PS LA 2007/24 - Making default assessments: section 167 of the Income Tax Assessment Act 1936 and other similar provisions

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2007/24

FOI status: may be released

This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by Tax Office staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs Tax office staff must follow their business line's escalation process.

SUBJECT:	**Making default assessments: section 167 of the *Income Tax Assessment Act 1936* and other similar provisions**
PURPOSE:	**To guide staff contemplating making default assessments using the powers provided by section 167 of the *Income Tax Assessment Act 1936* and other similar provisions**

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SCOPE

1. All legislative references are to the *Income Tax Assessment Act 1936* (ITAA 1936) unless otherwise stated.

2. The principles relating to the exercise of the Commissioner's power under section 167 mentioned in this practice statement should also be applied to similar provisions, such as section 73 of the *Fringe Benefits Tax Assessment Act 1986*, where appropriate.

BACKGROUND

When to use section 167

3. Section 167 allows the Commissioner to make a judgment as to a taxpayer's taxable income for the purpose of making an assessment under sections 166 or 168, including for the purposes of amending assessments as limited by section 170.

4. Section 167 may be used where:

   - a taxpayer makes default in furnishing a return
   - the Commissioner is not satisfied with the return furnished by a taxpayer, or
   - the Commissioner has reason to believe that a taxpayer who has not furnished a return has derived taxable income.

5. Section 167 may also be used to make a judgment as to a taxpayer's taxable income for the purpose of amending assessments, subject to the time limits set out in section 170 (no time limits apply when there has been fraud or evasion).

6. Additionally, where the assessment relates to income derived in a period of less than a year (as covered by section 168), section 167 may be used to make a judgment as to a taxpayer's taxable income for that period.

7. Given the availability of enforcing odgement for outstanding returns using other mechanisms, it should be noted that different factors apply to the making of an assessment than for amending an assessment under section 167. Tax officers should refer to the coverage of this issue in paragraphs 26 to 31 and 76 to 81 of this practice statement.

STATEMENT

Making proper default assessments

8. Section 167 allows the Commissioner to make an assessment of the amount upon which, in his or her judgment, income tax ought to be levied. Given the objective nature of this judgment, tax officers must ensure that their decisions are fair, that they are made on reasonable grounds (see paragraph 9 of this practice statement), that there is sufficient information available to them to make a genuine judgement, and that they consider the relevant individual circumstances in accordance with the law, the commitments made in the taxpayers' charter and the principles of the compliance model.

9. Reasonable grounds for determining a taxpayer's taxable income may include:

   - information provided by third parties
   - any internal or external data matching information
   - indirect audit methodologies (such as sources and application of funds, 'T' accounts or asset betterment assessments)
   - relevant economic statistics, or
   - extrapolation from previous years returns.

10. Tax officers must ensure that the available information reasonably supports the decision reached as to the taxpayer's taxable income.

11. It is essential that tax officers make independent and defensible decisions as to the reliability of the information and its relevance to the determination of the taxpayer's taxable income. This is particularly important where the decision is based upon information provided by third parties (for example, information provided by government agencies or financial institutions).

12. Before deciding to make a default assessment under section 167, tax officers should ensure that they are properly authorised to do so by checking the relevant instruments of authorisation and dollar limit constraints within the Taxation Authorisations Guidelines on the intranet. Officers should contact Legal Services Branch, Law and Practice, for additional information.

13. Tax officers must document the basis for the section 167 default assessment and refer the report or submission to a tax officer who is authorised to make default assessments in the name of the relevant Deputy Commissioner of Taxation. The relevant submission or report together with the approval of the authorised tax officer must be recorded on the appropriate Tax Office case management systems, such as Siebel.

14. Tax officers should generally make a decision as to the taxpayer's taxable income, not merely their assessable income. This means that officers should consider obvious deductible outgoings, such as those incurred in carrying on a business of the relevant type.

15. However, section 167 does not require the Commissioner to endeavour to ascertain the assessable income and allowable deductions which the taxpayer has. Therefore, tax officers may make a direct judgment as to the amount of taxable income without first ascertaining assessable income less allowable deductions, so long as they have made a genuine estimate of the amount of the taxpayer's taxable income. For example, indirect audit methodologies, such as asset betterment calculations, may be used to calculate a taxpayer's final taxable income figure without any requirement for a detailed computation of assessable income less allowable deductions to determine taxable income.

16. Tax officers must ensure that the basis for the default assessment under section 167 is clearly communicated to the taxpayer in all circumstances.

Notice of intention to issue a section 167 default assessment

17. Generally, taxpayers should be advised in advance of a tax officer's intention to issue a default assessment and the basis upon which it is proposed that taxable income be calculated. This provides the taxpayer with an opportunity to put forward an alternate basis of calculation and/or to rebut the assumptions upon which the officer has based his or her calculations. Any assessment made with input from the taxpayer will still be a section 167 assessment, except in cases where the taxpayer lodges and the Commissioner accepts that return as the basis for an assessment under sections 166 or 168.

18. Tax officers should also consider whether it is appropriate to issue a default assessment without giving advance notice to the taxpayer. Examples of such circumstances include:

- where there is a risk of flight (for example, the taxpayer is likely to leave the country)
- a dilution of assets (for example, where assets are likely to be transferred)
- movement of funds outside Australia (for example, where a non-resident is selling their sole Australian asset), or
- other cases involving urgency (for example, to issue an amended assessment prior to the section 170 amendment period elapsing).

19. Similarly, for larger scale exercises, such as compliance projects focusing on particular industries or transaction types (for example, dividend or interest payments), tax officers should consider the administrative costs and benefits of proceeding directly to make section 167 default assessments without advance notice to the taxpayer. In these circumstances the tax officer must seek appropriate approval at the Senior Executive Service level and the basis for the assessment must be clearly communicated to each taxpayer subject to the larger scale exercise.

Information gathering

20. Tax officers should first consider whether there is sufficient information available to support the making of a section 167 assessment for the relevant income year.

21. Generally speaking, taxpayers either possess or can obtain information about their own financial affairs and those of entities in which they currently have an interest, or could acquire a future interest or might otherwise be able to sufficiently influence.

22. However, in those circumstances where complete information may not be available (for example, information has not been provided by the taxpayer or the information provided is unsatisfactory), tax officers can obtain information relevant to a taxpayer's assessment from third party sources in order to provide a reasonable basis for determining taxable income (all information gathering must adhere to the appropriate information gathering processes – refer to paragraph 24 of this practice statement).

23. Third party sources include, but are not limited to:

- Australian government agencies, employers, companies and financial institutions (subject to domestic laws)
- foreign governments (subject to applicable tax treaties), and
- information provided voluntarily by the public.

24. Where sufficient information is not already available from the taxpayer or third parties, officers should generally consider obtaining access to further information from the taxpayer to enable an assessment of taxable income through informal requests and the Commissioner's formal access powers.

25. The Commissioner's formal access powers may be used in appropriate circumstances to obtain further information or documents to provide a reasonable basis upon which a taxpayer's taxable income can be determined. Tax officers should consult the relevant parts of the *Access and Information Gathering Manual* for guidance on the use of these formal powers.

- For information or documents held in Australia or within the personal knowledge of persons within Australia, officers may rely on the powers granted under sections 263 or 264.
- For information or documents held offshore, officers should refer to Chapter 3 – 'International information gathering' – of the *Access and Information Gathering Manual*. For example, tax officers should consider the Commissioner's powers to make a request under section 264A that a taxpayer produce information or documents that the Commissioner has reason to believe may be held offshore relating to that taxpayer's assessable income. Furthermore, tax officers should also consider making a request from a treaty partner country for an exchange of information held by the revenue authorities in that country regarding any transactions that may relate to a taxpayer's assessable income.

Section 167 default assessments and prosecution for failure to lodge

26. Officers should consider, in light of the taxpayer's compliance history and individual circumstances, whether to enforce odgement through a section 167 default assessment or whether it is more appropriate to proceed directly to prosecution.

27. Where a taxpayer does not lodge a return, officers should generally consider enforcing compliance with the requirement to lodge returns through appropriate avenues such as correspondence, final notice and prosecution actions, in line with normal Tax Office odgement enforcement practices, the Prosecution Policy of the Commonwealth and the *ATO Prosecution Policy* (found in the Corporate Management Practice Statement PS CM 2007/02).

28. Taxpayers may be prosecuted for failing to comply with the requirement to lodge returns, irrespective of whether a section 167 default assessment has been made. Officers should contact the In House Prosecution unit in the Tax Practitioner and Lodgment Strategy business line (BSL) for additional information about the relevant prosecution policies.

29. Where a taxpayer has previously been prosecuted for failure to lodge a return and has subsequently failed to comply with a court order requiring him or her to lodge that return, tax officers should consider making a section 167 assessment where there is new and sufficient information available to support such an assessment. This is as an alternative to initiating further court proceedings to prosecute the taxpayer for failure to comply with the previously mentioned court order.

30. Tax officers should not make a section 167 assessment regarding a year of income in respect of which court proceedings with a taxpayer to enforce the requirement to lodge an income tax return are underway without consulting with the relevant in-house Prosecutor. (Corporate Management Practice Statement PS CM 2007/02 provides guidance to staff in relation to the prosecution process.)

31. Where a taxpayer is subject to prosecution for matters which do not relate to taxation offences and the facts in that matter point towards an income tax liability (for example, from undisclosed income), tax officers should still consider issuing a section 167 assessment if there is sufficient information available as to the amount of that liability. In such cases, tax officers should seek assistance from the appropriate technical specialists in the relevant BSL for advice before making a decision to issue such an assessment.

Section 167 default assessments and administrative penalties

32. When making a section 167 default assessment, tax officers must consider the application of administrative penalties. There are various administrative penalty regimes for different income years.

33. For the 2000-01 and later income years, administrative penalties apply where a taxpayer has either made a false or misleading statement which results in a shortfall amount or where they have failed to lodge a required return and the Commissioner determines the tax-related liability without the assistance of that return. For further information, tax officers should refer to paragraphs 87 to 89 of this practice statement for the appropriate discussion.

34. For income years between 1992-93 and 1999-2000, tax officers should refer to paragraphs 90 and 91 of this practice statement for the appropriate discussion.

35. For earlier income years, tax officers should refer to paragraph 92 for the appropriate discussion.

EXPLANATION

The purpose of section 167

36. Section 167 is a supporting or facilitative power (*George v. Federal Commissioner of Taxation* (1952) 86 CLR 183) intended to assist the exercise of the Commissioner's obligation under section 166 to 'make an assessment of the amount of taxable income … of any taxpayer'. This facilitative power can also be used to make an assessment under section 168, such as where income has been derived in a period of less than a year. This power allows the Commissioner to 'make an assessment of the amount upon which in his judgment income tax ought to be levied' (*George v. Federal Commissioner of Taxation* (1952) 86 CLR 183, at 202).

37. In order to support this purpose, tax officers should make such assessments as soon as practicable after they have sufficient information to determine the amount of the taxpayer's taxable income. This allows for collection and processes under Part IVC of the *Taxation Administration Act 1953* (TAA) to commence in a timely fashion, which minimises the risks for both taxpayers and the Tax Office.

38. The section 167 power may also be applied to the process of amending assessments, subject to the time limits set out in section 170. In this context, the satisfaction of conditions (now restricted only to time limits in the absence of fraud or evasion) referred to in section 170 is part of determining whether the assessment is excessive (*McAndrew v. Federal Commissioner of Taxation* (1956) 98 CLR 263). This may be relevant to appeal or review of decisions on objections to assessments using the section 167 power.

Validity of default assessments

39. In making a section 167 default assessment, tax officers must observe the same requirements as for any valid assessment, specifically:

- the assessment must be the result of an 'act or operation of the Commissioner' (*R v. Deputy Commissioner of Taxation, ex parte Hooper* (1926) 37 CLR 368, at 373 per Isaacs J)
- the assessment must lead to an ascertainment, on consideration of all relevant circumstances, including sometimes the Commissioner's opinion, of the taxpayer's taxable income and their tax payable (*R v. Deputy Commissioner of Taxation, ex parte Hooper* (1926) 37 CLR 368)
- the assessment must be definitive in character, rather than tentative or provisional (*Federal Commissioner of Taxation v. sec Hoffnung & Co Pty Ltd* (1928) 42 CLR 39, *FJ Bloemen Pty Ltd and Simons v. Federal Commissioner of Taxation* (1981) 147 CLR 360), and
- the assessment notice must be served on the taxpayer as this is the completion of the process where the 'Commissioner ... serves a notice that he has assessed the taxable income then the tax becomes due and payable' (*Batagol v. Federal Commissioner of Taxation* (1963) 109 CLR 243, per Kitto J at 252).

Factual conclusions

40. Section 167 may require the drawing of a conclusion of fact that goes to assessment of liability. In *Bailey v. Federal Commissioner of Taxation* (1977) 136 CLR 214 at 217 Barwick CJ said that the process of assessment requires the application of the law to the facts as known and accepted by the Commissioner. His Honour also stated that the Commissioner must, as part of the assessment process, adopt a view of the relevant facts which are facts that disclose a taxable income.

41. The process of assessment may require the drawing of conclusions as to facts that are a prerequisite for triggering the application of the various provisions of the Act. Toohey J said in *Commissioner of Taxation v. Dalco* [1989-1990] 168 CLR 614 at 630 said:

> Section 6(1) of the Act relevantly defines 'assessment' to mean 'the ascertainment of the amount of taxable income and of the tax payable thereon'. The view of Kitto J in *Batagol v. FCT* (1963) 109 CLR 243 at 252; 9 AITR 207, that 'assessment' means 'the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case' was generally shared by the other members of the court in that case and was endorsed by Mason and Wilson JJ in *F J Bloemen Pty Ltd v. FCT* (1981) 147 CLR 360 at 371-2; 11 ATR 914; 35 ALR 104.

Record retention periods and default assessments

42. Generally, the taxpayer is the best starting point for information relevant to his or her assessment, as 'the facts of a taxpayer's income are peculiarly within the knowledge of the taxpayer' (per Latham CJ in *Trautwein v. FCT* (1936) 56 CLR 63, at 87). Such information may be supplemented by, or verified through, information obtained from third parties. The collection of such information is covered in the *Access and Information Gathering Manual*.

43. Generally, business records must be kept for a period of five years (see section 262A and Taxation Rulings TR 96/7 and TR 94/14) with different requirements for other classes of records, such as for employment related expenses.

44. In the event that the taxpayer does not keep the required records, or in the words of Isaacs J in *Stone v Federal Commissioner of Taxation* (1918) 25 CLR 389, at 393 'if he chooses to keep them so as to afford no sufficient internal evidence of the nature of the transaction they record, he must be prepared to take the consequences of his own omission', the taxpayer cannot rely on his or her own failure to keep records as a defence against the making of a default assessment under section 167.

45. Latham CJ made a comment to similar effect in *Trautwein v. FCT* (1936) 56 CLR 63 at 87:

> In the absence of some record in the minds or books of the taxpayer, it would often be quite impossible to make a correct assessment. The assessment would necessarily be a guess to some extent, and almost certainly inaccurate in fact. There is every reason to assume that the legislature did not intend to confer upon a potential taxpayer the valuable privilege of disqualifying himself in that capacity by the simple and relatively unskilled method of losing either his memory or his books.

46. In circumstances where a taxpayer claims that his or her records have been lost or destroyed and the exact reconstruction of those records proves difficult or impossible, it will be appropriate to make a default assessment based upon whatever information is available.

47. In addition, there are many reasons why the tax officer responsible for issuing an assessment may legitimately decide to enforce the obligation for a lesser or greater period than the document retention period. Such a decision should only be made through a proper consideration of the facts of the particular case, in line with the principles contained in the taxpayers' charter and underlying the compliance model and in the context of the legal framework for making assessments discussed below.

Review of assessments

48. A discussion of the validity of assessments needs to be prefaced by distinguishing between purported assessments, held to be of no effect (or a nullity), and assessments that are found to be excessive under Part IVC of the TAA.

Purported assessments

49. A taxpayer may instigate proceedings in the Federal Court under section 39B of the *Judiciary Act 1903* (Judiciary Act) and argue that the making of an assessment was so fundamentally flawed that no assessment exists.

50. Where an assessment is made tentatively and fails to create a definitive liability or where no bona fide attempt to exercise the assessment power is made, sections 175 and 177 cannot be relied upon in proceedings brought under section 39B of the Judiciary Act (*DCT v. Richard Walter Pty Ltd* (1995) 183 CLR 168).

51. Section 175 protects the validity of an assessment, including default assessments, against challenge on the grounds of non-compliance with certain provisions in the income tax laws. However, it will not create a valid assessment where no assessment has been made. An actual assessment being made may be viewed as a condition precedent to the operation of section 175 (*Briggs v. DFC of T and Ors; Ex parte Briggs* (1986) 69 ALR 185).

52. Section 177 provides that the production of a notice of assessment under the hand of the Commissioner, a Second Commissioner or a Deputy Commissioner, is conclusive evidence of the due making of that assessment, and the amount and all of the particulars of the assessment are correct (except in relation to appeals or reviews under Part IVC of the TAA). The case law on this provision has drawn a distinction between the process of making an assessment (which is not open to challenge under Part IVC) and the substantive liability imposed by the assessment (which may be challenged under Part IVC).

53. The combined effect of sections 175 and 177 protects genuine attempts by tax officers to apply section 167 from procedural challenge. However, where there is evidence indicating a lack of any genuine attempt at making an assessment, the Federal Court may go behind the purported 'assessment' to examine its due making and may determine it to be a nullity. A purported assessment found to be a nullity falls outside the protection offered by sections 175 and 177.

54. In determining whether there is a valid assessment, the essential question is whether there is any assessment at all. Merely recognising that the process may have been done better does not make the resulting assessment a nullity, so long as a real effort to carry out the process of assessment was undertaken. The courts exercise judicial oversight to determine whether the Commissioner's process resulted in an assessment or was an exercise unrelated to the taxpayer's circumstances (*R v. DCT (WA); Ex Parte Briggs* (1987)18 ATR 570; 87 ATC 4278).

55. A valid assessment requires that the Commissioner make a genuine attempt to determine a taxpayer's taxable income. The High Court established in *Trautwein v. FCT* (1936) 56 CLR 63 that the estimation process may go close to guesswork and yet be lawful. However, a figure cannot simply be 'plucked from the air' (*Re DCT (WA); Ex Parte Briggs* (1986) 17 ATR 1031) or an estimate 'made upon no intelligible basis' (*Trautwein v. FCT* (1936) 56 CLR 63). The primary requirement is that the judgment of a taxpayer's taxable income is based on some reasonable or rational grounds. Where this occurs the assessment is defensible from challenge on the basis that the assessment was arbitrary, lacked rational foundation and was therefore not a bona fide exercise of power.

56. Where relying upon information relating to assessable income receipts, it will generally be appropriate to consider potential allowable deductions in order to make a proper determination of the taxpayer's taxable income (*Martin v. FCT* (1993) 93 ATC 5200, 27 ATR 282). It will not be appropriate, however, to consider allowable deductions in instances where information relating to net income is relied upon, such as the results of an asset betterment or 'T' account calculation (see Sheppard J in *Briggs (No 2)* (1987) 87 ATC 4278, at 4290-1, 18 ATR 570 at 588; Davies J in *Martin* at 5201; and Foster J in *Eldridge v. Federal Commissioner of Taxation* (1990) 90 ATC 4907, at 4919-20, and in *Madden* 96 ATC 4268 at 4299-300).

57. Where notices of assessment are motivated by an improper or collateral purpose of a tax officer then no valid assessment exists. Examples of an improper purpose include intent to cause a taxpayer to consult with the Tax Office (*R v. DCT (WA); Ex Parte Briggs* (1987) 18 ATR 570; 87 ATC 4278) and issuing a notice of assessment based on facts that are known to be untrue (*Darrell Lea Chocolate Shops Pty Ltd v. FCT* (1996) 72 FCR 175).

58. All assessments must be a genuine attempt to arrive at a definitive taxable income for the taxpayer. There is no power in the ITAA 1936 to make an assessment which is any way tentative or interim (*Stokes v. FC of T* (1996) 136 ALR 632).

59. The mere indication that an assessment will be reviewed later does not require the conclusion that the assessment is tentative. Provided that the notice of assessment purports to create a definitive liability, the assessment will not be tentative (*McCleary v. Commissioner of Taxation* (1997) 97 ATC 4266).

60. An assessment will not be regarded as tentative merely because two assessments have issued to different taxpayers concerning the same income with the consequence that one of the assessments need be reduced to nil (*DC of T v. Richard Walter Pty Ltd* (1995) 183 CLR 168). Provided that the notice of assessment creates a definitive liability and there is no evidence to the contrary, the assessment will not be tentative.

Excessive assessments

61. Where an assessment is not a nullity in the sense discussed above, the notice of assessment creates a definitive liability and the process of making the assessment is protected from challenge by section 177. In this circumstance, a taxpayer wanting to object to this assessment of their taxable income must follow the prescribed avenue of review in Part IVC of the TAA and meet the burden of proving that the assessment is excessive. This burden requires the taxpayer to show that, on the balance of probabilities, the assessment of their taxable income is excessive (*Ma v. FCT* (1992) 37 FCR 225; 23 ATR 485).

62. Part IVC of the TAA provides a set of objection, review and appeal procedures which apply in relation to challenges to taxation decisions, including the review of an assessment decision in the income tax laws via the initial making of an objection to the relevant assessment. Part IVC provides taxpayers with a statutory avenue to argue, in the Administrative Appeals Tribunal or Federal Court, that the substantive liability imposed by an assessment is excessive through a challenge to an objection decision.

63. The application of Part IVC of the TAA presupposes the existence of an assessment, and decisions are restricted to determining if the assessment covered by the relevant objection decision is excessive (the process of making assessments cannot be challenged using Part IVC). Where an assessment is found to be excessive, the Commissioner is required to amend the assessment in accordance with the findings of the Court or Tribunal.

64. Determining whether a section 167 default assessment is excessive and deciding its validity are two separate, but inextricably linked issues. A valid default assessment is a genuine attempt to determine a taxpayer's taxable income. Properly documenting the process by which the assessment decision is reached assists in rebutting any possible future claims that the actions taken were unrelated to the taxpayer's individual circumstances. Properly prepared documents should also assist in rebutting any argument that the assessment of taxable income is excessive.

65. In relation to discharging the burden of showing an assessment to be excessive, Burchett J said in *Ma v. FCT* (1992) 37 FCR 225 at 230; 23 ATR 485 at 489:

> ... if a taxpayer denies any undisclosed source of income, provides acceptable evidence of how he spends his time, and demonstrates a reasonable explanation for any appearance of the possession of assets, he will generally discharge his burden of proof unless some positive reason is shown why he is to be disbelieved. Any other view would introduce a degree of arbitrariness into liability for tax.

Other administrative law considerations

66. As with all exercises of administrative discretion, the making of section 167 default assessments must be based upon an independent exercise of discretion by the tax officer. Relevant factual circumstances must be considered, generally allowing the taxpayer an opportunity to have input into the process (this opportunity may elapse should the taxpayer fail to reply to a reminder letter or final notice). However, in circumstances where there are factors arguing for urgency in issuing the assessment, such input from the taxpayer may be provided after the event (refer to paragraph 18 for this practice statement for the circumstances where this action may be appropriate).

67. An assessment must not be made at the direction of a third party, such as another government agency, although it is permissible to rely upon information provided by such a third party as part of the basis of an assessment. All dealings with third parties, including other government agencies, must be properly recorded either contemporaneously or as soon as possible thereafter. While co-operation with other agencies in meeting joint objectives is appropriate, these records must fully reflect the fact that the assessment is being issued solely for the purposes of the income tax laws. Otherwise, there is an understandable risk of allegations being made of an improper purpose or the decision-maker acting under direction.

Reasonable basis for section 167 default assessments, including statistical information

68. The Commissioner may make a default assessment of a taxpayer's taxable income upon any basis that is reasonable and takes into account their particular circumstances. This includes the use of available external information, indirect audit methodologies, statistical information or extrapolation from previous years returns. Examples of the bases that have been supported by the courts include 'T' accounts, asset betterment calculations and unexplained deposits in financial institution accounts.

69. Using a 'T' account, tax officers can compare cash available at the beginning of a period plus cash received during the period with cash expended during the period plus cash on hand at the end of the period. The two sides of the 'T' account should balance if tax officers have full and accurate information. If the two sides of the 'T' account do not balance, it is likely there is undisclosed income.

70. An alternative method to a 'T' account available to tax officers is an asset betterment calculation. Under this method, the net worth of an entity at the end of each relevant year is compared with the net worth at the beginning of each of those years, and an estimate of annual asset growth is obtained. Non-deductible expenditure is added to this estimate and liabilities and exemptions are subtracted. A figure is then computed for total taxable income.

71. Whatever the source of the information, each step in the process of estimating the taxpayer's taxable income must be recorded, so that the decision or decisions will be supported if the resulting assessment is contested.

72. Statistical information from compliance improvement research, corporate databases or external sources such as the Australian Bureau of Statistics (ABS) may form an important part of decision-making. However, such information, its source and the rationale for any calculations based upon it must be fully documented. Additionally, the statistical information should be related to the circumstances of each particular taxpayer. In the past, where properly recorded decision-making has been presented in evidence, the use of information such as ABS cost-of-living figures has been successfully argued in support of section 167 default assessments.

73. The application of this approach may be demonstrated through the reference to ABS Household Expenditure Survey data in *Favaro v. Federal Commissioner of Taxation* (1996) 34 ATR 1 at 6. In that case, Branson J held that the taxpayer's tastes 'were not, it seems, universally frugal' before accepting that the Tax Office's reliance upon the data was supportable. This was an answer to the taxpayer's [unsupported] argument that their lifestyle was less extravagant 'than the hypothetical average individual'.

74. This approach is supported by the Privy Council in *Gamini Bus Co Ltd v. Commr of Income Tax, Colombo* (1952) AC 571, (1952) TR 44 which involved a comparison with available statistical data on the performance of taxpayer companies in the same area of similar size and scale.

75. Additionally, a similar result was found in an Australian Board of Review case, (1951) 2 TBRD *Case B1*, where the taxpayer's earnings were estimated by comparison with the earnings of other taxi drivers, although the assessment was reduced on the basis of evidence of greater than average fuel consumption for that particular taxpayer.

Lodgment enforcement – final notices and prosecutions

76. Under the current self-assessment system, the Commissioner will generally make an assessment under section 166 of a taxpayer's taxable income based on the return that the taxpayer is required to lodge.

77. The self-assessment system assumes that returns are based on a taxpayer's unique knowledge of their own taxation affairs (*Federal Commissioner of Taxation v. Clarke* (1927) 40 CLR 246 at 251, per Isaacs ACJ; *George v. Federal Commissioner of Taxation* (1952) 86 CLR at 201, per Dixon CJ, McTiernan, Williams, Webb and Fullager JJ).

78. Where a taxpayer does not lodge a return, the Commissioner may enforce lodgment through issuing a notice under section 162 and subsequent prosecution under section 8C of the TAA. Prosecution may result in a fine for the taxpayer, and an order to lodge the relevant return or returns under section 8G of the TAA.

79. The making of a section 167 default assessment does not change the fact that the taxpayer has failed to lodge a required return or returns. As a result, a taxpayer may still be prosecuted for such a failure, even if the Tax Office has issued such an assessment in default of the taxpayer's lodgment of their return.

80. However, generally there may be some conflict between the Tax Office seeking an order under section 8G of the TAA to require a taxpayer to lodge a return, where the Tax Office has already issued a section 167 default assessment in respect of the relevant year. Tax officers not initiating such lodgment enforcement action after issuing a section 167 assessment, do not do so on the basis that such an assessment may be seen as tentative or provisional, pending lodgment of the return for the relevant year or years.

81. It may be appropriate to issue default assessments instead of enforcing lodgment in the following circumstances:

- where there is a risk that taxpayers would remove themselves or their assets from Australia (for instance if a departure prohibition order is being considered or where a Mareva injunction may be appropriate)
- where there is a risk either that moneys that are, or will be, available to satisfy the tax debt would become irrecoverable unless action was taken under section 260-5 of Schedule 1 to the TAA (for any taxpayer) or section 255 of the ITAA 1936 (if the taxpayer is a non-resident)
- where a taxpayer's compliance record indicates that the taxpayer appears to pay the fines resulting from prosecution action, but does not lodge relevant outstanding returns, possibly due to the larger amount of administrative penalties that would flow from lodging late returns
- where there are such a large number of non-lodgers in a particular industry, occupation, scheme or arrangement, there may be significant administrative benefits in making section 167 default assessments, and
- where an independent decision based on whole-of-government initiatives indicates that issuing a default notice is more appropriate.

Section 167 default assessments and administrative penalties

82. When making a section 167 default assessment, tax officers must consider the application of administrative penalties. The determination of the level of penalties (that is, the level to which the penalty imposed by law would be remitted) is predicated upon an evaluation of the overall compliance risk posed by the taxpayer, and this is based on his or her individual circumstances. Tax officers must give due consideration to the principles contained in the taxpayers' charter and compliance model.

Administrative penalty regime

83. A uniform administrative penalty regime applies to all 'taxation laws' as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) (section 3AA of the TAA states that an expression has the same meaning in Schedule 1 of the TAA as in the ITAA 1997). The broad objective of the regime is to impose penalties for particular types of behaviour that result in understatements of tax or overstatements of entitlements.

84. *A New Tax System (Tax Administration) Act (No. 2) 2000* introduced the uniform administrative penalty regime into Part 4-25 in Schedule 1 to the TAA. In relation to income tax, the regime applies in relation to particular income years, commencing from the 2001 income year onwards (amendments relating to FBT return matters apply to the year of tax starting 1 April 2001 and later years). The regime consists of three distinct components:

- failure to lodge returns and other documents on time
- penalties relating to statements and schemes, and
- penalties for failure to meet various other tax obligations.

85. Guidelines in relation to administrative penalties are set out in the *ATO Receivables Policy*. Chapter 91 of the *ATO Receivables Policy* states that the determination of the level of penalties (that is, the level to which the penalty imposed by law would be remitted) is predicated upon an evaluation of the overall compliance risk posed by the taxpayer.

86. Assessments of penalties and, with certain exceptions, decisions relating to the remission of penalties are reviewable in accordance with Part IVC of the TAA.

Income years 2000-01 and after

87. In relation to the 2000-01 and later income years, penalties may be imposed where a taxpayer makes a statement that results in an underpayment of tax or an overpayment of an entitlement, or fails to make a statement and the Commissioner determines the tax-related liability without the statement (Division 284 of Schedule 1 to the TAA). Tax officers must consider administrative penalties under section 284-75 of Schedule 1 to the TAA for:

- making a false or misleading statement when a taxpayer has lodged a return which results in a shortfall amount (subsection 284-75(1) of Schedule 1 to the TAA)

- treating an income tax law as applying to a matter in a particular way that was not reasonably arguable (subsection 284-75(2) of Schedule 1 to the TAA), or
- failing to lodge a document required to determine a tax-related liability and the Commissioner determines the tax-related liability without the assistance of that document (subsection 284-75(3) of Schedule 1 to the TAA).

88. Tax officers must administer the penalties for false and misleading statements imposed under subsection 284-75(1) of Schedule 1 to the TAA in accordance with Law Administration Practice Statement PS LA 2006/02, which covers the circumstances when statements may give rise to a liability, how the penalty is assessed and when remission of the penalty may be warranted.

89. Under subsection 284-75(3) of Schedule 1 to the TAA, a penalty is payable if a taxpayer fails:

- to provide a return, notice, or other document to the Commissioner by the day it is required to be provided,
- that document is necessary for the Commissioner to accurately determine a tax-related liability, and
- the Commissioner determined the tax-related liability without the assistance of the document.

An equivalent penalty did not exist under the former tax shortfall provisions in sections 222A to 226ZB. Penalties for failing to provide returns should be contrasted with the penalty for not lodging documents on time under Division 286 of Schedule 1 to the TAA. Refer to chapter 98 of the *ATO Receivables Policy* for the appropriate discussion concerning penalties for not lodging documents on time.

Income years between 1992-93 and 1999-2000

90. When a tax officer makes a section 167 default assessment in respect of an income year prior to 2000-01, different penalty regimes will apply in respect of those years.

91. For income years between 1992-93 and 1999-2000, tax officers should refer to Taxation Rulings TR 94/3, TR 94/4, TR 94/5, TR 94/6 and TR 94/7. The former tax shortfall penalty provisions in sections 222A to 226ZB may still apply in respect of those income years where the taxpayer has provided a return and either they have made a default in furnishing the return or the Commissioner is not satisfied with the return. Guidelines in relation to penalties for failure to lodge on time are found in Chapter 98 of the *ATO Receivables Policy*.

Income years before 1992-93

92. For income years before 1992-93 it will generally be appropriate to seek specialist advice on the application of the relevant penalty regime from the Policy and Practice team in the Debt BSL.

Remission of penalties

93. The Commissioner has the discretion to remit an administrative penalty in whole or in part (subsection 298-20 of Schedule 1 to the TAA). Guidelines on the remission of penalties imposed under subsection 284-75(1) of Schedule 1 to the TAA where a shortfall amount results from a false or misleading statement made on or after 1 April 2004 are set out in PS LA 2006/02.

94. For statements made prior to 1 April 2004, the remission policy as set out in Law Administration Practice Statements PS LA 2002/8 and PS LA 2000/9 (before 31 July 2001) applies. For remission guidelines under the former tax shortfall penalties regime, see Taxation Ruling TR 94/7.

95. Guidelines in relation to penalties for failure to lodge on time are found in Chapter 98 of the *ATO Receivables Policy*.

96. In addition, if prosecution action has been instituted in respect of the same conduct that gave rise to such a penalty, then the taxpayer is no longer liable to pay that penalty due to the operation of section 8ZE of the TAA (see paragraph 29 of Corporate Management Practice Statement PS CM 2007/02 Fraud Control and the Prosecution Process).

Section 167 default assessments and collection issues

97. Tax officers relying on section 167 to issue default assessments must consider the practical issue of collecting the resulting tax debt. There may be particular collection risks in respect of section 167 default assessments. Tax officers should contact the Debt BSL before the assessment is issued, as the process of information gathering that led to the section 167 default assessment may have disclosed assets (including financial institution deposits, share or unit holdings or trade debts), income flows, transactions or relationships that may assist in the collection process. In relation to bulk default assessments, tax officers will not generally be required to contact the Debt BSL for each case but instead liaise with the Debt BSL for the whole client population of that project.

98. In respect of such information, in line with Part B of the ATO Receivables Policy, it may be appropriate for tax officers to consider the potential use of collection options, such as:

- notices under section 255 to require payment of funds held on behalf of a non-resident to the Commissioner (this may be especially relevant in cases where a non-resident taxpayer has disposed of an asset in a manner which creates a capital gains tax liability and has little or no other connection with Australia)
- notices under section 260-5 of Schedule 1 to the TAA to recover funds from taxpayers holding them on behalf of the taxpayer (this may be especially relevant in cases where the taxpayer has funds held on account with a financial institution or has trade debts with a customer or client), and

- Mareva injunctions to restrain a taxpayer from transferring, disposing of or dealing with particular assets which might be used to satisfy a debt (this is relevant where there may be a real risk that the taxpayer may have his or her assets removed from the jurisdiction, or disposed of within the jurisdiction, or otherwise dealt with so that those assets will not be available to satisfy a judgment for the tax debt).

Examples of common situations that officers are likely to encounter

99. *Example 1 – unexplained deposits*

A taxpayer with no disclosed income producing activities and who has not lodged any income tax returns has used funds sourced from a series of significant cash bank deposits over several years to pay for living expenses for himself and his family. The taxpayer has provided several unsatisfactory explanations for these deposits in interviews with a tax officer. After considering the case officer's submission containing details of these explanations, the authorised officer makes a default assessment under section 167 for the amounts of unexplained deposits in each year as taxable income for the relevant year. This assessment does not include any allowable deductions, given the likelihood that this amount is net of expenses and the lack of detail regarding the nature of the income producing activity. An administrative penalty for the failure to lodge returns is also imposed for each of the relevant income years. In addition, the case officer provides details of the bank account to the Debt business line, who arrange service of a notice under section 260-5 of Schedule 1 to the TAA upon the bank where the funds are held to secure payment of the tax debt, given the taxpayer's record of non-cooperation and likely non-payment of the debt.

100. *Example 2 – asset betterment/'T' account*

A taxpayer has lodged returns for a number of years disclosing consistent losses from business activities. Tax officers conduct an audit of the taxpayer's affairs. Their audit reveals a steady increase in the value of assets of the taxpayer and evidence of the taxpayer leading a lavish lifestyle, which is inconsistent with the ongoing losses appearing in returns. The taxpayer is uncooperative in explaining this inconsistency. As a result, these tax officers prepare an indirect financial analysis of the apparent sources and application of funds (or 'T' account), which quantifies the apparent shortfall in disclosed income from business activities. This forms the basis for the use of the section 167 default assessment power to make amended assessments for the relevant years by an authorised officer, within the period provided by section 170 (in the absence of fraud or evasion). This assessment relies upon the results of the 'T' account to determine taxable income, so there is no need to calculate assessable income or allowable deductions. The assessment also includes an administrative penalty for the making of false or misleading statements in the each of the previously lodged returns under subsection 284-75(1) of Schedule 1 to the TAA accompanied by an increase of 20% in the base penalty amount of the shortfall amount for taking steps to obstruct the Commissioner from finding out about the shortfall amount.

101. *Example 3 – extrapolation from prior year returns and third party information*

A taxpayer has failed to lodge returns for several years. The last two returns that were lodged contained details of income producing activities. Following a lack of response to various enquiries made to the taxpayer's last known address, tax officers use third party information to confirm that the taxpayer is still involved in these income producing activities. An authorised officer makes a section 167 default assessment on the taxpayer, based on an extrapolation of the previously disclosed assessable income and allowable deductions, increased by the ABS inflation rate on a quarterly basis over the following years. An administrative penalty is imposed for failure to lodge returns for the relevant income years under subsection 284-75(3) of Schedule 1 to the TAA in addition to a penalty for not lodging documents on time under subsection 286-75(1) of Schedule 1 to the TAA. The tax officer also advises staff from the Debt business line of the identified third parties with whom the taxpayer is apparently trading in order to aid debt collection activity if it is required.

102. *Example 4 – use of external economic statistics*

A taxpayer is identified through the Australian Transaction Reports and Analysis Centre (AUSTRAC) as having sent large amounts of funds to an offshore country listed by the Organisation for Economic Cooperation and Development as an uncooperative tax haven which has bank secrecy laws. When tax officers query these transactions, the taxpayer does not offer any credible explanation for the transactions and does not provide any details of proceeds of any offshore investments resulting from them. After weighing the taxpayer's account of the transactions, an authorised officer assesses the taxpayer on the unexplained funds that were transferred offshore as taxable income (on the same basis as Example 1 above). In addition, the authorised officer uses ABS data on net return on foreign investments to calculate the taxpayer's taxable (not assessable) income and make a section 167 default assessment accordingly. An administrative penalty is also imposed for failure to lodge returns for the relevant income years under subsection 284-75(3) of Schedule 1 to the TAA in addition to a penalty for not lodging documents on time under subsection 286-75(1) of Schedule 1 to the TAA.

NOTE: it might be relevant to consider the application of the attribution regimes discussed in Law Administration Practice Statement PS LA 2007/7 if available information suggests that the overseas investments are through a relevant entity and should be assessed on an accruals basis under one of those regimes, rather than as direct investment income of the taxpayer.

103. *Example 5 – use of third party information – government information*

A government agency exchanges information with the Tax Office that indicates an individual taxpayer is engaged in income-producing activities. This information includes details of various receipts by the taxpayer of significant amounts of money, some of which is currently held in an account with an Australian bank. Tax officers prepare a profile of the taxpayer's reported income-earning activities and current asset position which supports a finding that the taxpayer has significant undisclosed income at a similar level to that reported by the government agency. As a result of international travel information of the taxpayer which indicates frequent overseas trips, the tax officers form the view that it is likely that the taxpayer may flee the country if advised in advance of our intention to issue an amended assessment. Consequently, the tax officers recommend to an authorised officer that a section 167 default assessment be immediately issued on the amount of income that they calculate on a reasonable basis that has not been disclosed by the taxpayer. Due to the risk of movement of the funds currently located in the Australian bank account to an overseas bank account, they also arrange with Debt business line staff to issue a notice under subsection 260-5(2) of Schedule 1 of the TAA on the bank in respect of the relevant assessment debt, once it issues and becomes due and payable.

104. *Example 6 – use of internal information in relation to other obligations*

A taxpayer has failed to lodge returns for several years. The last two returns that were lodged contained details of income producing activities. Using the data from related Business Activity Statements, it has been confirmed that the taxpayer is still receiving income from these income earning activities. When tax officers query these activities with the taxpayer, the taxpayer acknowledges receipt of income from these activities, but does not provide any further details or lodge returns for the relevant years. As a result of a submission by the tax officers, an authorised officer makes a section 167 default assessment on the taxpayer, based on an extrapolation of the previously disclosed assessable income and allowable deductions, increased by the ABS inflation rate on a quarterly basis over the following years. The assessment also includes an administrative penalty for failure to lodge returns for the relevant income years under subsection 284-75(3) of Schedule 1 to the TAA in addition to a penalty for not lodging documents on time under subsection 286-75(1) of Schedule 1 to the TAA.

105. *Example 7 – use of third party information – non-government information*

A financial institution provides information to the Tax Office concerning a large number of taxpayers. This information includes details of the dividend and interest proceeds received by those taxpayers, which is held within various accounts of that particular financial institution. Upon receipt of this information, an integrity check of that data is performed by the appropriate tax officers to ensure that the data is accurate and of a high quality, and procedural checks are also preformed to ensure that the appropriate taxpayers have been identified by the data matching process. Tax officers then use this information to prepare a profile of those taxpayers' reported income-earning activities and current asset position and determine that many have significant undisclosed income at a level similar to that reported by the financial institution. On this basis, these tax officers recommend that section 167 default assessments should be issued to those taxpayers. Due to the large number of taxpayers involved and the anticipated cost and burden associated with advising each individual taxpayer, an authorised tax officer decides that the section 167 default assessments be immediately issued without prior notice to each of those taxpayers.

106. *Example 8 – asset disposal by non-resident*

A non-resident company with no other Australian connection is found to be about to dispose of an interest in Australian real property which it has held since 1995. During this time, there have been substantial increases in real property prices. Upon detecting the imminent sale, tax officers obtain details of the original purchase price, the sale price at date of sale and the identity of the purchaser. In the absence of further information about cost base issues, an authorised officer calculates the increase in value over the period of holding and raises a section 167 default assessment on this as the non-resident company's taxable income, without prior notification, due to the immediacy of the transaction. Tax officers also arrange with staff from the Debt business line to issue a section 255 notice to the Australian purchaser to ensure payment of the assessed debt at settlement, given that there is a significant risk that the funds will otherwise leave Australia without the non-resident company meeting their obligation.

107. *Example 9 – destroyed records for resident business*

A resident business taxpayer claims that their business records were destroyed in an accident at their business premises and that they are therefore unable to lodge outstanding income tax returns for the preceding two financial years. Tax Office records indicate that the taxpayer has a poor previous compliance record, including repeated failures to comply with both final notices and court orders to lodge returns. As a result, an authorised officer responsible for the taxpayer's lodgment enforcement case decides to issue a section 167 default assessment for the two previous financial years. Tax Office information indicates that the taxpayer's business has experienced steady growth considerably above the inflation rate for the last five years. From this, the officer concludes that extrapolating the taxpayer's taxable income using ABS data for the outstanding years would form a reasonable basis for a section 167 default assessment. In the absence of indications of any particular risk to the revenue, the authorised officer advises the taxpayer of the intention to issue the section 167 default assessment on this basis and provides the taxpayer with an opportunity to comment on the resulting taxable income calculation. The taxpayer advises that they cannot comment on the accuracy of the proposed taxable income, due to the destruction of their records and argues that no assessment should be made as a result. The officer considers the taxpayer's argument and decides to issue the assessment on the basis previously advised.

108. *Example 10 – lost records for resident individual*

A self-employed resident individual taxpayer claims that their taxation records for the preceding financial year were lost when moving interstate and that he is unable to easily reconstruct them, as they largely relate to cash receipts and payments. The taxpayer has a good compliance history and a reasonably stable taxable income over the last several years. As a result, the tax officer responsible for the taxpayer's lodgment enforcement case decides to issue a section 167 default assessment for the relevant financial year. The officer contacts the taxpayer and discusses an appropriate basis for calculating the taxpayer's taxable income, including the taxpayer's estimates of his assessable income and allowable deductions. The officer prepares a report for their manager (who is an authorised officer based upon the taxpayer's income levels) recommending that a section 167 default assessment be issued on the basis agreed with the taxpayer (which is the average of their last three years' taxable income levels). The manager agrees with this recommendation and issues a section 167 default assessment accordingly.

Subject references	Section 167 Default Assessments
Legislative references	A New Tax System (Tax Administration) Act (No.2) 2000 Fringe Benefits Tax Assessment Act 1986 73 Judiciary Act 1903 39B ITAA 1936 6(1) ITAA 1936 166 ITAA 1936 167 ITAA 1936 168 ITAA 1936 170 ITAA 1936 175 ITAA 1936 177 ITAA 1936 222A – 226ZB ITAA 1936 255 ITAA 1936 262A ITAA 1936 263 ITAA 1936 264 ITAA 1936, Schedule 2A ITAA 1936, Schedule 2B ITAA 1997 995-1(1) TAA 1953 3AA TAA 1953 8C TAA 1953 8G TAA 1953 8ZE TAA 1953 Pt IVC TAA 1953 Sch 1 260-5 TAA 1953 Sch 1 284-75 TAA 1953 Sch 1 284-75(1) TAA 1953 Sch 1 284-75(3) TAA 1953 Sch 1 286-75(1) TAA 1953 Sch 1 298-20
Related public rulings	Taxation Ruling TR 94/3 Taxation Ruling TR 94/4 Taxation Ruling TR 94/5 Taxation Ruling TR 94/6 Taxation Ruling TR 94/7 Taxation Ruling TR 94/14 Taxation Ruling TR 96/7
Related practice statements	PS CM 2007/2 PS LA 2000/9 PS LA 2002/8 PS LA 2006/2 PS LA 2007/7
Case references	Bailey v. Federal Commissioner of Taxation (1977) 136 CLR 214

	Batagol v. FCT (1963) 109 CLR 243 at 252; 9 AITR 207 Briggs v. DFC of T and Ors; Ex parte Briggs (1986) 69 ALR 185 Briggs (No.2) (1987) 87 ATC 4278; 18 ATR 570 Case B1 (1951) 2 TBRD Commissioner of Taxation v. Dalco [1989-1990] 168 CLR 614 Darrell Lea Chocolate Shops Pty Ltd v. FCT (1996) 72 FCR 175 DCT v. Richard Walter Pty Ltd (1995) 183 CLR 168 Eldridge v Federal Commissioner of Taxation (1990) 90 ATC 4907 Federal Commissioner of Taxation v. Clarke (1927) 40 CLR 246 Favaro v Federal Commissioner of Taxation (1996) 34 ATR 1 Federal Commissioner of Taxation v. sec Hoffnung & Co Pty Ltd (1928) 42 CLR 39 FJ Bloemen Pty Ltd and Simons v. FCT (1981) 147 CLR 360; 11 ATR 914; 35 ALR 104 Gamini Bus Co Ltd v Commr of Income Tax, Colombo (1952) AC 571, (1952) TR 44 George v. Federal Commissioner of Taxation (1952) 86 CLR 183 Ma v. FCT (1992) 37 FCR 225; 23 ATR 485 Madden 96 ATC 4268 Madden v. Madden (1995) 58 FCR 590 McAndrew v. Federal Commissioner of Taxation (1956) 98 CLR 263 McCleary v. Commissioner of Taxation (1997) 97 ATC 4266; (1997) 35 ATR 318 Martin v FCT (1993) 93 ATC 5200; 27 ATR 282 R v. Deputy Commissioner of Taxation, ex parte Hooper (1926) 37 CLR 368 R v. DCT (WA); Ex Parte Briggs (1987) 18 ATR 570; 87 ATC 4278 Re DCT (WA); Ex Parte Briggs (1986) 17 ATR 1031 Stokes v. FC of T (1996) 136 ALR 632 Stone v Federal Commissioner of Taxation (1918) 25 CLR 389 Trautwein v. FCT (1936) 56 CLR 63
Other references	**ATO Receivables Policy** ATO Receivables Policy (link available internally only)
File references	07/18030
Date issued	20 December 2007
Date of effect	20 December 2007
Other Business Lines consulted	**Debt, Serious Non-Compliance, Office of the Chief Tax Counsel, Small & Medium Enterprises, Micro Enterprises & Individuals, Compliance Support & Capability, (TechNet representatives)**
Amendment history	**11 September 2008** Para's 85, 89, 91, 95, 98 & "Related practice statements" – reference to PS LA 2006/11 removed Link to the policy added to "Other references" **6 August 2008** Contact officer details updated