its impact on employees.

This should include the collection and analysis of data (including additional information that may be captured and available to the ATO in the future in line with Recommendation 3) to estimate the amount of money involved with SG non-compliance, the percentage of non-compliant employers and affected employees across market segments and the quantum of the salary sacrifice component.

ATO position — implemented

6.8 The ATO agreed with this recommendation, noting that it would use all readily available data and information to ascertain a more fulsome picture of SG compliance levels in various markets and industries.

6.9 The ATO has advised that an analysis was undertaken on ATO information and data collected on employers that were the subject of employee notification (ENs) complaints and third party referrals. The analysis was undertaken to determine the characteristics of employers who are more likely to be prone to SG non-compliance. The characteristics of the non-compliant employer included the industry, location, operating structure, size and market segment.

6.10 On 1 July 2009, compulsory reporting on Reportable Employer Superannuation Contributions (RESC) was introduced. As a result, the ATO began undertaking analysis of the RESC data that was collected. RESC data consists of those contributions where the employee has influenced the amount of superannuation that was contributed – for example, salary sacrificed amounts. The analysis of this data provided the ATO with further understanding of employer compliance at a macro level – for example, being able to identify industries that potentially make employer contributions in excess of the SG. The ATO has advised that it will continue to use RESC data in future diagnostic analysis of SG non-compliance.

6.11 Furthermore, as part of the ATO's data matching strategy, it has used internal data, such as employee salary, wage and contribution figures, to also help identify those industries or employers who have the highest risk of being non-compliant.

IGT conclusion — implemented

6.12 The IGT considers that the ATO has implemented this recommendation.

6.13 It should be noted that the extent to which the ATO was able to undertake the analysis envisaged in the second paragraph of this recommendation was contingent on legislation being enacted to implement Recommendation 3, which would lead to an increase in the data available to the ATO over time. As such legislation has not been enacted, the ATO has been unable to estimate accurately the amount of money involved with SG non-compliance, the percentage of non-compliant employers and affected employees across market segments and the quantum of the salary sacrifice component.

6.14 Where further opportunity arises for the ATO to improve performance monitoring strategies by collecting additional data relating to the amount of money involved with SG non-compliance and the percentage of employees affected by employer SG non-compliance the IGT would support such action.

Recommendation 2

6.15 This recommendation was made for the previous Government to consider and is reproduced in Appendix 2.

Recommendation 3

The Government consider improving the current payment and information systems for SG obligations to allow the ATO to undertake more real-time monitoring and rapid follow up of high-risk employers, particularly micro-businesses.

The payment and information systems should have the following features:

- *Capturing the following details for each employee: name, tax file number, ordinary time earnings, amount of superannuation contribution paid by employer, superannuation fund and member number;*
- *ATO to have access to this data on a quarterly basis; and*
- *Compulsory requirement for all employers in high-risk segments to participate in the system rather than it being optional.*

In a manner that minimises compliance obligations, the ATO should also engage superannuation funds and clearing houses to obtain information for the purposes of identifying potential SG non-compliance.

ATO position — implemented

6.16 The ATO agreed with the part of the recommendation that was directed to it, noting that the ATO already encourages people in the superannuation industry and others to provide information on employers at risk of non compliance with their SG obligations.

6.17 Since that time, the ATO has advised that a number of superannuation funds, clearing houses and other government departments have been engaged directly so that information can be obtained to identify potential SG non-compliance. For example, the ATO, together with the Industry Funds Forum,¹⁰⁹ established a steering committee to guide and

109 A non-profit, non-political, national incorporated association whose members are the Chief Executive Officers of twenty eight (28) of Australia's largest industry superannuation funds.

oversee a pilot to examine SG compliance in the building and construction industry. The pilot identified that the parameters already used by the ATO to detect SG non-compliance are consistent with those found to be indicators of SG non-compliance in the data provided by the Building and Construction Industry superannuation funds.

6.18 Furthermore, the ATO has advised that it entered into an agreement with the Department of Human Services (DHS) for the exchange of data relating to the Small Business Superannuation Clearing House (SBSCH). The ATO has advised that the data from the SBSCH could be used to:

- profile compliant employers to assist with strategies for non-compliant employers and for use as a general measure of compliance;
- assist resolution of EN cases against employers registered with the clearing house; and
- risk assess employers who cease to make payments to the clearing house for potential SG compliance action.

6.19 A MOU was also entered into by the ATO and the Fair Work Ombudsman (FWO), whereby the FWO would supply data to the ATO which contain details of employers who appear to have not paid SG during the course of FWO investigations.

IGT conclusion — implemented

6.20 The IGT considers that the ATO has implemented this recommendation.

6.21 It should also be noted that on 28 November 2012, the *Superannuation Laws Amendment (Capital Gains Tax Relief and Other Efficiency Measures) Act 2012* was introduced. Amongst other things, the legislation expanded superannuation reporting by requiring superannuation providers to provide statements to the ATO for all members who held an interest in the super plan at any time during a reporting period. The new legislation will provide an opportunity for the ATO to engage and develop communications with a number of superannuation providers and ascertain whether the additional information collected from them may be used for the purpose of identifying potential SG non-compliance.

Recommendation 5

To improve the employee experience of ATO communications in relation to its investigation of EN complaints, the ATO should improve its communications by ensuring that:

- *Employees receive appropriate and personalised letters in a timely manner that set out the following details:*
 - *SGC liabilities raised by the ATO on behalf of employees following an investigation;*
 - *SGC amounts collected by the ATO; and*
 - *Where the ATO has not been able to collect, the reasons for non-collection (for example, insolvent employer, uneconomical to pursue) and the amount written-off.*
- *Auditors correctly complete the case management system so as to allow ATO officers to appropriately respond to employee requests for updates on ATO action.*

ATO position — implemented

6.22 The ATO agreed with the recommendation, noting that whilst it had already taken steps to minimise the likelihood of auditors making errors when completing case management files in the related systems. The ATO also indicated that they would review its letters to improve communications with relevant SG-affected employees. Currently, the ATO issues letters at different stages of superannuation guarantee investigations. When SG liabilities are established and raised, letters are sent to the employees, informing them of the amount raised and collected. Where the ATO is not able to collect, letters providing reasons for non-collection are sent to the employees.

6.23 In respect of the second part of the recommendation, the ATO has advised that regular reporting has been implemented to reduce the level of errors made in issuing automated letters and to ascertain whether internal ATO templates are correctly completed by audit officers. A reduced level of errors in completing these templates, therefore, better assists ATO officers in responding appropriately to employee requests for updates on ATO action. To further improve this process, the ATO has also advised that it is changing its systems to automate the implementation of this recommendation presently.

IGT conclusion — implemented

6.24 The IGT considers that the ATO has implemented this recommendation.

Recommendation 6

To improve transparency of the time taken for the ATO to complete its compliance action in response to employee notifications, the ATO should also measure its performance with the 4-month and 12-month completion timeframes from the date that an employee lodges a valid complaint with the ATO.

ATO position — implemented

6.25 The ATO agreed with this recommendation and noted that it would implement new performance standards in the 2010–11 financial year.

6.26 The ATO has advised that it measures performance and responsiveness with 4-month and 12-month completion timeframes. These timeframes commence from the date that an employee lodges a 'valid complaint' which is a complaint comprising all the information necessary to commence compliance action.

6.27 Since the 2010–11 financial year, the ATO reports the performance regarding the 4-month and 12-month completion timeframes in its Annual Reports. The ATO's performance benchmarks for superannuation complaints are as follows:

- 100 per cent of superannuation complaints commenced within 28 days;
- 50 per cent of superannuation complaints resolved within 4 months; and
- 90 per cent of superannuation complaints resolved within 12 months.

6.28 The following performance results were extracted from the Commissioner's 2012–13 Annual Report:¹¹⁰

Table 7: Completion timeframes for Superannuation Guarantee cases

Percentage of superannuation guarantee cases completed in a timely manner	99.2% commenced within 28 days (benchmark 100%) 50.8% completed within 4 months (benchmark 50%) 99.7% completed within 12 months (benchmark 90%)
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Source: Commissioner of Taxation, *Annual Report 2012–13*

IGT conclusion — implemented

6.29 The IGT considers that the ATO has implemented this recommendation.

Recommendation 7

To ensure continuous improvement of the EN complaints process, the ATO should measure the time it takes for an employee to receive their SG entitlement from the time that they lodge an EN complaint.

ATO position — implemented

6.30 The ATO agreed with this recommendation but qualified that implementation was subject to its systems capabilities. Furthermore, the ATO stated that the implementation of this recommendation was contingent on the implementation of SG systems into the new enterprise platforms, which was not expected to occur until 12 months after the recommendation was made.

6.31 The ATO has advised that it implemented a manual tracking process of EN complaints received in the 2008–09 and 2009–10 financial years. The ATO continues this process on a yearly basis. The ATO has also advised that the manual tracking process provides a platform to:

- obtain a complete and accurate picture of the EN population and how the ATO is performing in terms of actioning ENs;
- assist with risk differentiation, such as improving the ATO's abilities to focus resources on areas of higher risk;
- ensure that ENs are correctly and completely actioned irrespective of which ATO business line is actioning the case;
- identify situations where the automatic allocation system has broken down and those funds which should have been allocated to the notifier remained unallocated;
- identify letters that have not been issued to taxpayers;

110 Commissioner of Taxation, *Annual Report 2012-13* (2013) p 69.

- enable the ATO to send letters more quickly where a finalisation letter had not been issued and there has been a break down in the EN process; and
- improve the speed and accuracy of notifications, resulting in less complaints and rework.

6.32 In continuing with this process the ATO expects to clearly identify trends and improvements in SG EN complaints, particularly in areas such as reporting, governance and work practices.

IGT conclusion — implemented

6.33 The IGT considers that the ATO has implemented this recommendation.

Recommendation 8

As a means to better measure performance around SG administration and increasing transparency, the ATO should report on the following:

- *the number of SG complaints leading to an SGC liability being raised and those leading to no result;*
- *the total number of employees whose superannuation entitlements are checked and the number of employers whose records are checked;*
- *the percentage of superannuation complaints resolved in accordance with the service standards; and*
- *the total amount and basis for SGC written-off.*

ATO position — implemented

6.34 The ATO agreed with this recommendation and qualified that implementation was subject to data being readily available from its systems.

6.35 The ATO advised that it currently reports performance information around SG administration in its Annual Report. The following was extracted from the 2012–13 Annual Report:

Table 8: Reported Superannuation Guarantee performance information

IGT recommendation	Type of ATO information reported	2012–13 performance
Rec 8 Part 1	Number of superannuation guarantee complaints leading to a superannuation liability being raised and those leading to no result	Complaints leading to liability being raised — 11,413 Complaints leading to no result — 5,563
Rec 8 Part 2	Number of employees who have had superannuation guarantee entitlements raised through compliance activities and voluntary disclosures	154,644 employees had entitlements raised through compliance activities 360,922 employees had entitlements raised through voluntary disclosures
Rec 8 Part 2	Number of employers whose records were checked	18,102

Table 8 (continued)

IGT recommendation	Type of ATO information reported	2012–13 performance
Rec 8 Part 3	Percentage of superannuation guarantee cases completed in a timely manner	99.2% commenced within 28 days (benchmark 100%) 50.8% completed within 4 months (benchmark 50%) 99.7% completed within 12 months (benchmark 90%)
Rec 8 Part 4	Value of superannuation guarantee debt on hand and the amount of superannuation guarantee debt written off	\$932.1 million superannuation guarantee debt on hand (including collectable debt) \$203.8 million superannuation guarantee debt written off (due to employer insolvency or that it was uneconomical to recover)

Source: Commissioner of Taxation, *Annual Report 2012–13*

6.36 The ATO also reported the amount of SCG raised, collected and transferred to superannuation funds or paid to individuals in the 2012–13 financial year. These amounts were \$646.4 million, \$337.4 million and \$311.8 million, respectively.¹¹¹

IGT conclusion — implemented

6.37 The IGT considers that the ATO has implemented this recommendation.

Recommendation 9

The Government consider whether the current multi-faceted and complex penalty system applying to SG (such as non-deductibility of SGC, the application of nominal interest and the administrative component from the beginning of each quarter and Part 7 penalties) should be streamlined and better targeted to improve voluntary compliance.

To bolster the Part 7 penalty regime as part of an effective deterrent against non-payment of SG entitlements, and give greater importance to the lodgement of SGC Statements, the ATO should revise its policy and administration of the penalty regime to ensure it strikes an appropriate balance between:

- *Discouraging the non-lodgement of SGC Statements by imposing penalties at a more meaningful level; and*
- *Recognising the need for appropriate remission in circumstances where the non-lodgement was due to circumstances outside the employer's control.*

The ATO should seek to more widely publicise the outcomes of its application of Part 7 penalties to deter non-compliant behaviour but in a way that protects taxpayer secrecy.

ATO position — implemented

6.38 The ATO agreed with the part of the recommendation that was directed to it.

6.39 The ATO has advised that its procedures in relation to the application of 'Part 7 penalties have been reviewed to ensure that these penalties are effectively used to deter non-compliance with SG obligations.

111 *ibid.*

6.40 On 15 September 2011, the ATO publicly released PSLA 2011/28 *Superannuation guarantee – remission of additional superannuation guarantee charge imposed under subsection 59(1) of the Superannuation Guarantee (Administration) Act 1992* which provides guidelines for the remission, in whole or part, of the Part 7 penalty. This practice statement requires ATO officers to ensure that employers in like circumstances (so far as practicable) receive like treatment¹¹² and also to consider the following:

Any decision concerning the remission of the Part 7 penalty must have regard to the circumstances of the case including the effort made by the employer to comply with the obligation to self-assess the liability for SGC. Tax officers should bear in mind that the purpose of imposing penalties is to ensure employees' superannuation entitlements are protected and to encourage future voluntary compliance and continuing co-operation from employers. It is appropriate to treat genuine attempts to comply differently to situations where an employer does not make an effort to comply. This approach accords with principles of the Taxpayers' Charter and with the compliance model.¹¹³

6.41 The ATO's has advised that during the 2012–13 financial years and the YTD, the total Part 7 penalties raised in proportion to the total SGC raised were 12.5 per cent and 12 per cent respectively. Given this percentage, the ATO were of the view that publicly communicating this information would be unlikely to deter non-compliant behaviour. As an alternative to public communication of Part 7 penalties, the ATO has advised that it addresses employers directly. In letters to employers at various stages of the audit process, the recipient is informed that:

substantial penalties are automatically imposed under the law if you fail to meet your super obligations. However, they can be significantly reduced if you complete and return SGC statements to us, for each period where a shortfall exists, within 21 days or before we notify you of our intention to undertake an audit, (whichever is later), and have a good compliance history.¹¹⁴

IGT conclusion — implemented

6.42 The IGT considers that the ATO has implemented this recommendation.

Recommendation 10

To bolster SG prosecution action as part of an effective deterrent against non-payment of SG entitlements the Government consider whether the ATO should be afforded greater prosecution powers (such as the ability to seek the imposition of civil pecuniary penalties) where an employer does not pay SG and fails to cooperate with the ATO.

In the event that the ATO is given greater prosecution powers, the ATO should implement a media strategy that is designed to maximise the compliance leverage effect by raising the coverage and profile of SG prosecution cases.

112 ATO, *Superannuation Guarantee – Remission of Additional Superannuation Guarantee Charge Imposed under Subsection 59(1) of the Superannuation Guarantee (Administration) Act 1992*, PS LA 2011/28, 12 December 2012, para [15].

113 *ibid*, para [16].

114 ATO, 'Notice of Advice Received Letter', internal ATO Document, 22 April 2014.

Recommendation 10 (continued)

Notwithstanding being granted these further powers, the ATO should adopt a stronger prosecution strategy for the more egregious and high-risk employers and should also finalise and publicly release its revised SG prosecution strategy and implementation plan.

ATO position — implemented

6.43 In relation to that part of the recommendation directed to the ATO, the ATO agreed to publish the key elements of its SG prosecution strategy once it was complete.

6.44 The ATO has advised that as a result of the recommendation it has reviewed and broadened its SG prosecution strategy by targeting repeat offenders¹¹⁵ and issuing an increased number of formal notices to provide information (section 77 notices). This broadened prosecution strategy was published on 13 December 2011.¹¹⁶

6.45 The ATO has advised that it will also develop a media strategy for publicising prosecutions if greater powers are provided through future legislative changes.

IGT conclusion — implemented

6.46 The IGT considers that the ATO has implemented this recommendation.

Recommendation 11

6.47 This recommendation was made for the previous Government to consider and is reproduced in Appendix 2.

Recommendation 12

To minimise SGC debt defaulters, the ATO should improve its risk identification techniques to better target high-risk employers with firmer action sooner. For instance, the ATO's debt collection processes should place greater emphasis on employers' previous compliance behaviour in determining how a debt case is actioned.

Where an employer has defaulted in their payment arrangement, the ATO should require further information regarding the employer's financial and compliance position before entering into further payment arrangements.

ATO position — implemented

6.48 The ATO agreed with this recommendation, noting that it had implemented the key elements of the recommendation and continues to explore options to further improve its case risk assessment and differentiated compliance approach to SGC debt collection.

115 ATO, *Superannuation Prosecution Strategy – Formal Notice to Provide Information* (July 2012) <<http://www.ato.gov.au/>>.

116 ATO, *Superannuation Prosecution Strategy* (5 July 2012) <<http://www.ato.gov.au/>>.

6.49 On 18 May 2011, the ATO commenced the 'Debt Right Now' (DRN) pilot for SGC debt collection. Due to the success of the pilot, it has become a part of the ATO's 'business as usual' process for SGC debt collection.

6.50 The DRN uses the ATO's existing debt risk-rating models to produce 'risk scores' which are then used to determine the action that will be taken by the ATO. Employers with low risk scores are actioned by automated processes, such as automated demand letters and may receive more than one telephone call before the ATO proceeds to firmer recovery action. However, the ATO proceeds to firmer action sooner when employers have high risk scores – for example, if a payment arrangement is not agreed, a garnishee action or creditor's statutory demand will be issued. The ATO has advised that as a result of the pilot, the ATO have increased their collections, which led to decreased numbers of debt cases and values of debts outstanding.

IGT conclusion — implemented

6.51 The IGT considers that the ATO has implemented this recommendation.

APPENDIX 1 — RECOMMENDATIONS WITH WHICH THE ATO DISAGREED IN WHOLE

A.1.1 The ATO has disagreed with some the IGT's recommendations in whole or in part. Those recommendations with which the ATO disagreed with in whole are set out in this Appendix. Those recommendations with which the ATO disagreed in part are not reproduced here as they have been reproduced throughout the previous chapters of this report.

REVIEW INTO THE ATO'S ADMINISTRATION OF THE SUPERANNUATION GUARANTEE CHARGE

A.1.2 The ATO disagreed with the following recommendation in the Review into the ATO's Administration of the Superannuation Guarantee Charge.

RECOMMENDATION 4

To minimise the timeframe between SG non-compliance and the ATO's detection, the ATO should significantly expand its proactive SG audit work to allow for more real-time monitoring and rapid follow up of high-risk employers, especially in the micro-business segment, who have not paid superannuation. This should include:

- *Increased reliance on data-matching approaches; and*
- *Increased community presence through more targeted field work along the lines of the FWO campaigns.*

This also requires the ATO to further develop its risk identification strategies to more effectively detect the different types of SG non-compliance as each requires different analysis techniques and detection mechanisms.

ATO response — disagree

The ATO already uses data matching techniques to identify employers at risk of non compliance and will be able to do this with even more precision with the availability of Reportable Employer Superannuation Contributions data.

The ATO already targets high risk industries and employers. Approximately 95 per cent of our proactive audits are in the micro segment.

The ATO already has a high percentage of its proactive audit resources in field activities. Any further increase would have to be carefully considered due to the high costs of each field activity compared to a phone or desk audit.

The ATO is committed to addressing all employee SG complaints in a timely way and this necessarily constrains the resources available for proactive work. Nevertheless, 27 per cent of our compliance resources working on SG are doing proactive risk-based work.

Having regard to the overall level of risk in the SG system, and the range of other tax and superannuation risks that the ATO is required to address, we believe that the current level of resources allocated to addressing SG risks is appropriate.

REVIEW INTO THE UNDERLYING CAUSES AND THE MANAGEMENT OF OBJECTIONS TO TAX OFFICE DECISIONS

A.1.3 The ATO disagreed with the following recommendation in the Review into the Underlying Causes and the Management of Objections to Tax Office Decisions.

RECOMMENDATION 5

The Commissioner should remit the general interest charge for the time taken by the Tax Office to finalise an objection beyond a 60-day 'available to the Tax Office' period where the taxpayer has acted in good faith.

ATO response — disagree

The Tax Office's ATO Receivables Policy currently provides a broad and well balanced approach to the recovery of disputed debt and the remission of GIC, and appropriately addresses any instances of Tax Office delay in resolving objections. Remission decisions will be based on all the facts and circumstances of the case and will not follow any pre-determined formula.

REVIEW INTO THE TAX OFFICE'S ADMINISTRATION OF PUBLIC BINDING ADVICE

A.1.4 The ATO disagreed with the following recommendation in the Review into the Tax Office's Administration of Public Binding Advice.

KEY RECOMMENDATION 2

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

ATO response — disagree

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

Moreover, the Tax Office considers that these documents have been known and viewed as rulings for considerable time, even though they may not be capable of being legally binding. These include the Income Tax (IT) series and the Superannuation Guarantee (SG) series of rulings and determinations. The Tax Office is not aware of any evidence that there is confusion

about the status of such documents. Indeed, the Tax Office considers that the implementation of this recommendation, particularly in relation to pre-ROSA rulings referred to in the report, would cause rather than remove confusion, and would not alter the way in which these rulings might be used or viewed by the community.

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

APPENDIX 2 — RECOMMENDATIONS WHICH WERE MADE FOR THE PREVIOUS GOVERNMENT’S CONSIDERATION

A.2.1 This Appendix sets out the recommendations that were made for the previous Government’s consideration.

REVIEW INTO THE ATO’S ADMINISTRATION OF THE SUPERANNUATION GUARANTEE CHARGE

A.2.2 In the *Review into the ATO’s Administration of the Superannuation Guarantee Charge*, the following five recommendations were made for the previous Government’s consideration, either in whole or in part.

RECOMMENDATION 2

The Government consider providing employees with more timely information regarding whether their employer has paid SG by the due date, by having employers, on a quarterly basis, include on each employee’s payslip their ordinary time earnings for SG purposes and the amount of SG actually paid to the employee’s superannuation fund or the ATO. This will also assist in reducing the timeframe between when a SG shortfall arises and when an employee lodges an EN complaint with the ATO.

A.2.3 On 21 September 2011, the then Government announced its intention to require employers to disclose on employee payslips when SG contributions were due to be paid and, therefore, provide early warning to employees if superannuation entitlements were not paid.¹¹⁷ Legislation which gave effect to this intention became law on 27 June 2012.¹¹⁸

RECOMMENDATION 3

The Government consider improving the current payment and information systems for SG obligations to allow the ATO to undertake more real-time monitoring and rapid follow up of high-risk employers, particularly micro-businesses.

The payment and information systems should have the following features:

- *Capturing the following details for each employee: name, tax file number, ordinary time earnings, amount of superannuation contribution paid by employer, superannuation fund and member number;*

117 Bill Shorten (Minister for Financial Services & Superannuation), ‘A Better Deal for Superfund Members’ (Media Release No 131, 21 September 2011).

118 *Tax and Superannuation Laws Amendment (2012 Measures No. 1) Act 2012.*

RECOMMENDATION 3 (CONTINUED)

- *ATO to have access to this data on a quarterly basis; and*
- *Compulsory requirement for all employers in high-risk segments to participate in the system rather than it being optional.*

In a manner that minimises compliance obligations, the ATO should also engage superannuation funds and clearing houses to obtain information for the purposes of identifying potential SG non-compliance.

A.2.4 On 7 January 2014, the Government announced its intention to shift the running of the small business clearing house from Medicare to the ATO commencing 1 April 2014.¹¹⁹ This clearing house allows small business employers to pay superannuation contributions electronically to one location. Once the correct amount is paid to the clearing house, the small business is discharged of their obligations.¹²⁰

RECOMMENDATION 9

The Government consider whether the current multi-faceted and complex penalty system applying to SG (such as non-deductibility of SGC, the application of nominal interest and the administrative component from the beginning of each quarter and Part 7 penalties) should be streamlined and better targeted to improve voluntary compliance.

To bolster the Part 7 penalty regime as part of an effective deterrent against non-payment of SG entitlements, and give greater importance to the lodgement of SGC Statements, the ATO should revise its policy and administration of the penalty regime to ensure it strikes an appropriate balance between:

- *Discouraging the non-lodgement of SGC Statements by imposing penalties at a more meaningful level; and*
- *Recognising the need for appropriate remission in circumstances where the non-lodgement was due to circumstances outside the employer's control.*

The ATO should seek to more widely publicise the outcomes of its application of Part 7 penalties to deter non-compliant behaviour but in a way that protects taxpayer secrecy.

119 Bruce Billson (Minister for Small Business) and Arthur Sinodinos (Assistant Treasurer), 'Life Made Easier for Small Business' (Media Release, 7 January 2014).

120 Chris Bowen (Minister For Human Services Minister For Financial Services, Superannuation and Corporate Law) and Craig Emerson (Minister For Small Business, Independent Contractors and the Service Economy Minister for Competition Policy and Consumer Affairs Minister Assisting the Minister for Finance on Deregulation), 'Cutting Red Tape for Small Business – Superannuation Clearing House Service' (Media Release, 6 November 2009).

RECOMMENDATION 10

To bolster SG prosecution action as part of an effective deterrent against non-payment of SG entitlements the Government consider whether the ATO should be afforded greater prosecution powers (such as the ability to seek the imposition of civil pecuniary penalties) where an employer does not pay SG and fails to cooperate with the ATO.

In the event that the ATO is given greater prosecution powers, the ATO should implement a media strategy that is designed to maximise the compliance leverage effect by raising the coverage and profile of SG prosecution cases.

Notwithstanding being granted these further powers, the ATO should adopt a stronger prosecution strategy for the more egregious and high-risk employers and should also finalise and publicly release its revised SG prosecution strategy and implementation plan.

RECOMMENDATION 11

To better protect employees' SG entitlements, improve deterrence against SG non-compliance and provide greater transparency of the cost of SG non-compliance on future age pension outlays, the Government consider:

- *Expanding the director penalty regime to apply to unpaid SGC liabilities of the company; and*
- *Expanding GEERS to cover unpaid SGC liabilities where a company has been placed into liquidation and the ATO has not been able to recover against the directors personally.*

A.2.5 On 5 July 2011, the then Government announced consultation on draft legislation intended to secure workers' superannuation and apply broadly to directors' obligations to cause their company to pay certain tax liabilities and superannuation guarantee amounts for employees'.¹²¹ The amending legislation became law on 29 June 2012, with operational commencement from 30 June 2012.¹²²

REVIEW INTO THE NON-LOGEMENT OF INDIVIDUAL INCOME TAX RETURNS

A.2.6 In the *Review into the Non-lodgement of Individual Income Tax Returns*, the following three recommendations were made for the previous Government's consideration.

121 Bill Shorten (Minister for Financial Services & Superannuation), 'Countering Fraudulent Phoenix Activity by Strengthening Company and Directors' Obligations' (Media Release, No 101, 5 July 2011).

122 *Tax Laws Amendment (2012 Measures No. 2) Act 2012.*

RECOMMENDATION 1

The Government should refer the review's findings and the results of the community survey to the Henry review of Australia's future tax system for consideration in that broader context, noting that the Henry Review has specifically sought input in this area.

RECOMMENDATION 3

The Government should increase support to the Tax Office in making key improvements to the availability and usefulness of third party data used to identify non-lodgers and for other lodgement compliance activities. This could include new legislative requirements, new arrangements with Commonwealth agencies, and agreements by the states and the territories for third party data to:

- *include unique identifiers such as a TFN or ABN*
- *where possible be an electronic transmission*
- *be promptly provided to ensure the currency of the information*
- *determine whether a taxpayer was in or out of Australia.*

RECOMMENDATION 5

The Government should consider strengthening the failure-to-lodge penalty regime and, in particular, increasing penalties for high-risk taxpayers.

REVIEW INTO THE UNDERLYING CAUSES AND THE MANAGEMENT OF OBJECTIONS TO TAX OFFICE DECISIONS

A.2.7 In the *Review into the Underlying Causes and the Management of Objections to Tax Office Decisions* the following recommendation was made for the previous Government's consideration.

RECOMMENDATION 1

The Government should consider improving the objection system established by Part IVC of the Taxation Administration Act by ensuring that the objections process can only be used for genuine disputes arising from amended assessments, default assessments, private binding rulings or where the Commissioner has failed or refused to make a decision in relation to a matter in dispute. All other requests, regardless of whether the taxpayer labels them as objections, should be treated as self amendment requests.

Taxpayers' rights should be preserved by allowing the Commissioner to extend the period in which a taxpayer may amend their tax return.

APPENDIX 3 — ATO USE OF THE FACTS AND EVIDENCE WORKSHEET

A.3.1 The following information is a summary of information extracted from the ATO's intranet and is referred to in Chapter 5, in particular, Action Item 16.

A.3.2 The ATO's intranet contains a series of pages for each business line outlining the circumstances in which ATO officers are expected to use the facts and evidence worksheet.

ATO Aggressive Tax Planning business line

A.3.3 Of the thirteen aggressive tax planning (ATP) 'products' outlined, three require the use of the facts and evidence worksheet. These products are:

- Income Tax Participant Scheme Position Audit;
- High Risk Participant Audit; and
- Promoter Audit.

A.3.4 The remaining products require either the use of the 'ATP Evidence Matrix' or the 'facts tab' in the Siebel case management system.

ATO Indirect Tax business line

A.3.5 For the Indirect Tax (ITX) business line, the following cases for each business area must use the facts and evidence worksheet:

Business area	When to use
Serious Evasion	all audit cases review cases where there is a high risk of dispute.
Large Market	all audit cases review cases where there is a high risk of dispute.
Small Medium Enterprise (SME)	cases where there is a high risk of dispute highly recommended for significant cases.
Micro Enterprise	cases where there is a high risk of dispute highly recommended for significant cases.
Refund Integrity Branch	not required to be used.

A.3.6 The ATO's intranet page for ITX describes 'significant cases' as including:

- The four year rule will have an impact on this case – section 105.50 of Schedule 1 to the Taxation Administration Act 1953 (TAA) and section 105.55 of Schedule 1 to the TAA.
- An issue has been, or is likely to be referred to a Centre of Expertise for advice (not necessarily a priority technical issue).

- The case or issue has the potential to adversely impact on ATO reputation or the case/issue is likely to be politically or media sensitive.
- The case is an aged case which has exceeded the cycle time by 250 days or more.
- The case has market or industry impacts, that is, the issue will affect other players in a particular market.
- A 'revenue at risk case', that is, potential taxpayer flight risk or strategic Debt involvement.
- Aggressive Tax Planning case.
- The matter involves significant reputation risk for the client – the client is challenging the ATO view and/or litigation is likely.
- Prosecution is likely.
- The case has Legal Professional Privilege (LPP) and/or accountant's concession issues.
- The ATO is approached to settle the matter.

A.3.7 The published excel version of the ITX active compliance facts and evidence worksheet is the only worksheet authorised for use in ITX active compliance.

ATO Tax Practitioner and Lodgment Strategy business line

A.3.8 The Tax Practitioner and Lodgment Strategy (TPALS) business line states that the ITX practice note is to be applied in respect of cash economy audits.

ATO Large Business and International business line

A.3.9 For the then Large Business and International (LB&I) business line, the facts and evidence worksheet must be used for all audit cases after 1 February 2011. The facts and evidence worksheet is not mandatory for all audit cases commenced prior to 1 February 2011 however, it must be completed by auditors for those cases where there is a reasonable likelihood of an objection. Objection cases that proceed to litigation require the worksheet to be completed as part of the Legal Services Branch (LSB) referral process. The LB&I business line also uses the Law & Practice (L&P) worksheet templates in such referrals.

ATO Micro Enterprises and Individuals business line

A.3.10 In the Micro Enterprises and Individuals (ME&I) business line, active compliance case officers must consult their team and technical leaders for specific guidance on when to use the facts and evidence worksheets.

A.3.11 The ME&I executive have 'endorsed' the completion of the facts and evidence worksheet for the following active compliance low volume cases:

- cases likely to go to prosecution;

- international compliance comprehensive audit cases;
- wealthy Australians comprehensive audit cases;
- cases involving the use of fraud or evasion;
- more contentious comprehensive audits where there is a high risk of dispute or litigation.

A.3.12 The use of the facts and evidence worksheet is to be considered on a case-by-case basis.

A.3.13 The ME&I business line uses the L&P business line worksheet templates.

ATO Superannuation business line

A.3.14 For the Superannuation business line, the facts and evidence worksheet the facts and evidence worksheet template 'should be commenced' at the earliest opportunity when it becomes clear the decision/s intended to be made:

- make a reviewable decision that is supported by a position paper, e.g. penalty imposition and remission;
- status of worker; and
- issuing a notice of non-compliance or disqualification of an individual etc.

ATO Small and Medium Enterprises business line

A.3.15 For the Small and Medium Enterprises (SME) business line, the use of the facts and evidence worksheet is mandated for:

- all audit cases;
- matters likely to go to litigation, where one or more of the following features are exhibited:
 - the taxpayer and/or their advisor has indicated to the ATO a litigious inclination either during the audit or objection process, or during settlement discussions. Such an indication may be verbal.
 - the tax law at issue is contentious or unsettled.
- any other contentious cases where one or more of the following features are exhibited:
 - matters that are within the Issues to be reviewed by the SME Technical Panel;
 - matters that are within the SME Case Leadership referral guidelines;

- matters that involve the advice of Tax Counsel Network (TCN) and/or Centre of Expertise;
- matters where Part IVA¹²³ is in contemplation;
- matters involving complex tax law issues;
- matters involving little primary documentary evidence, concealment of income (including foreign income);
- Section 167 assessments.¹²⁴ The worksheet will assist with identifying evidentiary gaps to determine whether an section 167 assessment is sustainable. However it is recognised and acknowledged that the level of facts and evidence available to support an s167 assessment will often be less than in other audit cases;
- matters involving the use of fraud or evasion to amend;
- matters that are likely to result in referral to Serious Non-Compliance;
- the matter is a priority technical issue that has been endorsed by the SME Technical Panel, and has a TCN attached and an SME SES sponsor;
- matters involving potential reputation risk and/or media attention, public scrutiny;
- matters where the penalties in contemplation are either recklessness or intentional disregard of the law.

A.3.16 The SME business line uses its own facts and evidence worksheet templates.

ATO Serious Non-compliance business line

A.3.17 For the Serious Non-compliance (SNC) business line, only auditors that have completed the facts and evidence training should complete the worksheet. The SNC business line maintains its own worksheet template. The 'SNC Tech Alert' containing this information is relatively old – there may be updated work processes.

123 *Income Tax Assessment Act 1936 Pt IVA.*

124 *Income Tax Assessment Act 1936 s 167.*

APPENDIX 4 — ATO RESPONSE



Australian Government
Australian Taxation Office

Second Commissioner of Taxation

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

Dear Ali

Follow up review into the ATO's implementation of agreed recommendations included in five Inspector-General of Taxation reports publicly released from August 2009 to November 2010

Thank you for the opportunity to comment on the final draft of your report on the follow up review into the ATO's implementation of agreed recommendations included in five Inspector-General of Taxation reports publicly released from August 2009 to November 2010.

We welcome your feedback on the implementation of recommendations from the five reports.

We note your acknowledgment of the ATO's oversight arrangements in relation to the effective implementation of recommendations.

I would like to acknowledge the efforts of all involved in undertaking this follow-up review.

If you require further information on our response, please contact Sue Sinclair on (02) 6216 1785.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Mills'.

Andrew Mills
Second Commissioner
Australian Taxation Office

17 July 2014

APPENDIX 5 — ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ATO	Australian Taxation Office
ATP	Aggressive Tax Planning
CMPS	Corporate Management Practice Statement
Code	Code of Settlement Practice
Commissioner	Commissioner of Taxation
DHS	Department of Human Services
DMP	Dispute Management Plan
DRN	Debt Right Now
ENs	Employee Notifications
FWO	Fair Work Ombudsman
GAP	General Administrative Practice
HOTSA	Income Tax Health of the System Assessment
IGT	Inspector-General of Taxation
IQF	Integrated Quality Framework
IT	Information Technology
ITX	Indirect Tax
L&P	Law and Practice
LIB	Law Infrastructure Branch
LPP	Legal Professional Privilege
LPS	Law Practice Support
LPWP	Legal Practitioners Working Party
LSB	Legal Services Branch
ME&I	Micro Enterprises and Individuals
Model	Income Tax Return Not Required Analytical Model
MOU	Memorandum of Understanding

MT	Miscellaneous Taxation Ruling
NTLG	National Tax Liaison Group
NRQL	Not Required To Lodge
ORCLA	Online Resource Centre for Law Administration
PGI	Public Groups and International
PGH	Private Groups and High Wealth Individual
PSLA	Law Administration Practice Statement
R2L	Required to Lodge
RDR	Review and Dispute Resolution
RESC	Reportable Employer Superannuation Contributions
ROSA review	Review of Aspects of Income Tax Self Assessment
SBSCH	Small Business Superannuation Clearing House
SME	Small and Medium Enterprises
SG	Superannuation Guarantee
SGC	Superannuation Guarantee Charge
SNC	Serious Non-Compliance
SSR	Standard Settlements Reporting
TQAF	Technical Quality Assurance Forum
TD	Taxation Determination
TPALS	Tax Practitioner and Lodgment Strategy
TR	Taxation Ruling
YTD	Year-to-date