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

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Note: This practice statement is being progressively phased out in line with the implementation of the Transforming Transitional Tax Technical Making (TTTTDM) project. If Law and Practice staff have transferred to your business line under the TTTDM, you must follow PSLA 2012/1. Otherwise, you may continue to follow this practice statement.

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Practice Statement Law Administration

PS LA 2004/4

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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 Australian Taxation Office (ATO) staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs tax officers must follow their business line's escalation process.

SUBJECT: **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**

PURPOSE: **To advise:**

- **what issues are referred to Centres of Expertise (CoEs)**
- **how issues are referred to CoEs**
- **the general rule of responsibility of business lines and CoEs**
- **the business line roles and responsibilities**
- **the CoE roles and responsibilities**
- **when early engagement of internal technical specialists in active compliance cases is appropriate**

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STATEMENT

What issues are referred to CoEs?

1. Interpretative issues are referred to CoEs for the creation of a precedential ATO view. Law Administration Practice Statement PS LA 2003/3 requires tax officers to escalate interpretative issues where no precedential ATO view exists. It explains what a precedential ATO view is and states that there are some issues that do not require the application of a precedential ATO view.

2. Tax officers are required to refer any interpretative issue to CoEs where a precedential ATO view is required to be applied, and:

   - there is no precedential ATO view
   - the precedential ATO view is not current (for example, it does not take into account a material law change or a final court decision), or
   - the tax officer considers that:
     - the application of the existing precedential ATO view would result in an outcome that is incorrect or unintended, or
     - there is a significant alternative view to the precedential ATO view.[1]

3. Tax officers are also required to refer class rulings to CoEs for authoring[2] and approval where there is no existing precedential ATO view. Class rulings are referred to CoEs for approval where there is an existing precedential ATO view.

4. Tax officers should not refer an issue to CoEs where:

   - the issue involves a straightforward application of the law[3]
   - a precedential ATO view exists and does not require a review because the view is correct and does not result in any unintended outcome, or
   - the issue involves:
     - the exercise of a discretion[4]
     - making an ultimate conclusion of fact,[5] or
     - making a decision requiring the determination of the value of something.[6]

   However, an interpretative issue concerning a legislative provision which contains a discretion may be referred to a CoE. This includes where the legislation provides for specific factors to be considered in exercising the discretion and there is doubt about the meaning of one or more of those factors. CoEs do not provide guidance about what facts are relevant in determining the matters 'the Commissioner

[1] See paragraphs 31 and 32 of PS LA 2003/3.
[2] There is an expectation that business lines will be required to provide whatever assistance is necessary to help resolve the issue, including fact gathering and the allocation of staff to assist with research and drafting work – see *Relationship between Business Lines, Tax Counsel Network and Centres of Expertise.* This also provides an opportunity for business lines to improve the capability of their officers by interacting with CoE officers. (A hyperlink to the document mentioned in this footnote is provided at the Other references and links section at the conclusion of this practice statement. The link is only available within the Tax Office).
[3] See paragraph 15 of PS LA 2003/3.
[4] See paragraphs 18 to 25 of PS LA 2003/3.
[5] See paragraphs 26 to 29 of PS LA 2003/3.
[6] See paragraph 30 of PS LA 2003/3.

considers relevant'; or what is 'fair and reasonable'. Nor are the CoEs involved in making a decision to exercise or not to exercise a discretion.

5. Where business lines seek to apply any of the General Anti-Avoidance Rules[7] they must, before making a determination or declaration cancelling the particular benefit, refer the matter to the Tax Counsel Network (TCN) rather than a CoE, using the relevant business line escalation processes.[8]

6. Interpretative issues that are referred to CoEs for the creation, review or clearance of a precedential ATO view include issues about the interpretation of a legislative provision that the Commissioner administers. This includes the law relating to, for example, income tax, fringe benefits tax, superannuation, indirect tax, international tax agreements, tax administration and excise. Issues requiring the creation, review or clearance of a precedential ATO view may be identified in the following types of work:

   - requests for private rulings or other written guidance
   - public rulings
   - active compliance case work including desk audit
   - objections and litigation
   - law design and improvement (for example, provision of advice to Treasury of the ATO view of the law that is being amended and on interpretative aspects of the proposed legislation)
   - risk analysis and business intelligence
   - taxpayer alerts
   - compliance strategy development
   - matters that raise priority technical issues (PTIs), and
   - drafting, technical clearance and authorisation of publications and educational/training materials.

How issues are referred to CoEs

7. Where an interpretative issue needs to be referred to a CoE for the creation, review or clearance of a precedential ATO view, tax officers must follow the procedures contained in the business rules that are endorsed by the CoEs and business lines.[9]

8. Tax officers must also follow their own business line's escalation processes. Links to these escalation processes can be found in the business rules.

9. Tax officers can find more information about referring issues to CoEs on the Centres of Expertise - escalation web page on the Law and Practice (L&P) intranet site. This web page explains the general requirements for escalation of issues to CoEs and has links to information about each CoE.[10]

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[7] These are contained in Part IVA of the *Income Tax Assessment Act 1936* for an income tax benefit, Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* for a GST benefit, Division 75 of the *Fuel Tax Act 2006* for a net fuel amount, and Division 6 of Part V of the *Petroleum Resource Rent Tax Assessment Act 1987* for tax benefits in relation to a petroleum project.

[8] See paragraphs 14 to 16 of Law Administration Practice Statement PS LA 2005/24 and the rules for escalating issues to TCN.

[9] A hyperlink to the business rules is contained in the 'Other references and links section' at the conclusion of this document. (Note: the link is only available within the Tax Office.)

[10] A hyperlink to this web page is contained in the 'Other references and links' section at the conclusion of this document. (Note: the link is only available within the Tax Office.)

Business rules

10. The business rules that are linked to this practice statement specify the procedures and practices for an efficient and effective referral of issues to the CoEs and resolution of those issues.

11. The business rules are in addition to the practices set out in the Online Resource Centre for Law Administration (ORCLA) and the individual business line escalation processes, and must be read in conjunction with them.

12. The business rules are subject to change by the CoEs and business lines through collaborative processes to ensure the continuous improvement of procedures and systems.

General rule of responsibility of business lines and CoEs

13. The general rule is that the business line retains case ownership and refers the issue for which there is no precedential ATO view to the relevant CoE. The exceptions to this rule are that officers in the:

    - Public Infrastructure Unit in the Finance and Investment CoE will own and manage cases; and will create the precedential ATO view in relation to all public infrastructure issues, and
    - Innovation Segment and Petroleum Resource Rent Tax team in the Large Business and International (LB&I) business line are not required to refer issues to a CoE, provided all cases involving the creation of the precedential ATO view are approved by the nominated TCN officer for the particular area of specialisation.

14. Business lines and CoEs will work collaboratively to ensure that:

    - the responsibilities of CoEs, business lines and TCN in relation to technical decision making as set out in the *Relationship between Business Lines, Tax Counsel Network (TCN) and Centres of Expertise (CoEs)*[11] are met
    - the commitments in the Taxpayers' Charter and the Tax Office service standards are met, and
    - when developing the precedential ATO view, consideration is given to the impact on compliance costs.

    The CoE has the ultimate responsibility for the technical accuracy of the precedential ATO view. However, where an issue that requires the creation of a precedential ATO view has also been determined to be a PTI, generally the CoE will be responsible for developing the precedential ATO view, but TCN may be required to give final approval to the ATO view.[12]

[11] A hyperlink to this document is provided at the 'Other references and links section' at the conclusion of this document.

[12] For Priority 1 and 2 issues an appropriate TCN or CoE officer of at least EL2 level must be the PTI owner. For Priority 1 issues an appropriate Senior Tax Counsel must have involvement with the issue. Where the suggested treatment of the technical issue is a public ruling, litigation or legislative amendment an appropriate tax counsel must have involvement with the issue. See PS LA 2003/10.

What are the business line roles and responsibilities?

15. Business lines will refer all interpretative issues requiring the creation, review or clearance of precedential ATO views to the relevant CoEs as soon as possible after the issues have been identified. Before an interpretative issue is referred to a CoE, business lines should ensure that (unless the CoE and business line have agreed to other arrangements for more complex issues):

    - all the relevant information and evidence have been obtained
    - they have reached a preliminary position on the operation of the law, and
    - they have prepared a draft precedential ATO view document such as an ATO Interpretative Decision (ATO ID), unless the CoE agrees with the business line that this is not required.[13]

16. PTIs that require the creation of a precedential ATO view are to be referred to the relevant CoE in accordance with Law Administration Practice Statement PS LA 2003/10.[14] PTIs that are associated with priority private rulings are to be referred to the relevant CoE in accordance with Law Administration Practice Statement PS LA 2005/10. The business line roles and responsibilities outlined in paragraph 15 of this practice statement apply to PTIs as well.

17. Where an issue has been referred by a business line to a CoE, the business line is responsible for:

    - ownership and management of the case, including coordination where input is required from other areas of the Tax Office, and monitoring timeframes
    - identifying and managing compliance risks
    - managing client relationships
    - authorising advice or guidance that issues to the client, and
    - finalising the case once the issue is resolved.

18. The business lines will provide technical input and work with the CoEs, as outlined in the business rules, to determine the precedential ATO view. Unless otherwise agreed between the CoE and the business line, this input includes:

    - obtaining all relevant information and evidence
    - researching the issue
    - fully assessing the issue prior to its escalation
    - developing a preliminary view on the interpretation and application of the law, and
    - drafting precedential ATO view documents such as ATO IDs, and public rulings (including class and product rulings).

[13] There is an expectation that business lines will be required to provide whatever assistance is necessary to help resolve the issue, including to assist with drafting work - see *Relationship between Business Lines, Tax Counsel Network and Centres of Expertise.* This also provides an opportunity for business lines to improve the capability of their officers by interacting with CoE officers.

[14] See paragraph 30 of PS LA 2003/10.

What are the CoE roles and responsibilities?

19. The CoEs were established to improve consistency in technical decision-making by taking a corporate approach to the creation of precedential ATO views. In order to focus on this core role, all CoEs adopt an issues-based approach to their work.

20. The primary role of the CoEs is the creation and authorisation of precedential ATO views. Review of existing precedential ATO view documents is a consequential task, resulting from this primary role.

21. In creating precedential ATO views, the CoEs will seek input from business lines as outlined in the business rules.

22. If:

    (a) an interpretative issue is referred to a CoE (the original CoE) by a business line case officer, and

    (b) the original CoE has identified another issue that may require a precedential ATO view from another CoE

    the gatekeeper in the original CoE will notify the gatekeeper of the appropriate CoE and advise the business line case officer accordingly.

23. The gatekeeper from the other CoE will then liaise with the business line case officer to determine whether the other issue is one that should be referred. If the other issue requires a precedential ATO view, the business line case officer will formally refer that issue to the other CoE.

24. Similarly, where an issue has been referred incorrectly to a particular CoE, the original CoE gatekeeper will be responsible for notifying the correct CoE gatekeeper of the issue and advising the business line case officer accordingly. Where appropriate, the correct CoE gatekeeper will then liaise with the business line case officer to arrange for the referral of the interpretative issue.

25. In reviewing an existing precedential ATO view, an officer (or officers) other than the officer (or officers) who created the original precedential ATO view will conduct that review. If it is not possible to have different CoE officers involved in the review, the final decision will be reviewed and approved by the appropriate CoE manager.

26. The CoEs will determine the internal priorities and resourcing for work within their CoEs, having regard to any agreed timeframes with business lines about compliance risks and the Tax Office service standards.

27. The CoEs will immediately advise business lines of any impediment to meeting agreed timeframes.

CoE roles – Commissioner's powers of general administration

28. Some issues are resolved relying on the Commissioner's powers of general administration of the taxation law.[15] The Administration, Business & Personal Taxes CoE provides guidance on the appropriate exercise of the Commissioner's powers of general administration in matters that are non-routine or contentious. A link to the Administration topics web page on the Intranet is provided in the 'Other references and links' section at the conclusion of this practice statement. This web page provides further explanation and links to other documents on this topic.

[15] See, for example, section 8 of the *Income Tax Assessment Act 1936.* Other Acts of which the Commissioner has the general administration have equivalent provisions.

Early engagement of internal specialist officers in active compliance cases

29. In certain complex active compliance cases, tax officers with specialist technical knowledge or particular experience may be engaged to assist at an early stage even though a PTI has not been created or the need for a precedential ATO view on an issue has not been identified at that time. Specialists who may be involved in early engagement include officers from business lines, CoEs, Legal Services Branch and TCN.

30. The practice of early engagement of specialist officers recognises that when these officers are involved at an early stage of a case, efficiencies are achieved by:

- assisting teams to develop an hypothesis that explains the facts, events or issues in the case; and using the hypothesis to focus discussion, information collection and case direction
- directing the focus of information gathering on the key elements of the compliance risks, including targeting relevant questions
- assisting clear communication to taxpayers of Tax Office concerns about the compliance risks
- reducing the need to request further information from taxpayers, and
- reducing the risk of not understanding the taxpayers' business.

Determining the need for specialists and the timing and extent of their engagement

31. The early engagement of specialist officers is intended to contribute to improvements in business line capability in active compliance work. The specialist officers are not to be engaged as a solution for general resource or capability issues in the business line.[16] Resources (including officers with specialist knowledge) from within a business line should be mobilised first to support the current and planned cases in the business line, having regard to their relative priority, before seeking the assistance of specialist officers from other areas.

32. Where early engagement of technical specialists is required in an active compliance case, the specialists should be engaged at the earliest appropriate time. Tax officers must follow the referral and engagement procedures in the business rules when requesting early engagement of specialist officers.

33. Whether a case requires the early engagement of specialist officers is determined having regard to the likelihood that failure to manage the case effectively, without appropriate and timely engagement of specialist officers, could result in significant compliance costs or inconvenience to the taxpayer, and/or a decrease in community confidence. Early engagement may lead to earlier mitigation of risks, and more effective management of Tax Office resources. This will require consideration of a range of factors such as:

- the complexity of the facts, or difficulty in identifying and/or obtaining the documentation and information required in the case
- the complexity of the technical issues in, and the relevant law applicable to, the case
- the experience of the business line in dealing with the facts or issues identified

[16] Where specialist officers are engaged, the business line should use this as an opportunity to improve the capability of their officers as a result of interacting with the specialist officers.

- the amount of revenue at risk in the case, and in the overall context of the industry, and
- whether the case exhibits elements that may be part of an aggressive tax planning arrangement.

The most significant active compliance cases in the large market are generally accepted as meeting the above criteria. However, some issues in these cases are sufficiently straightforward so as not to require specialist assistance.

34. The timing and extent of the engagement of specialist officers may vary, including whether it is appropriate to engage them during the risk assessment stage of an active compliance case. The extent to which technical specialists from another business line are involved during the early engagement depends on the availability of resources in the areas where the technical specialists come from, and should be consistent with the arrangements outlined in the *Relationship between Business Lines, Tax Counsel Network (TCN) and Centres of Expertise (CoEs).*[17]

35. The involvement of technical specialists generally will be limited to attending workshop(s) with the case team to assist in focusing Tax Office information gathering, and contributing to the formation of the Tax Office's view on the facts of the case. The terms of the early engagement should be agreed between the relevant Senior Executive Service managers, subject to further review, as appropriate. Ongoing involvement of the specialists beyond early engagement is subject to the normal rules for their engagement that are set out in PS LA 2003/10, in this practice statement and in the business rules.

[17] A hyperlink to this document is provided at the 'Other references' and links section at the conclusion of this document.

Amendment history

Date of amendment	Part	Comment
10 May 2011	Contact details	Updated.
16 February 2009	Footnote 14 Paragraph 25	Updated. New paragraph added.
17 October 2007	Various	Revised to include • greater clarification of circumstances when issues should not be referred to the CoEs • further clarification of the CoE and business line roles and responsibilities, and • guidance on when early engagement of internal technical specialists in active compliance cases is appropriate.

Subject references	referral of issues to Centres of Expertise issues based approach for Centres of Expertise business rules precedential ATO views ATO Interpretative Decisions
Legislative references	
Related public rulings	
Related practice statements	PS LA 2003/3; PS LA 2003/10; PS LA 2005/24
Case references	
Other references and links	Business rules Centres of Expertise – escalation web page Administration topics web page ORCLA Relationship between Business Lines, Tax Counsel Network and Centres of Expertise Escalation of issues to Tax Counsel Network Note: these links are available within the Tax Office only.
File references	2004/001010
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