PS LA 2001/8 - ATO Interpretative Decisions

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Practice Statement Law Administration

PS LA 2001/8

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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: **ATO Interpretative Decisions**

PURPOSE: **To advise:**

- **what is an ATO Interpretative Decision (ATO ID)**
- **when an ATO ID must be followed**
- **when an ATO ID must be prepared**
- **when an ATO ID need not be prepared**
- **the process for preparing an ATO ID**
- **who is responsible for reviewing and maintaining ATO IDs**
- **the protection granted to taxpayers who rely on ATO IDs**

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STATEMENT

What is an ATO Interpretative Decision

1. An ATO Interpretative Decision (ATO ID) is an edited and summarised version of a documented decision on an interpretative issue[1] about the application of law administered by the Commissioner. Law administered by the Commissioner includes income tax, indirect taxes, fringe benefits tax, withholding taxes, superannuation and excise.

2. ATO IDs set out precedential ATO views that tax officers must apply in resolving interpretative issues. ATO IDs are precedents for tax officers about how a provision of the law applies to a particular factual situation. They are a valuable method of capturing and publishing work that has been done in relation to matters that would provide a useful precedent.

3. An ATO ID provides the precedential ATO view in relation to the interpretative issue it covers for a private ruling, other advice, dispute resolution, or compliance activity by tax officers. *Law Administration Practice Statement PS LA 2003/3 Precedential ATO view* explains the meaning of 'precedential ATO view'.

4. ATO IDs may be based on decisions on interpretative issues including those arising from private rulings, audits, correspondence, advices or disputes. Also a pre-emptive ATO ID[2] may be based on a scheme or transaction that is known to exist, or to be in serious contemplation, even though the Commissioner has not been required to make an actual decision in relation to any interpretative issue which arises from that scheme or transaction.[3] The range of schemes in this context is broader than the range of schemes in a tax avoidance context.[4]

5. ATO IDs are publications approved in writing by the Commissioner. They are not published as a form of advice. They are published to meet freedom of information requirements because they may be applied by tax officers in making other decisions.

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[1] The meaning of 'interpretative issue' is explained in paragraphs 10 to 12 of *Law Administration Practice Statement PS LA 2003/3 Precedential ATO view.*

[2] For information concerning pre-emptive ATO IDs see paragraphs 23 to 27 of this practice statement.

[3] Scheme is defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) to mean:
(a) any arrangement; or
(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

[4] This is because a tax avoidance scheme must not only be a scheme as defined in subsection 177A(1) of the *Income Tax Assessment Act 1936* but a taxpayer must also obtain a tax benefit in connection with the scheme – see section 177D of that Act.

When an ATO ID must be followed

6. ATO IDs are produced for the primary purpose of facilitating consistent interpretative decision-making by tax officers. Tax officers must search for, identify and apply relevant ATO IDs or other precedential ATO view documents in resolving interpretative issues. This means that where:

   - there is **no material difference** between the facts of the scheme upon which a decision is required and an existing ATO ID or other precedential ATO view document, and
   - the tax officer considers that the application of the view set out in the ATO ID or other precedential ATO view document would result in a correct decision,

   the ATO ID or other precedential ATO view document must be followed.

7. If a tax officer considers that there is a conflict between an ATO ID and another precedential ATO view document, or applying an ATO ID may lead to an incorrect or unintended result, then the matter must be escalated to the relevant Centre of Expertise (CoE) in accordance with the business line's escalation processes (see *Law Administration Practice Statement PS LA 2004/4 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*)).

When is there 'no material difference'?

8. There is 'no material difference' where the facts underlying a particular issue and the facts outlined in a precedential ATO view document (including an existing ATO ID) are similar enough to enable the tax officer to be satisfied that applying the existing precedential ATO view will result in the law being applied correctly to the circumstances of the case.

9. While the decision in relation to an issue must be determined on its own particular facts, it may still be covered by the principles set out in a precedential ATO view document, even though the facts are not identical. Care should be taken to identify the key interpretative issue underlying the scheme or transaction to ensure that an ATO ID can be applied as a precedent for schemes or transactions that have different factual contexts, but which turn on the same interpretative issue. Therefore, it is important to understand the tax law principles underlying a scheme or transaction, particularly where the matter is complex. This will ensure that issues arising from a particular case are not treated as if there is no existing precedent dealing with those issues merely because of factual differences.

10. On the other hand, even small factual differences between the circumstances of the matter under consideration and the facts that underlie an existing precedential ATO view document may be material and consequently lead to a different decision and require the preparation of an ATO ID. This is particularly important for provisions of general application such as section 8-1 of the ITAA 1997, which is an area of tax law that has been subject to a significant amount of litigation.

11. What is material is a question of fact and degree depending on the issue being considered and will involve the exercise of judgment. The following examples provide some guidance.

Examples of 'no material difference'

12. ***Example 1***

There is an ATO ID on the reduction of deductions for the decline in value of a computer by an accountant who uses the computer partly for business purposes. A new private ruling request is received on the reduction of deductions for decline in value of a mobile telephone (a different depreciating asset) used by a lawyer (someone in a different occupation) partly for business purposes. The same legal principles apply. The existing ATO ID should be followed as the differences in the facts are not material because the circumstances of the respective taxpayers and of the depreciating assets are sufficiently similar.

13. ***Example 2***

Taxation Ruling TR 95/13 states that a deduction is allowable for expenses incurred in maintaining and training police dogs. A private ruling request is received on the deductibility of expenses incurred by a fire-fighter in maintaining and training a dog used in search and rescue work. The legal principles as explained in TR 95/13 will apply. The differences in the facts are not material, because the search and rescue dog performs similar functions to a police dog. Although the private ruling is not about a police dog, TR 95/13 provides the precedential ATO view in relation to the training costs and maintenance of animals used in the workplace in a similar manner to police dogs.

14. As ATO IDs are edited and summarised versions of what may have been complex legal argument applied to complex facts, a general similarity of another taxpayer's situation to the circumstances in an ATO ID will not necessarily lead to the same result. There may be a material difference which cannot be established unless tax officers refer to the facts on which the ATO ID was based. Consequently, tax officers may need to refer to the case report underlying the ATO ID. Case reports can be found by searching the Siebel system. (Note: access to Siebel case reports is available only to tax officers.)

15. Tax officers who are unable to determine whether an ATO ID applies to the factual situation under consideration must seek assistance from their technical leader. If the matter cannot be resolved with the involvement of the technical leader, then it must be escalated to the relevant CoE for resolution in accordance with the business line's escalation processes.[5]

[5] See *Law Administration Practice Statement PS LA 2004/4 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.*

When an ATO ID must be prepared

16. An ATO ID must be prepared for each decision on an interpretative issue about the application of any of the laws administered by the Commissioner that satisfies the following criteria:

    - there is no precedential ATO view[6] on the issue, unless it is an exception (see dot points 6 to 9 of paragraph 28 of this practice statement), or
    - there is a precedential ATO view on the issue, but the ATO ID
        - will improve clarity and certainty in relation to the interpretation of the particular area of the law, or
        - is of wide significance, application and interest and the precedential ATO view has not been adequately covered previously.

17. An ATO ID may also need to be prepared where the decision is about an interpretative issue involving the administration or collection of a tax, net fuel amount, grant or benefit. The taxes, net fuel amounts, grants or benefits concerned include income tax, mining withholding tax, fringe benefits tax, goods and services tax and excise.[7] For example, an ATO ID should be prepared where there is no precedential ATO view for an issue that involves the interpretation of Division 721 of the ITAA 1997 which deals with the collection of tax liabilities of a head company of a consolidated group.

18. If multiple interpretative issues are identified in a particular case and none of them have a precedential ATO view, an ATO ID must be prepared for each issue.

19. Where a tax officer is unable to decide whether to prepare an ATO ID, they must seek assistance from their technical leader. If the matter cannot be resolved with the involvement of the technical leader, it must be escalated to the relevant CoE for resolution in accordance with the business line's escalation processes.

20. When deciding whether an additional ATO ID would provide guidance or clarity to existing precedent, the tax officer should be satisfied that the new ATO ID adds value to the precedential ATO view data base, such as by providing greater clarity and certainty in relation to the interpretation of the particular area of the law.

21. An ATO ID should be prepared and published in relation to an issue where we have made a decision for which there is no existing precedential ATO view, including where a decision relating to a Priority Technical Issue (PTI)[8] is involved. This is so even where it is anticipated that another ATO precedential view document on that issue will be prepared (for example a public ruling).[9] In rare cases, it may be decided that the proposed preparation of a precedential

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[6] Officers involved in interpretative work must use relevant information technology systems in use in the ATO for research including locating precedential ATO views – see *Law Administration Practice Statement PS LA 2002/16 Mandatory use of Information Technology systems for interpretative work* – inclusion in performance agreements.

[7] For full details of the taxes, benefits and grants concerned, see section 357-55 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

[8] See *Law Administration Practice Statement PS LA 2003/10 Management of Priority Technical Issues*. Before preparing the ATO ID on a PTI issue, the tax officer must escalate the issue to the PTI owner who will determine what course of action is to be taken.

[9] Note there are some limited exceptions to the requirement to publish an ATO ID, see paragraph 37 of this practice statement.

ATO view document will remove the requirement for an ATO ID on an issue on which binding advice has issued to a taxpayer.[10] However, in the event that the precedential ATO view document dealing with the matter covered in the ATO ID is not expected to issue within a reasonable period, the matter should be escalated for a decision about whether or not the ATO ID should be published and the timing of such publication (see paragraph 38 of this practice statement).

22. Similarly, the preparation of an ATO ID should not affect the consideration of whether another precedential ATO view document, including a public ruling, should be prepared. Where the precedential ATO view expressed in an ATO ID is of particular significance, or has wide application, consideration should always be given to converting the ATO ID into a public ruling. If another ATO precedential document is already being prepared, the author of the other document should be consulted to determine the most practical way of promulgating the ATO view.

Pre-emptive ATO IDs

23. In limited circumstances, a pre-emptive ATO ID may be prepared. A pre-emptive ATO ID may be based on a scheme or transaction that is known to exist, or to be in serious contemplation, even though the Commissioner has not been required to make a decision in relation to an actual case concerning that scheme or transaction. For example, a private ruling request may be withdrawn before a ruling has issued, or a scheme or transaction that is in serious contemplation, has been escalated to the relevant CoE and a position determined. Where significant work has been done by business lines or CoEs on an interpretative issue and a decision is reached but is not reflected in a precedential ATO view, tax officers must consider whether an ATO ID should be prepared. They should refer the matter to the relevant CoE for technical clearance and authorisation in accordance with the business line escalation processes (see paragraph 29 of this practice statement).

24. A pre-emptive ATO ID may also issue where:

- most aspects of a topic have been covered by precedential ATO view documents
- an important aspect of this topic has not been addressed, and
- taxpayers may be misled if this aspect were not to be addressed.

25. ***Example 3***

A taxpayer asks for a private ruling about whether a receipt from an asset sale is ordinary income. Whilst this aspect is contained in a precedential ATO view document, the capital gains tax (CGT) implications have not been considered. An ATO ID should be prepared and published on the CGT implications to ensure that tax officers and the community are aware of the CGT implications of such a transaction.

26. Consideration should be given to preparing one precedential ATO view document instead of preparing a number of pre-emptive ATO IDs on the one issue. Further, where several existing ATO IDs are related to the same topic, consideration should be given to amalgamating them into one precedential ATO view

[10] This is one of the exceptions to publication referred to in paragraph 37 of this practice statement.

document. A public ruling such as a taxation ruling or determination is the preferred means of expressing and communicating a precedential ATO view on multiple issues relating to the same topic.

27. An ATO ID may be prepared on the application of legislation that is not yet in operation; for example, where the legislation is awaiting Royal Assent. However, publication of the ATO ID must be withheld until the legislation has received Royal Assent.

When an ATO ID need not be prepared

28. An ATO ID does not need to be prepared:[11]

- If there is no material difference between the particular facts and reasons of the case and those set out in a precedential ATO view document.
- If an ATO ID is already in the course of preparation on the same issue and the schemes are not materially different. Tax officers must search the Siebel database for ATO IDs in course of preparation.
- If written general advice[12] is issued that explains the general operation of the law and does not apply the law to a particular set of facts.
- If the issue is to be referred to another agency (for example a Research and Development issue is referred to the Industry Research and Development Board).
- If the decision does **not** involve an interpretative issue, such as if a taxpayer asks for a ruling on a scheme or transaction where the decision is reached by a straightforward application of clear and unambiguous law to a particular set of facts (see PS LA 2003/3 for more information).
- To the extent that the decision solely involves the exercise of the Commissioner's discretion. This includes decisions about whether the Commissioner would exercise a particular discretion in a specified fact situation (see PS LA 2003/3 for more information). Where the discretion is one involving the application of a general anti-avoidance provision, it is essential to refer to Law Administration Practice Statement PS LA 2005/24 for guidance.
  - Note that tax officers should apply any relevant ATO guidelines when making a decision that involves the exercise of a discretion. These guidelines may be contained in other documents, including, for example, law administration practice statements.
- To the extent that the decision involves an ultimate conclusion of fact. An ultimate conclusion of fact involves ascertaining the relevant primary facts and drawing a conclusion from those facts (see PS LA 2003/3 for more information).

[11] Note that there are circumstances where an ATO ID may not be published, see paragraphs 36 to 39 of this practice statement.
[12] The term 'written general advice' is explained in *Law Administration Practice Statement PS LA 2008/3 Provision of advice and guidance by the ATO*.

- Note that tax officers should apply any relevant ATO guidelines about drawing conclusions of fact. These guidelines may be contained in public rulings or other documents, including, for example, law administration practice statements.

- Where the decision is one which turns on the particular facts of the case rather than the interpretation of law. For example, the issue concerns:
  - the determination of the value of something
  - the pure calculation of amounts; for example, answering questions about how penalty and interest is calculated, or
  - a claim for compensation based on defective administration.

The process for preparing an ATO ID

29. Business lines are responsible for:

- identifying issues where a precedential ATO view does not exist, and
- either:
  - preparing a draft ATO ID for clearance by the relevant CoE, or
  - referring the matter to the relevant CoE for the preparation of an ATO ID in accordance with PS LA 2004/4, which provides a link to the Business Rules for referring issues by business lines to the Centres of Expertise for the creation of Precedential ATO view (Business Rules), and in accordance with the business line's escalation processes.

30. The primary role of the CoEs is the creation and authorisation of precedential ATO views in respect of all the laws administered by the Commissioner. Only CoEs and Tax Counsel Network (TCN) are authorised to create and issue precedential ATO views.[13]

31. ATO IDs should set out decisions in a summary form in a clear standard structure and format that includes:

- the issue
- the decision
- the facts
- the reasons for decision, and
- references (keywords, legislation, case law, etc).

The ATO ID template in Siebel must be used to prepare an ATO ID.

32. In preparing an ATO ID, care should be taken to:

- ensure that the focus of the ATO ID is on the technical issue
- include only the material facts so that it is clear what situation is covered. For example:

[13] Apart from those Senior Executive Service officers to whom the Commissioner has delegated the relevant powers under subsection 8(1) of the TAA.

- in issuing an ATO ID on whether the cost of footwear is deductible because it protects the wearer from physical harm, the facts would set out the attributes that are material, such as being steel-capped, or having acid-resistant soles. The colour of the footwear would not be material.
- in deciding whether an unfilled pastry shell comes within 'tarts and pastries' (item 23 of clause 1 of Schedule 1 to the *A New Tax System (Goods and Services Tax) Act 1999*), it is not material whether it was intended to have a sweet or savoury filling.

- set out the reasons for the decision based on the application of the relevant principles, and
- ensure that ATO IDs do not identify taxpayers, nor disclose confidential information. Ordinarily, it should be possible to summarise a decision in such a way that privacy and confidentiality requirements are met. The guidelines for preparing edited versions of written binding advice contained in *Law Administration Practice Statement PS LA 2008/4 Publication of edited versions of written binding advice* should be applied when preparing ATO IDs. The following matters arise when editing confidential information:
  - there may be some cases where it is not possible to edit or draft an ATO ID so that it does not identify taxpayers or disclose confidential information, and
  - there may be instances where the specific facts are so integral to the decision that no useful precedent can be extracted without identifying the taxpayer. For example a decision on the application of a provision to a taxpayer who is one of only a very small number of taxpayers in a particular industry.

  In the two situations above, an ATO ID is still prepared but must not be published either internally or externally. Advice or assistance should be sought from either the Priority Technical Issue and Public Rulings Unit (PTI&PRU) in Law Practice Support Branch (LPS), Law and Practice (L&P), or TCN in the case of an anti-avoidance provision. An ATO ID must not be published internally or externally unless privacy and confidentiality requirements can be met.

33. Detailed guidance for the preparation of ATO IDs is contained in the ATO ID Guidelines. Additional assistance and support may be obtained from the PTI&PRU.

34. All ATO IDs are subject to a clearance process. This process involves preparation, technical clearance and authorisation by the relevant CoE, or escalation to the CoE by the business lines for technical clearance and authorisation in accordance with PS LA 2004/4 and the Business Rules (the relevant CoE will escalate matters to TCN where necessary). Checking of style, format, structure and compliance with the ATO ID Guidelines is carried out by the PTI&PRU.

Numbering

35. PTI&PRU allocates ATO IDs with a unique reference number which begins with the prefix 'ATO ID' followed by the year and sequential numbering. These numbers are assigned in order of publication when an ATO ID is added to the Legal Database.

Publication

36. The *Freedom of Information Act 1982* requires that internal guidelines are available to the public. ATO IDs are produced for the primary purpose of facilitating consistent interpretative decision-making by tax officers and are on ATOlaw. They are also made publicly available through the Legal Database on the Tax Office website www.ato.gov.au.

37. Whilst it is clear that ATO IDs are not to be published in cases where privacy and confidentiality requirements cannot be met, there are three other exceptions to the requirement to publish ATO IDs. These exceptions are:

- A precedential ATO view document such as a public ruling or draft public ruling on the topic is expected to issue within a reasonable period (see paragraph 21 of this practice statement).
- The issue covered in the ATO ID relates to:
  - a court case that is subject to appeal
  - a proposed legislative amendment, or
  - a recommendation for a legislative amendment (this is intended to deal with a situation where the ATO has referred an issue to Treasury for policy consideration because the outcome of our interpretation appears to be inconsistent with the underlying policy of the law. In those circumstances, it is necessary to inform taxpayers to whom advice is provided in relation to that issue that the matter has been referred to Treasury and may be the subject of a recommendation to Government to amend the law).
- There is a PTI that covers the subject of the ATO ID and a decision about how the precedential ATO view on that issue should be communicated has not been made.

38. A decision not to publish an ATO ID in situations (other than for privacy reasons) and as to what is a reasonable period should be made by the Senior Assistant Commissioner CoE or a Deputy Chief Tax Counsel. An exception to this requirement is where the issue in the ATO ID is also covered by a PTI. In this circumstance, the case officer should escalate the issue to the PTI owner who will then determine whether the ATO ID can be published (see paragraph 21 of this practice statement).

39. Copies of any ATO ID provided to the public by tax officers **must not** be taken from ATOlaw as it includes the Siebel work item number and the business line details. To prevent accidental inclusion of these details, tax officers should produce copies of ATO IDs only from the external Legal Database on www.ato.gov.au.

Reviewing and maintaining ATO IDs

40. Reviewing and maintaining the currency of ATO IDs is the responsibility of the CoEs. The CoEs will review ATO IDs for accuracy, currency and for the purpose of making additions, changes or withdrawing ATO IDs.

41. All relevant ATO IDs should be reviewed where:

- new legislation is passed
- a final decision is handed down by a court or tribunal
- there is a change to the Commissioner's interpretation of a law, or
- a public ruling or other precedential ATO view document is being prepared.

42. A tax officer who considers that an ATO ID is incorrect, misleading, uncertain, or not current in any way must escalate it to the relevant CoE in line with business line processes (see Chapter 5 of the ATO ID Guidelines).

43. An ATO ID should be withdrawn where:

- it is incorrect
- a substantial change is required
- its application may lead to unintended consequences, or
- where the precedential ATO view is expressed in a later issued public ruling (consideration should be given to incorporating the ATO ID as an example in the public ruling).

44. However, where there are minor errors that do not affect the decision or the reasons for the decision, the ATO ID can be amended rather than being withdrawn. Minor errors include, for example:

- spelling, punctuation or grammatical errors, or
- an error is discovered in the citation of a legislative provision which does not alter the decision or the reasons for decision.

45. If it is proposed to replace an ATO ID that is to be withdrawn, the replacement precedential ATO view document must be prepared and published as soon as possible after withdrawal. If the new precedential ATO view is to change an existing precedential ATO view this must be brought to the attention of the relevant Deputy Chief Tax Counsel, see paragraph 35 of PS LA 2003/3.

Protection granted to taxpayers who rely on ATO IDs

46. ATO IDs are publications approved in writing by the Commissioner.

47. Accordingly, a taxpayer is not liable for the general interest charge or shortfall interest charge under a relevant provision to the extent that the charge would relate to a shortfall amount or a scheme shortfall amount that was caused by the taxpayer reasonably relying in good faith on an ATO ID. This rule does not apply

to the general interest charge accruing more than 21 days after the Commissioner notifies the taxpayer of the correct position. [14]

48. In addition, there is also protection afforded in terms of administrative penalties where a taxpayer reasonably relies in good faith on an ATO ID.[15]

[14] See subsection 361-5(1) of Schedule 1 to the TAA
[15] See subsection 284-224(1) of Schedule 1 to the TAA

Amendment history

Date of amendment	Part	Comment
1 December 2011	Paragraphs 46 – 48	Content updated as a result of the publication of TD 2011/19 which explains general administrative practice.
	Throughout	References to PMU changed to PTI&PRU References to Tax Office changed to ATO Correction of citation of references to related law administration practice statements
9 November 2009	Paragraphs 14, 28, 31 and 29 Paragraph 25 Paragraph 28 Paragraph 30 Paragraph 32 Footnote 12	References to the Technical Decision Making System (TDMS) updated to refer to Siebel. Updated reference to CGT Instance of when an ATO ID does not need to be prepared deleted Updated reference to TCN Updated a reference to a related practice statement from PS LA 2001/7 to PS LA 2008/4 Further clarification on publication and preparation of an ATO ID added BSL references updated from OCTC to L&P Updated a reference to a related practice statement from PS LA 2001/4 to PS LA 2008/3
2 September 2009		Contact officer details updated
23 July 2009		Updated a related practice statement from PS LA 2001/4 to PS LA 2008/3
11 August 2008		Contact officer details updated
26 November 2007	Paragraph 45	Corrected paragraph reference of PS LA 2003/3 (from para 33 to 35 of that practice statement)
8 June 2007		To clarify the issue of what 'no material difference' means, and to detail new exceptions to the requirement that ATO IDs are to be published

Subject references	ATO Interpretative Decisions Precedential ATO views
Legislative references	ITAA 1936 177A(1) ITAA 1936 177D ITAA 1997 8-1 ITAA 1997 Div 721 ITAA 1997 995-1(1) ANTS(GST)A 1999 Sch 1 cl 1 TAA 1953 8(1) TAA 1953 Sch 1 284-224(1) TAA 1953 Sch 1 357-55 TAA 1953 Sch 1 361-5(1) FOI Act 1982
Related public rulings	TR 95/13;
Related practice statements	PS LA 1998/1; PS LA 2001/7; PS LA 2002/16; PS LA 2003/3; PS LA 2003/10; PS LA 2004/4; PS LA 2005/24; PS LA 2008/3 ;PS LA 2008/4
Case references	
Other references	***ATO ID Guidelines*** (link available only within the Tax Office) ***Business Rules for referring issues by business lines to the Centres of Expertise for the creation of precedential ATO view*** (link available only within the Tax Office) Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005
File references	2001/7447
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Other Business Lines consulted	All