PS LA 2005/25 (Withdrawn) - Aggressive tax planning end-to-end process.

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This practice statement is withdrawn with effect from 23 October 2008 and has been replaced by PS LA 2008/15.

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Practice Statement Law Administration

PS LA 2005/25

This practice statement is withdrawn with effect from 23 October 2008 and has been replaced by PS LA 2008/15.

FOI status: may be released

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 tax officers unless doing so creates unintended consequences. Where this occurs, tax officers must follow their business line's escalation process.

SUBJECT: **Aggressive tax planning end-to-end process.**

PURPOSE: **To provide practice instructions to Tax Office staff on their responsibilities in identifying, analysing and treating incidences of aggressive tax planning.**

STATEMENT

1. Aggressive tax planning undermines the integrity of the tax system. Left untreated, aggressive tax planning will erode community confidence in the fairness and equity of the tax system. It is the responsibility of the Tax Office – and therefore all Tax Office staff – to ensure that aggressive tax planning arrangements are identified and that appropriate compliance risk management strategies are implemented.

2. This practice statement explains the conceptual model known as *PASTO*[1] – and the end-to-end process used in the Tax office for identifying, analysing and treating aggressive tax planning risk. This practice statement also explains the roles and responsibilities of Tax Office staff in the end-to-end process.

3. Aggressive tax planning is a special Compliance Program focus area, under the leadership of the First Assistant Commissioner (Aggressive Tax Planning).

4. The First Assistant Commissioner is assisted in strategic planning and management by an Aggressive Tax Planning Steering Committee. The Steering Committee has formed a Risk Review Panel to oversee the delivery of strategies for the identification, assessment, treatment and review of aggressive tax planning risks in the end-to-end process.

[1] *PASTO* is further explain at paragraph 11

5. The Commissioner has committed resources to each business line specifically to work on aggressive tax planning risk identification, assessment and treatment within the business line market or segment. In addition, Tax Office staff (in general) need to be attentive to things they encounter in their daily work that may point to new and emerging aggressive tax planning arrangements, and use corporate tools and processes for ensuring that information is recorded on Tax Office systems.

EXPLANATION

Aggressive tax planning

6. Aggressive tax planning refers to schemes or arrangements (in the broad sense of those words) that are designed to obtain benefits under revenue laws that were not intended to be available.

7. An aggressive tax planning arrangement may include one or more of the following features:

- contrivance and artificiality in the method of execution;
- little or no real underlying business activity or purpose;
- the claimed tax benefit may be significant in realising an economic return;
- complete or substantial removal of any risk to the taxpayer;
- the contrived transfer of a tax benefit;
- limited or non recourse financing associated with a round robin arrangement;
- little cash outlay associated with borrowing of funds under a capitalising debt facility;
- a mechanism for winding up or exiting an arrangement before net income is generated for an investor;
- assumptions, including ‘blue sky’ projections, that can lead to seemingly excessive valuations of assets resulting in inflated deduction claims;
- use of tax exempt entities to wash income;
- transactions involving tax havens;
- use of superannuation funds for purposes other than retirement income;
- interposed entities which have no substantial commercial rationale except to create a tax benefit; and
- transactions which do not appear to be legitimate business dealings.

Parties to an aggressive tax planning arrangement

8. **Promoters** of aggressive tax planning activity include those who devise, market, sell or implement aggressive tax planning arrangements. In this context, promoters may include financiers, accountants, lawyers, tax agents, financial planners, business or financial consultants and other businesses.

9. **Associates** are persons or organisations who assist a promoter, usually to develop and/or market aggressive tax planning schemes. Associates can also act as intermediaries who provide financing or other services needed to give a scheme or arrangement its legal or commercial form.

10. **Participants** are taxpayers who enter into, or indirectly benefit from, an aggressive tax planning scheme or arrangement in order to obtain a tax benefit.

***PASTO*, the end-to-end risk management model**

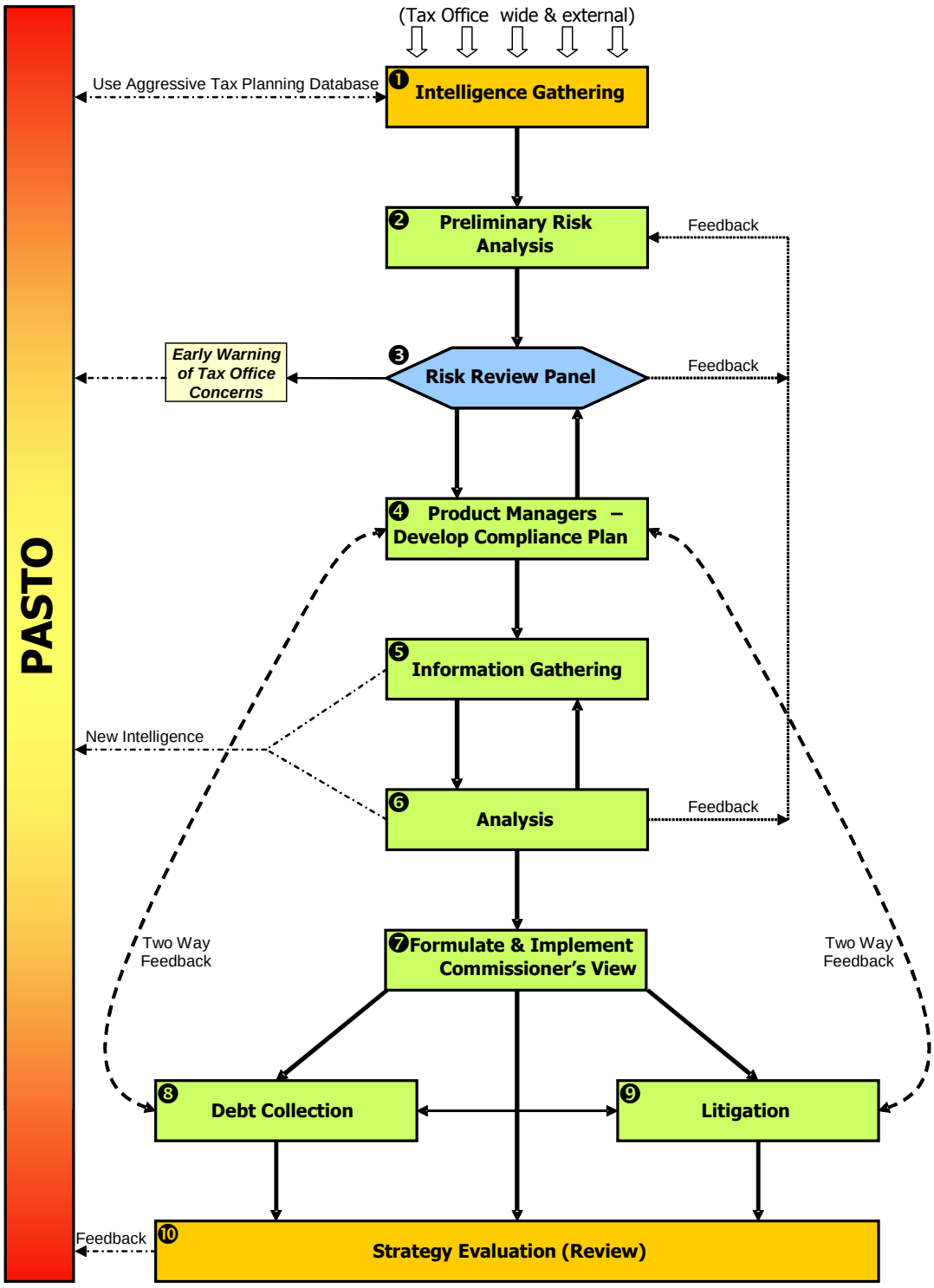
11. The end-to-end process for managing aggressive tax planning risk is based on *PASTO*, a conceptual model that encompasses the complete cycle of risk management from identification to treatment and review. The model is about holistically dealing with aggressive tax planning risk by integrating approaches across the **P**romoters of arrangements; the **A**ssociates of promoters who market and facilitate aggressive tax planning arrangements; the **S**tructure of aggressive tax planning arrangements, the **T**axpayers who are participating in aggressive tax planning arrangements; and **O**ther issues relevant to the management of an aggressive tax planning risk.

12. The end-to-end process that implements the *PASTO* model involves the following deliverables:

    - identification of aggressive tax planning risks through intelligence capture and analysis;
    - analysis of the issues arising and risk assessment of those issues;
    - early warning to the community and stakeholders as appropriate;
    - development of the ATO view on the substantive tax issues involved in the scheme or arrangement;
    - implementation of strategies to treat the risks to the revenue and to the integrity of the system; and
    - review to improve procedures and treatments.

13. The cycle (depicted in the following diagram and explained in detail in the following paragraphs) is continuous, with elements and activities within it occurring simultaneously or separately as required.

Aggressive Tax Planning - End to End Process



Element 1 Intelligence gathering

14. This activity is undertaken across the Tax Office. Business lines maintain their own intelligence units collecting and analysing information from active compliance and passive sources. This intelligence is conveyed to the Strategic Intelligence and Analysis Unit, where it is combined with intelligence from the Promoters Task Force and other sources to form a strategic view of new and emerging aggressive tax planning risks.

15. Sources of information relevant to identifying potential aggressive tax planning risks would include:

- ruling requests;
- information from professionals, taxpayers or the public;
- tax returns and other taxpayer-Tax Office transactions (for example, ABN and TFN registrations);
- visits conducted under the Commissioner's access powers;
- transaction data from the Australian Transaction Reports and Analysis Centre (AUSTRAC);
- risk profiling;
- risk reviews;
- audits and investigations;
- high risk refunds;
- media and publications;
- brochures and advertisements for seminars;
- internet sites;
- statements about relevant investment or financial products (including information memoranda and product disclosure statements);
- information from other government agencies; and
- information received from the tax authorities of other countries.

Element 2 Preliminary risk analysis

16. This activity is undertaken within business lines (Strategic Intelligence and Analysis and the Promoters Task Force) either as part of their intelligence process, or as a separate activity that sheds more light on new and emerging risks. The Strategic Intelligence and Analysis Unit combines risk assessment information to provide a strategic view of the scale and nature of new and emerging aggressive tax planning risks.

Element 3 Risk review panel

17. The Risk Review Panel is a group of senior officers responsible for overseeing the identification, risk assessment, treatment and review of aggressive tax planning risks. It regularly reviews new and emerging aggressive tax planning risk intelligence presented by the Strategic Intelligence and Analysis Unit, and assesses the risk rankings that the Unit assigns to aggressive tax planning risks from across the Tax Office. Where the Risk Review Panel views a risk as being in the highest risk category it will nominate a Product Manager to be responsible for developing and implementing the strategies necessary to successfully treat that risk. In addition, the Risk Review Panel evaluates and advises on the treatments applied to specific risks and may make recommendations to the First Assistant Commissioner and the Aggressive Tax Planning Steering Committee.

Element 4 Product managers

18. A product manager is a case or project manager, located within a business line who develops and manages the implementation of a detailed plan to deal with an identified aggressive tax planning risk. The product manager creates the necessary linkages and alliances with other areas of the Tax Office to ensure the *PASTO* model is followed in treating an aggressive tax planning risk.

19. An essential part of the product manager's responsibilities is the development and implementation of a compliance plan which:

- defines and scopes the risk by addressing the elements of *PASTO*;
- assesses the risk through the Aggressive Tax Planning Matrix including quantification of the revenue at risk;
- identifies the need for early warnings to taxpayers and other stakeholders and records the required notifications to Strategic Intelligence and Analysis and the Aggressive Tax Planning Executive Support and Communications Team;
- identifies and analyses the patterns, trends, drivers, leverage points and future impacts of the risk;
- informs the Risk Review Panel of the recommended treatment strategies;
- specifies the plan's outcomes, strategies, accountabilities, resources, timeframes, measures and evaluation; and
- drives the development and communication of the Commissioner's view.

Element 5 Information gathering

20. This is an active compliance activity. Depending on the circumstances it will be undertaken within a business line, by the Promoters Taskforce, by specifically established taskforces or by Serious Non-Compliance. This work encompasses a range of actions, appropriate to the circumstances of an identified aggressive tax planing risk, in order to obtain information needed to complete a detailed risk assessment.

21. These compliance activities can involve:

- informal information collection;
- formal information collection through the access powers of laws administered by the Commissioner; and
- formal investigations in co-operation with other agencies such as the Australian Crime Commission, the Australian Securities and Investments Commission and the Australian Federal Police.

Element 6 Analysis

22. Officers working with aggressive tax planning risks will continue *PASTO* analysis throughout the end-to-end process. Over time the profile of the risk built through *PASTO* must be refined and reshaped as more information comes to hand and our understanding of the risk becomes sharper.

23. Where that analysis takes place will depend on the stakeholders involved and the resources available. In most instances the ongoing *PASTO* analysis will be undertaken by the business line officers working on the risk in collaboration with others interested in its treatment such as Strategic Intelligence and Analysis Unit.

24. In some cases the Risk Review Panel may consider that the circumstances require a cross business line team to be engaged to undertake the analysis. Such cases may include those where there is a particular urgency because of a significant risk to the integrity of, or to community confidence in, the tax system.

Element 7 Formulate and implement the Commissioner's view

25. This involves establishing and communicating a treatment strategy appropriate to the confirmed aggressive tax planning risk. That strategy may involve a set of actions, which can include:

- making Determinations under Part IVA[2];
- litigating the substantive issues about the legal efficacy of the arrangement;
- audits;

[2] PS LA 2005/24 Application of General Anti-Avoidance Rules provides further guidance to tax officers on the application of Part IVA.

- amending income tax assessments (recognising that there are specific timeframes available under the law for amending assessments);
- determining objections;
- remitting penalties;
- negotiating individual or widely-based settlements;
- remitting interest charges;
- undertaking prosecutions; and
- managing the collection of debts.

26. Implementing the Commissioner's view can also involve communicating with the general community and informing and working with external stakeholders and reviewers such as the Minister, Parliament, the Ombudsman and the Inspector-General of Taxation. Formulating and implementing the Commissioner's view often involves a high degree of co-operation and team work within and across business lines; other functional areas of the Tax Office such as Office of Chief Tax Counsel (OCTC), Operations, the core Aggressive Tax Planning Team (including the Promoters Taskforce), Serious Non-Compliance and external agencies.

27. Generally, the business lines are responsible for identifying and applying the existing Commissioner's view in respect of aggressive tax planning risks. Where the Commissioner has not formed a view then the issues must be escalated to the Tax Counsel Network and/or the appropriate Centre of Expertise for the formulation of the Commissioner's precedential view. Law Administration Practice Statements PS LA 2003/3 Precedential ATO view and PS LA 2003/10 The Management of 'Priority Technical Issues' provide practice instructions and guidance relevant here.

28. Where the application of Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) is proposed then the matter must be escalated to the General Anti-Avoidance Rules Panel to ensure that part is applied consistently and strategically[3].

29. To maximise the compliance impact of our treatment of aggressive tax planning risks, prompt communication of the Commissioner's view on the tax issues arising from those risks is essential. Each compliance plan prepared in respect of aggressive tax planning risks must include a communication strategy which encompasses communication needs at all stages of the end-to-end process. This would include planning for the content and timing of:

- relevant information to be shared with other officers within the Tax Office;
- position papers;
- private rulings, product rulings and class rulings;
- early warning letters and Taxpayer Alerts;
- draft rulings or determinations setting out the Commissioner's view;

[3] See PS LA 2005/24 at paragraph 17 for further information on the General Anti-Avoidance Rules Panel

- question time briefs (QTBs) and other Ministerial briefing material as required;
- draft media releases; and
- notification of any affected Tax Office Call Centres and any required call centre scripts.

Element 8 Debt collection

30. A compliance plan in respect of an aggressive tax planning risk must address the collection strategies to be used. The business line responsible for the collection risk must link with Operations Debt so that any risk to the revenue from delay or non-compliance is minimised.

Element 9 Litigation

31. Litigation in the end-to-end process may include review under Part IVC of the *Taxation Administration Act 1953*, lodgment and recovery actions, administrative reviews of our decisions and prosecution referrals to the Director of Public Prosecutions. Legal advice and support is provided to the business lines through the Legal Services Branch in OCTC.

Element 10 Strategy evaluation

32. At the end of each case, key stakeholders will conduct a review. The review will examine actual outcomes against those planned, any internal capability issues including skilling and process improvements and any identified systemic improvements including options for legislative reform or administrative changes.

Expectations of tax officers generally

33. It is imperative that information which identifies potential aggressive tax planning activity is captured and communicated to the other areas of the Tax Office affected by that activity.

34. Tax officers who identify potential aggressive tax planning arrangements should aim to answer several key questions including:
    - who is promoting the arrangement and have they been involved in other aggressive tax planning activity?
    - who are the people associated with the promotion of the arrangement? (for example, lawyers, accountants, financial planners or other consultants)
    - how is the arrangement structured and how does it work?

- who are the taxpayers participating in the arrangement and how did they become involved?
- what are the other relevant issues? (for example, other legal issues including criminal, corporations law and consumer protection issues; the involvement of other agencies; or previous Tax Office action).

35. Managers of areas which use the **Aggressive Tax Planning Database** (the database) may enter intelligence directly into the database. That action will automatically generate an email alerting the Strategic Intelligence and Analysis Unit of the information added to the database. An officer with information which may identify aggressive tax planning activity should discuss with their manager whether that information should be entered on the database.

36. In addition, all officers working within the Compliance Program should have the **ATO Intelligence** icon on their desktop screen. The online form for placing intelligence on this system asks if the intelligence relates to aggressive tax planning. If the officer enters 'yes' to this question then the intelligence is automatically referred to the Strategic Intelligence and Analysis Unit.

37. Those officers in Large Business and International and GST Interpretations and Large Enterprise Compliance who have access to the **Healthcard 2** system should use that system to capture intelligence which identifies or relates to aggressive tax planning activity.

Role and functions of the strategic intelligence and analysis unit

38. The primary role of the Strategic Intelligence and Analysis Unit is the strategic analysis of aggressive tax planning intelligence. This includes identifying and making sense of the patterns, trends, drivers, leverage points and future impacts from *PASTO* analysis undertaken in the business lines.

39. In addition to the business line treatment of the arrangement and the associated risks, the circumstances of particular cases may require the Tax Office to provide an early warning to taxpayers and other stakeholders of its concerns about a specific arrangement. That warning may be provided through an early warning letter, a Taxpayer Alert, a speech or media release or by placing information on the Tax Office's website. The Strategic Intelligence and Analysis Unit is responsible for overseeing and advising on the drafting of Taxpayer Alerts and the procedures involved in getting a draft alert to the point at which it is considered by the First Assistant Commissioner (Aggressive Tax Planning) for approval and publication.

40. Law Administration Practice Statement PS LA 2005/13 contains detailed practice instructions in respect of Taxpayer Alerts. Tax officers dealing with aggressive tax planning need to be familiar with the terms of that practice statement.

Role and functions of the promoters taskforce

41. The Promoters Taskforce is a special unit under the direct management of the First Assistant Commissioner (Aggressive Tax Planning). The primary role of the Promoter Taskforce is to implement active compliance strategies targeted specifically at the promoters of aggressive tax planning arrangements and their associates.

42. Information about the activities of promoters and their associates is captured on the **Aggressive Tax Planning Database** and, for officers in Large Business and International and GST Interpretations and Large Enterprise Compliance, on **Healthcard 2**.

43. It is recognised that many areas of the Tax Office are focusing on Aggressive Tax Planning Promoters. The Promoter Taskforce is expected to give assurance and report on the active compliance strategies applied to promoters corporately. Accordingly, officers investigating possible promotion activities, should provide details of these cases to the regional Promoter Taskforce manager.

Product managers and compliance plans

44. The Product Manager nominated by the Risk Review Panel will work collaboratively across business lines to ensure that successful treatments are applied to the risk in question. The Product Manager will also be responsible for keeping the Risk Review Panel informed on the progress of those strategies. An essential part of those responsibilities will be the development and implementation of a compliance plan which:

- defines and scopes the risk by addressing the elements of *PASTO;*
- assesses the risk through the Aggressive Tax Planning Matrix including quantification of the revenue at risk;
- identifies the need for early warnings to taxpayers and other stakeholders and records the required notifications to the Strategic Intelligence and Analysis Unit and the Aggressive Tax Planning Communications Team;
- identifies and analyses the patterns, trends, drivers, leverage points and future impacts of the risk;
- works collaboratively with the Promoters Taskforce to ensure active compliance strategies appropriately target promoters and their associates;
- informs the Risk Review Panel of the recommended treatment strategies;
- specifies the plan's outcomes, strategies, accountabilities, resources, timeframes, measures and evaluation;
- drives the development and communication of the Tax Office view; and
- includes a document and audit trail of decisions including decisions made by the Risk Review Panel and supporting evidence, product

plan and supporting activities, Tax Office view, communications with Operations Debt and Legal Services Branch and strategy evaluation.

Information gathering

45. The Tax Office relies on many members of the public, taxpayers and professionals who volunteer or co-operatively provide information on aggressive tax planning. In specific cases, where that information is insufficient to provide a complete picture of the particular risk under review the Tax Office may seek to use the Commissioner's access powers under section 263 or 264 of the ITAA 1936, or similar provisions in other taxation laws administered by the Commissioner.

46. Tax officers exercising authority delegated to them in respect of those powers must follow the guidelines contained in the Tax Office's Access Manual and any related practice statements. Guidance is also available through the ACE Newsletter access bulletins available on ATOconnect.

47. All tax officers need to be conscious of the rights of taxpayers and third parties where the Commissioner's powers are exercised. Where the circumstances of a specific case raise particular concerns in this regard, those concerns should be expressly raised with the manager responsible for the case and the Product Manager (where a Product Manager has been nominated). The Product Manager may choose to escalate the concerns to the Risk Review Panel.

Subject references	Aggressive tax planning end-to-end process
Legislative references	ITAA 1936 Pt IVA ITAA 1936 263 ITAA 1936 264 TAA 1953 Part IVC
Related public rulings	
Related practice statements	Law Administration Practice Statement PS LA 2003/3
	Law Administration Practice Statement PS LA 2003/10
	Law Administration Practice Statement PS LA 2005/13
	Law Administration Practice Statement PS LA 2005/24
Case references	
File references	

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Contact details updated