

## Compendium for Law Administration Practice Statement

### Background

This is a compendium of responses to the issues and comments raised in relation to Draft Law Administration Practice Statement PS LA 3434 *Matters the Commissioner considers when determining whether the Australian Taxation Office view of the law should only be applied prospectively*. As noted in the response column, we have made some changes to the practice statement in the light of the feedback received.

### Summary of issues raised by externals and responses

No.	Paragraph of circulated LAPS	New paragraph reference	Issue raised	Response
1.	General	General	<p>The practice statement should make a specific reference to the status of advance opinions.</p> <p>How would the principles in the draft practice statement apply to a situation in which an ATO audit team is reviewing an issue where there is already a longstanding position that was set out in an advance opinion?</p>	<p><b>No change made.</b></p> <p>We do not consider it necessary to make a specific reference to advance opinions in this practice statement. This is because advance opinions are no longer issued by the ATO. They have been replaced by the private and public rulings regimes.</p> <p>Paragraph 39 of the practice statement addresses the matter of ATO preliminary views in the context of rulings or audits. If the ATO provides a preliminary view in respect of the issues involved, these preliminary views are not in any way binding on the Commissioner and should not be considered as facilitating or contributing to the development of taxpayers' views or industry practice if the ATO later changes its view or position.</p>

No.	Paragraph of circulated LAPS	New paragraph reference	Issue raised	Response
2.	35	36	<p>The ATO approach as set out in the draft ruling is subject to three overriding factors in individual cases. One of those factors is set out in the following terms:</p> <p>A conclusion that the ATO view should only be applied prospectively will be overridden in any individual case 'if affected taxpayers have failed to take reasonable care in adopting their view of the law and if such a view is devoid of legal merit.'</p> <p>This 'overriding factor' makes no sense at all. It suggests, that it is possible for a taxpayer to 'have failed to take reasonable care' in relying upon a generally accepted administrative practice which otherwise meets the tests outlined in the draft ruling.</p> <p>The other aspect of the first overriding factor is an assumption that the ATO might adopt a settled administrative practice which can be fairly characterised as being 'devoid of legal merit'. I can't imagine the ATO adopting such an administrative practice, but if it is incompetent enough to do so then it should not be departed from in respect of past years. Does the ATO really want to incorporate in a practice statement an assumption that it could adopt settled administrative practices which are 'devoid of legal merit'? I agree that this overriding factor is likely to have minimal, if any, practical application. However, as a matter of principle, it should be deleted.</p>	<p><b>Change made.</b>  We have removed this overriding factor.  We agree that this factor would have had little if any practical application.</p>

No.	Paragraph of circulated LAPS	New paragraph reference	Issue raised	Response
3.	35	36	<p>The last overriding factor provides that where the ATO view should only be applied prospectively, this position will be overridden in individual cases 'where tax avoidance is involved, for example, where a determination has been made to apply a general anti-avoidance provision.'</p> <p>This overriding factor is expressed far too widely and goes well beyond any mischief which may be of legitimate concern to the ATO. It is fair enough to include, as an overriding factor, the utilisation of a generally accepted administrative practice in a tax avoidance context which would not have been anticipated by the ATO in adopting the practice in question. Indeed, in my view, that would have been the context in which the reference to tax avoidance would have been included in previous practice statements dealing with this subject. However, that is quite different from cases where the tax office may have adopted a generally accepted administrative practice in relation to the non application of Part IVA to particular kinds of cases. This is likely to have practical consequences and I believe it is wrong, as a matter of principle, to exclude from the scope of the practice statement cases where the ATO may have adopted a general administrative practice in relation to the application of Part IVA to particular kinds of factual circumstances. There is a fundamental difference, on the one hand, between a generally accepted administrative practice being manipulated to avoid tax and, on the other hand, a generally accepted administrative practice which specifically relates to whether or not the anti-avoidance provisions should be applied in a particular factual context.</p>	<p><b>Agree.</b> New sentence added to paragraph 36(c) in order to address this issue.</p>

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			The draft practice statement can legitimately treat the former as an 'overriding factor'. It is not justified in so treating the latter.	
4.	73	71	The only additional comment that we make so far on the draft practice statement is relating to Example 6. In that example, it appears that the ATO did not check the industry practice for at least a year and we wonder why the taxpayer must bear the consequences of the ATO not identifying the industry trend earlier. We recommend that the ATO has a process in place to ensure ATO officers take the necessary steps to establish whether there is an industry practice and not just consider whether there is a risk of the approach being adopted by taxpayers more generally. If the ATO does have such a process in place then Example 6 should be modified to reflect that the ATO took steps to discover whether there was an industry practice.	<p><b>No change made.</b></p> <p>Even if the industry practice had been identified earlier, it would not necessarily mean that the ATO view would not be applied both prospectively and retrospectively.</p> <p>The ATO makes decisions about its compliance activities based on risk and having regard to the most efficient use of its resources. As a result it is not possible for the Commissioner to conduct extensive research or be aware of all possible industry practices.</p>