

# ***PS LA 2004/13 - The Transfer Pricing Review Panel (TPRP)***

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Australian Government  
Australian Taxation Office

## ATO Practice Statement Law Administration

**PS LA 2004/13**

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**FOI status: may be released**

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*This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs, ATO officers must follow their Business Line's escalation process.*

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**SUBJECT: The Transfer Pricing Review Panel (TPRP)**

**PURPOSE: To advise the role, responsibilities and work practices of the TPRP**

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### **STATEMENT**

#### **Objectives and responsibilities of TPRP**

1. The role of the TPRP is to:
  - oversee the Tax Office's transfer pricing (TP) compliance program with a view to maintaining a high standard of technical and case management decision making to ensure that a sound and consistent approach is taken with TP casework; and
  - ensure that the principles and practices in Tax Office TP Rulings and other guidance are reflected in TP casework.
2. This applies to all casework that may give rise to TP issues, including TP reviews, audit cases and advance pricing arrangement (APA) cases.
3. A TP issue is one involving the application of Division 13 of Part III of the *Income Tax Assessment Act 1936* (Division 13 determinations), the Business Profits or Associated Enterprises Article of Australia's Double Taxation Agreements (the corresponding Treaty Articles), relevant Articles of the Timor Sea Treaty, and Rulings and other guidance relating to these provisions.

4. The role of the TPRP includes:
  - assisting the performance of TP casework, including by providing any necessary advice related to the planning of that work;
  - providing an independent quality review of TP cases to ensure that the approach taken and technical decisions made are consistent, sound and appropriately reflect the Tax Office view;
  - providing advice to facilitate the making of Division 13 determinations and applications of the corresponding Treaty Articles on a sound basis by the most appropriate officer; and
  - ensuring that a 'whole of ATO' approach is adopted in dealing with TP issues.
5. Advice given by the TPRP to a case owner on technical and case management issues should be followed, subject to any relevant escalation processes. Advice given by the TPRP to an officer making a Division 13 determination or applying a corresponding Treaty Article does not displace that officer's responsibility for proper exercise of his or her authority to make such determination or application.
6. The TPRP does not have a role in any casework resulting from an audit that occurs after the making of a Division 13 determination or applying the corresponding Treaty Articles. This includes objections to assessments and Mutual Agreement procedures (MAPs). The TPRP does not have a role in APA casework performed at the MAP stage of a case. However, officers performing such casework should take account of any advice provided by the TPRP at other stages of the work. Where this advice is not followed the TPRP should be advised of the reasons for this to ensure that they are taken into account in giving future TPRP advice.
7. The TPRP does not have authority to create a precedential ATO view on TP issues, the process for which must accord with PS LA 2004/4.
8. The TPRP as established by this Practice Statement replaces the 'International Audit Review Committee' that operated under a Charter as outlined in an International Tax Division Office Minute released in May 1998.
9. There is a need for a degree of flexibility in the processes followed in performing casework. The general requirements set out in this Practice Statement as to the TPRP processes and the need for its involvement in casework are not intended to impede the effective and efficient performance of casework. Accordingly, whilst there is an expectation that these requirements must ordinarily be met, the extent to which this is practicable or necessary is ultimately subject to the particular circumstances of a case.

## Referral of issues to TPRP

10. Bearing in mind paragraph 9, all owners of relevant casework must refer a TP issue to the TPRP for its advice and guidance. This includes the following:
  - the determination of a risk rating for a TP record review or other type of TP review that requires such a rating, subject to paragraphs 11 and 12;
  - the approach to be taken in the auditing of a TP issue, including significant case management decisions related to the planning and conduct of the audit;
  - a Position Paper, Discussion Paper or similar type of document that is to issue to the taxpayer in an audit or APA case;
  - the decision to make a Division 13 determination or apply a corresponding Treaty Article;
  - the decision to take no further action in respect of an audit of a TP issue;
  - the decision to accept an APA application, if there is doubt;
  - the approach to be taken in considering an APA application or pre-lodgement proposal, including significant case management decisions related to the planning and conduct of the work; or
  - the determining of a Tax Office position on the terms and conditions of an APA (but not including decisions made during MAP, as per paragraph 6).
11. Regarding the first dot point in the previous paragraph, in accordance with Taxation Ruling TR 98/11 a TP review (eg. a TP record review) involving an assessment of documentation quality and commercial realism of outcomes is required before proceeding to audit. The risk rating resulting from such a review requires TPRP involvement. This is the case whether the TP review is performed as part of a client risk review (CRR) or independently of a CRR. It is also the case if the TP review is performed in streamlined form.
12. However, not all TP risk assessments involve such a TP review and risk rating and therefore need be referred to the TPRP. For instance, a TP issue may be risk assessed in performing a CRR without the need for TPRP involvement.
13. Referral of issues to the TPRP should be timely. In cases involving audits and APAs, the case owner should ordinarily instigate referral at an early stage, consistent with the TPRP's role of providing any necessary advice related to the planning of TP casework.
14. It is expected that a case owner will make referrals to the TPRP at appropriate decision points over the course of an audit or APA, consistent with the TPRP's role of ensuring sound case management decision making and ongoing quality review in relation to TP issues.
15. Where an issue is referred to the TPRP, the business line retains case ownership, responsibility for management of the client relationship, and responsibility for finalisation of the work that raised the issue.

## Composition and administration

16. The membership of the TPRP has two categories. The first category comprises all Executive Level 2 officers in the Transfer Pricing Practice (TPP) of International Strategy & Operations (ISO) with due authority to make a Division 13 determination and to apply the corresponding Treaty Articles. The second category comprises Executive Level 2 officers in ISO Client Engagement & Strategic Intelligence (CESI), Field Economist Practice (FEP), GST International and the business lines with appropriate TP expertise who will be utilised on a case by case basis, as determined by the Chairperson in accordance with paragraphs 18 and 19.
17. The Assistant Commissioner TPP shall nominate a TPP member or members to perform the role of TPRP Secretariat. It is the Secretariat's responsibility to:
  - manage the schedule of TPRP meeting days, in accordance with paragraphs 20 and 21;
  - determine whether a case referred is suitable for TPRP consideration, having regard to paragraphs 10-12;
  - nominate the Chairperson for a case, in accordance with paragraph 19;
  - notify case owners and Chairpersons of meeting day agendas;
  - provide periodic reports to the TP Operations Group on cases referred to the TPRP; and
  - perform ongoing review of TPRP work practices.
18. It is the TPRP Chairperson's responsibility, in consultation with other members and stakeholders, to:
  - determine and arrange the composition of the TPRP to hear the case, in accordance with paragraph 19;
  - advise the case owner of the composition of the TPRP, so as to enable papers to be made available in accordance with paragraph 23;
  - determine and arrange the most appropriate officer to make any required Division 13 determination or application of a corresponding Treaty Article (which will usually be a member of the TPRP); and
  - approve the Minutes of a TPRP meeting as accurately recording the advice provided by the TPRP.
19. In determining the Chairperson and composition of the TPRP to hear a case, the following guidelines should be followed:
  - regard should be had to the nature, complexity and priority of the issue(s) and any particular expertise needed to effectively and efficiently hear the case;
  - PS LA 2003/5 requires that any officer proposing to make a Division 13 determination or apply the corresponding Treaty Articles must refer the issue/case to TPP. In accordance with Taxation Ruling TR 95/23, the responsibility for approving APAs is part of role of the Competent Authority, which lies with TPP. Accordingly, in cases involving a potential exercise of authority under Division 13 of Part III of the Income Tax Assessment Act 1936

or a Treaty Article, such as audits and bilateral or multilateral APAs, these requirements are ordinarily most efficiently met by nominating a TPP member as Chairperson;

- subject to this, and bearing in mind the first dot point above, in other cases such as TP reviews and unilateral APAs, the Chairperson need not be a TPP member;
- a TPRP should ordinarily include a business line member;
- it will ordinarily be appropriate for the TPRP that is to hear all but the least complex of cases to comprise at least three members from each of ISO (TPP or CESI), FEP and the business line;
- in appropriate cases, having regard to the nature and complexity of the issue(s), the TPRP may consist of the Chairperson alone
- a FEP member should be as nominated by the FEP Chief Economist.

## Meetings

20. TPRP meeting days will be scheduled on a regular basis in Sydney, Melbourne and Brisbane, and will be held as required in other locations. The scheduling of meeting days shall be determined by the TPRP Secretariat in consultation with the business lines. The TPRP Secretariat may cancel a scheduled meeting day for any reason, including insufficiency of referred cases or unavailability of necessary TPRP members. In this event, the TPRP Secretariat shall make every effort to arrange the earliest possible rescheduled hearing time for any affected cases. In recognition that a case may have special needs as to the meeting of agreed timeframes, a case may be heard other than on a scheduled meeting day in some circumstances, at the discretion of the TPRP Secretariat.
21. In arranging TPRP meetings, the TPRP Secretariat and Chairperson shall seek to minimise the costs involved, without compromising a proper and effective consideration of a case. TPRP meetings should be arranged so as to minimise travel for members and case presenters. Telephone and video conferencing should be used as appropriate.
22. The case owner is responsible for notifying the TPRP Secretariat of a case referred for hearing by the TPRP. The notification should indicate the type of matter involved and an estimate of the agenda time needed for consideration of the case. Cases must be notified for scheduling at least 10 working days prior to hearing.
23. The case owner and any ISO and FEP advisers involved in the case are responsible for ensuring that all papers necessary for a proper consideration by the TPRP of the TP issue(s) referred to it are made available to the members hearing the case. These papers must be made available to the members at least five working days prior to the scheduled meeting date. A failure to meet this requirement may result in the case being removed from the agenda for that meeting, at the Chairperson's discretion.

24. All TPRP meeting deliberations and decisions must be evidenced by written Minutes. The Minutes should be a concise record of the subject matter discussed and the outcome in terms of advice provided and action items. They should not cover the TPRP's deliberations in detail or record the views of individual members. The preparation of Minutes is the responsibility of the case owner. A draft should be circulated to TPRP members for comment within five working days of the meeting for finalisation within 10 working days of the meeting.

### **Access to TPRP by taxpayers and advisers**

25. The TPRP is a part of the Tax Office's internal quality assurance processes and is not accessible by taxpayers and their advisers. Taxpayers do not have a right to representation at TPRP meetings. In exceptional circumstances a taxpayer may be given the opportunity to liaise with the TPRP through access to a member or members where the Chairperson in consultation with the case owner regards this as appropriate. This may, for instance, be the case if it is necessary to assist the TPRP's consideration of the case or it is necessary to assist the taxpayer in understanding the outcome of the TPRP's consideration of the case. A taxpayer may be given the opportunity to review and comment upon the factual accuracy of materials prepared for consideration by the TPRP, at the case owner's discretion.

### **Dispute Resolution**

26. If there are any matters or issues that cannot be resolved by the TPRP they shall be dealt with under relevant established escalation and referral guidelines.

## **EXPLANATION**

### **Background**

27. The objective of ISO is to shape the international strategic direction and management and to provide the Tax Office with the assurance that the international tax system is being managed effectively and efficiently.
28. Under the high level design for ISO, the TPP was established to provide specialist TP expertise and CESI was established to take the lead role for the interpretation and administration of international issues and to perform the role of international centre of expertise.
29. Under the high level design, TPP has responsibility for coordinating the Independent Audit Review Committee (now TPRP) process, and both TPP and CESI have a role in the staffing of TPRPs.
30. ISO needs to operate in conjunction with the business lines to ensure that TP issues are dealt with appropriately, effectively and efficiently.
31. The TPRP is intended to provide the necessary advice and quality review to assist the TPP, CESI and the business lines in undertaking their respective roles and responsibilities in dealing with TP issues.

**Amendment history**

| <b>Date of amendment</b> | <b>Part</b>     | <b>Comment</b> |
|--------------------------|-----------------|----------------|
| 21 November 2011         | Contact details | Updated        |

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|------------------------------------|--|
| <i>subject references</i>          | Transfer Pricing Review Panel; International Audit Review Committee; transfer pricing; Division 13 determination; double tax agreements; Advance Pricing Arrangement |
| <i>legislative references</i>      | ITAA 1936 Part III Division 13; International Tax Agreements Act 1953  |
| <i>related public rulings</i>      | TR 98/11; TR 95/23   |
| <i>related practice statements</i> | PS LA 2003/5; PS LA 2004/4   |
| <i>Case references</i>             |  |
| <i>file references</i>             |  |

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Date issued: **17 December 2004**  
 Date of effect: **17 December 2004**  
 Other Business Lines consulted: **LB&I, SB**