PS LA 2008/3 - Provision of advice and guidance by the ATO

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Practice Statement Law Administration

PS LA 2008/3

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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: **Provision of advice and guidance by the ATO**

PURPOSE: **To explain:**

- **the forms of advice and guidance the ATO provides about the application of laws administered by the Commissioner**
- **the level of protection available to taxpayers who rely on each form of advice and guidance, and**
- **where to find further information about procedures in developing and issuing each form of advice and guidance**

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KEY PRINCIPLES

Providing assistance in the form of advice and guidance on the application of the laws administered by the Commissioner is central to the role of the ATO. The provision of this assistance enables taxpayers to understand and meet their obligations and be aware of their rights and entitlements in a self-assessment system.

Advice is binding on the Commissioner. It provides the highest level of protection for taxpayers who rely on it.

Guidance is not binding on the Commissioner. It provides more general information that assists taxpayers in a wide variety of circumstances to deal with their tax obligations.

Advice

Advice on the application of the laws administered by the Commissioner is generally provided in the form of a binding ruling.

There are three types of binding rulings: public, private and oral. The expectation for product and class rulings (which are public rulings) as well as private and oral rulings is that the taxpayer or adviser should make a full and true disclosure of all relevant facts in relation to the matters on which advice is sought.

A ruling does not bind the taxpayer in any circumstance. The taxpayer is entitled to apply the law if it provides a more favourable result for the taxpayer, subject to relevant time limits in the tax law. In other words, rulings operate as a shield for the taxpayer, not a sword for the Commissioner.

Advice provides the highest level of protection for taxpayers. This means that if the advice is incorrect and the taxpayer makes a mistake as a result, then they are protected from paying tax that would otherwise be payable under the law and there are no shortfall penalty or interest charges.

Public ruling

A public ruling is a published statement that is intended to contain advice on the way the law applies in defined circumstances that are common to many taxpayers. Public rulings include product and class rulings as well as public indirect tax rulings. A taxpayer can rely on a public ruling if it coincides with their particular circumstances.

The primary audience for public rulings are tax professionals or taxpayers who have a technical understanding of the underlying law. However, the subject matter will influence the level of technical precision necessary, it being greater where the issues are complex at law.

Private ruling

A private ruling is provided in writing and applies to a particular taxpayer in relation to their specific circumstances. It is based on the facts relevant to the scheme defined in the taxpayer's ruling application, and on any assumptions that are made. In effect, it allows taxpayers to be notionally assessed on an existing or proposed transaction.

A taxpayer can choose not to rely on the ruling, and can have the ruling reviewed if they disagree with it.

Oral ruling

An oral ruling applies to an individual in relation to their specific circumstances and is generally given on a provision of the law applicable to individuals, such as personal income tax or Medicare levy. However, oral rulings cannot be given on indirect tax matters.

The taxpayer is advised that the advice constitutes a binding oral ruling. A taxpayer can also choose not to rely on an oral ruling but, unlike private rulings, oral rulings are not reviewable.

Administratively binding advice

Some of the laws administered by the Commissioner do not enable advice to be provided in a legally binding form. In the interests of sound administration, the Commissioner will, in very limited circumstances, provide administratively binding advice in relation to these laws and in relation to a very limited range of other circumstances. If taxpayers rely on advice specified as administratively binding advice and it is later found to be incorrect, they will ordinarily not have to pay the tax that would otherwise be payable under the law.

Guidance

ATO guidance is provided to help taxpayers understand their obligations and entitlements under the laws administered by the Commissioner. Guidance provides general assistance and, especially for published products, is simply expressed, often provides step by step guidance and does not cover all possibilities. Generally, it does not address the taxpayer's specific circumstances.

A taxpayer who relies on guidance that is found to be incorrect, or misleading and the taxpayer makes a mistake as a result, will have to pay the tax that would otherwise be payable under the law but will be protected against shortfall penalty, and, if they have relied on the guidance reasonably and in good faith, against interest charges.

In limited circumstances, the ATO may produce documents that do not provide any protection. These documents should be clearly labelled. If a taxpayer relies on statements in these types of documents and they are found to be incorrect, or misleading and the taxpayer makes a mistake as a result, they will not be protected against the tax that would otherwise be payable under the law, nor will they be protected against shortfall penalty or interest charges unless the Commissioner exercises his discretion.

SCOPE

1. This practice statement provides an explanation of the different forms of advice and guidance the ATO provides about the application of laws administered by the Commissioner.
2. The practice statement also explains the level of protection available to taxpayers who rely on each form of advice and guidance. Attachment A contains a quick reference summary of the level of protection provided for each form of advice and guidance.
3. The practice statement also identifies some sources of further information on developing and issuing different forms of advice and guidance.

BACKGROUND

4. The *Report on Aspects of Income Tax Self Assessment*[1] produced a number of recommendations for legislative and administrative changes to the provision of assistance by the ATO. The recommendations for legislative change in relation to ATO assistance were enacted in the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005* with effect from 1 January 2006.

5. This practice statement replaces Law Administration Practice Statements:

   - PS LA 2001/4 Provision of written advice by the Australian Taxation Office, and
   - PS LA 2002/17 Provision of non-binding oral technical advice by the Australian Taxation Office,

   which applied before the date of effect of this practice statement.

EXCLUSIONS FROM THIS PRACTICE STATEMENT

6. This practice statement does not deal with the following matters:

   - An actual exercise of a discretion. However, this practice statement provides information on the appropriate form of assistance to be used to respond to a taxpayer's query involving the exercise of a discretion.[2]
   - Matters relating to laws over which the Commissioner does not have general powers of administration.
   - Matters giving rise to a duty to transfer amounts. For instance, procedural matters relating to the administration of the *Superannuation Guarantee (Administration) Act 1992* and related regulations (but not provisions under which the extent of an employer's liability to superannuation guarantee charge is worked out).
   - Matters involving the Commissioner's administration or application of provisions of the *Superannuation Industry (Supervision) Act 1993* and related legislation.
   - Matters involving the Commissioner's administration or application of provisions of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* and the *Small Superannuation Accounts Act 1995.*
   - Matters involving Self Managed Superannuation Funds Rulings and Determinations, or non binding specific advice in relation to matters arising under the *Superannuation Industry (Supervision) Act 1993,* to Self Managed Superannuation Fund (SMSF) trustees.[3]
   - Australian Prudential Regulation Authority related matters.

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[1] The Treasury 2004 *Report on Aspects of Income Tax Self Assessment Commonwealth of Australia,* Canberra.

[2] A Commissioner's discretion may be exercised under a power conferred by an administrative provision or a provision affecting liability or an anti-avoidance provision. The granting of a substituted accounting period or of an extension of time to lodge a return are examples of discretions exercised under an administrative provision. A determination that a corporate distribution is included in the assessable income of the recipient is an example of a discretion exercised under a provision affecting liability.

[3] These products do not come within the rulings regime in Part 5-5 of Schedule 1 to the *Taxation Administration Act 1953*.

- Advance Pricing Arrangements and Forward Compliance Arrangements. These are essentially arrangements between the taxpayer and the Commissioner about how the compliance relationship will be managed for a specified period rather than advice or guidance on the application of the law. However, where a taxpayer requires formal advice about how the law applies to their specific circumstances they may wish to obtain a private ruling.
- Audit position papers. These generally represent a preliminary view of the relevant facts and law applying to a particular situation.
- Taxpayer Alerts.[4]

Any requests for advice or guidance on the above matters, or on all other matters not dealt with by this practice statement, are to be dealt with in accordance with current ATO business practices and procedures.

REFERENCES IN THIS PRACTICE STATEMENT

7. Legislative references are to provisions found in Schedule 1 to the *Taxation Administration Act 1953* (TAA), unless otherwise indicated.

8. The following terms are used in this practice statement:

Term	Explanation
Entity	The term 'entity' is defined in section 960-100 of the ITAA 1997. Entity is defined to mean any of the following: (a) an individual (b) a body corporate (c) a body politic (d) a partnership (e) any other unincorporated association or body of persons (f) a trust (g) a superannuation fund, or (h) an approved deposit fund.[5]
ITAA 1997	*Income Tax Assessment Act 1997*
Interest charges	References in this practice statement to interest charges encompass: • the shortfall interest charge which is worked out under Division 280, and • the general interest charge which is worked out under Part IIA of the TAA.[6]

[4] Refer to Law Administration Practice Statement PS LA 2008/15 Taxpayer Alerts.

[5] For a discussion of the meaning of 'entity' see Miscellaneous Taxation Ruling MT 2006/1 The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number. The term entity is also defined in section 184-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and is similar to the definition of entity in section 960-100 of the ITAA 1997. It is intended that the term entity has a common meaning across the *A New Tax System (Australian Business Number) Act 1999*, GST and income tax Acts. See paragraphs 17 and 18 of MT 2006/1.

Term	Explanation
	Liability for general interest charge may result from late payment of the tax that would otherwise be payable under the law after the ATO notifies the taxpayer of the shortfall. This practice statement does not cover the general interest charge accruing after 21 days of the Commissioner notifying the taxpayer of the correct position. Also, for superannuation guarantee charge matters, the reference to interest charges does not extend to the nominal interest component of a superannuation guarantee shortfall under section 31 of the *Superannuation Guarantee (Administration) Act 1992*. **Note:** to receive protection against interest charges on tax that would otherwise be payable under the law, a taxpayer must act reasonably and in good faith.[7]
Legal personal representative	The term 'legal personal representative' is defined in subsection 995-1(1) of the ITAA 1997 as: • an executor or administrator of an estate of a person who has died • a trustee of an estate of a person who is under a legal disability, or • a person who holds a general power of attorney that was granted by another person.
Misleading statement	A statement is misleading if it creates a false impression, even though the statement is correct. It may be misleading because of something contained in the statement, or because something is omitted from the statement.
ORCLA	Online Resource Centre for Law Administration. It contains (or links to) policies and procedures governing the provision of various forms of advice and guidance. See Law Administration Practice Statement PS LA 2003/9 The Online Resource Centre for Law Administration.
Oral ruling	An oral ruling is an expression of the Commissioner's opinion made under Division 360 of the way in which the law applies or would apply to an individual. The Commissioner must give the ruling orally.
Private ruling	A private ruling is a written expression of the Commissioner's opinion about the way in which the law applies or would apply to a particular taxpayer in their particular circumstances. Private rulings on relevant provisions are made under Division 359 and they must be in relation to a specified

[6] Law Administration Practice Statement PS LA 2006/8 Remission of shortfall interest charge and general interest charge for shortfall periods contains guidelines on the remission of interest charges.
[7] Section 361-5.

Term	Explanation
	scheme. The legislative basis for private indirect tax rulings is sections 105-60 and 356-5. There are two types of private indirect tax rulings: • specific private ruling – specific advice to an entity about how the indirect tax law applies to its particular circumstances, and • written general advice – general advice to an entity which simply restates parts of a public indirect tax ruling or law without applying the public indirect tax ruling or law to the entity's particular circumstances. Where appropriate, distinctions are made in this practice statement between these types of rulings.
Public ruling	A public ruling is written binding advice, published by the Commissioner for the information of entities generally, on the way in which, in the Commissioner's opinion, the law applies or would apply to entities generally, or a class of entities. The legislative basis for public rulings on relevant provisions is Division 358. For public indirect tax rulings it is section 105-60 and section 356-5. Where appropriate, distinctions are made in this practice statement between these types of rulings.
Relevant provision	See paragraph 13 of this practice statement.
Scheme	Any arrangement or any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise. An arrangement is any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings.[8]
Shortfall penalty	Administrative penalty imposed under Subdivision 284-B. Shortfall penalties are not applicable where a taxpayer has exercised reasonable care. Nor is there a shortfall penalty in relation to an income tax matter if the taxpayer has a reasonably arguable position (unless the penalty relates to certain tax avoidance schemes).[9] Even if a shortfall penalty is applicable, it may be remitted by the Commissioner if it is fair and reasonable to do so.
Taxpayer	For ease of expression and comprehension, this practice statement often uses the term ‘taxpayer’ instead of ‘entity’.

[8] Subsection 995-1(1) of the ITAA 1997.
[9] For further information see Taxation Ruling TR 94/4 Income tax: tax shortfall penalties: reasonable care, recklessness and intentional disregard and Taxation Ruling TR 94/5 Income tax: tax shortfall penalties: reasonably arguable.

Term	Explanation
Tax that would be otherwise payable under the law (Tax shortfall)	• Additional tax representing the difference between the self-assessed[10] liability and the correct liability according to law, or • excess credit, grant or benefit representing the difference between the self-assessed entitlement and the correct entitlement according to law.[11] This concept is also referred to as tax shortfall in this practice statement, where appropriate. For superannuation guarantee purposes, references to a tax shortfall are taken to include a superannuation guarantee charge shortfall.
ATO website	www.ato.gov.au

STATEMENT

9. There are many forms of assistance that the ATO provides, both orally and in writing, about the laws administered by the Commissioner. In accordance with Taxpayers' Charter principles the ATO aims to provide complete, accurate and consistent advice and guidance to make taxpayers aware of their rights and entitlements and to help them understand and meet their obligations.

10. This practice statement explains each form of advice and guidance provided by the ATO (subject to the exclusions set out in paragraph 6 of this practice statement) and the level of protection provided by each.

PART A – ADVICE

11. Advice is the Commissioner's opinion on the application of the law that the Commissioner administers. It is binding on the Commissioner and is generally provided in the form of a ruling. It encompasses public, private and oral rulings as well as administratively binding advice.

Rulings

12. Part 5–5 provides the legislative framework for rulings to be given about the way in which the provisions of certain tax laws apply.

13. Provisions that are relevant to rulings are defined in section 357–55. Relevant provisions are provisions of Acts and regulations administered by the Commissioner that are about any of the following:

- income tax
- Medicare levy
- fringe benefits tax
- franking tax (defined as franking deficit tax, over-franking tax and venture capital deficit tax)

[10] This includes the calculation of liabilities and entitlements for indirect taxes.
[11] See Law Administration Practice Statement PS LA 2006/2 Administration of shortfall penalty for false or misleading statement.

- withholding taxes (including non-resident withholding taxes and mining withholding tax)
- petroleum resource rent tax[12]
- the administration or collection of those taxes
- product grants or benefits mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000* (including energy grants, cleaner fuel grants and product stewardship (oil) benefits) or the administration or payment of such grants and benefits, and
- net fuel amount,[13] or the administration, collection or payment of a net fuel amount.[14]

14. Sections 105–60 and 356–5[15] are the legislative bases for written rulings on the application of indirect tax laws relating to goods and service tax (GST), wine equalisation tax (WET) and luxury car tax (LCT). Further information about GST rulings is contained in Goods and Services Tax Ruling GSTR 1999/1 and about WET rulings in Wine Equalisation Tax Ruling WETR 2002/1.

15. A ruling is an expression of the Commissioner's opinion of the way in which a provision of a tax law applies, or would apply, to a taxpayer who has obligations or entitlements under those laws. A ruling is a way for a taxpayer to find out the Commissioner's view about how the laws apply, thereby reducing the risks to them of uncertainty, when they self-assess their obligations or entitlements.

16. A ruling confers the highest level of protection so that a taxpayer is not liable to pay any more tax (or repay any credit, grant or benefit received) than is contemplated in the ruling if the ruling applies to them, and they rely on it, but it is later found to be incorrect. In other words, the Commissioner is legislatively prevented from collecting the tax that would otherwise be payable under the law.

17. Advice in the form of a ruling is to be given in accordance with the procedures relevant to the preparation and authorisation of the respective type of ruling. There are three types of rulings:
    - public rulings
    - private rulings, and
    - oral rulings (however, oral rulings cannot be provided in relation to indirect tax matters).

Application of rulings and level of protection

18. A ruling applies to a taxpayer if, at the relevant time (that is, the time they rely on the ruling), the following are satisfied:
    - the taxpayer is a member of the class to whom the ruling applies (in the case of a public ruling)

[12] From 1 July 2006.
[13] The term 'net fuel amount' is defined in subsection 995-1(1) of the ITAA 1997 and has the meaning given by section 60-5 of the *Fuel Tax Act 2006*.
[14] From 1 July 2006.
[15] From 1 July 2006 (sections 37 and 63 of the TAA, before 1 July 2006). Sections 105-60 and 356-5 are not contained in Part 5-5.

- the ruling is given in response to a ruling application (in the case of a private ruling or oral ruling)
- the facts, assumptions or conditions set out in the ruling are met, and
- the law to which the ruling relates remains in force.

19. A ruling binds the Commissioner if it applies to a taxpayer and they rely on it by acting or omitting to act in accordance with it.[16] The effect of a ruling binding the Commissioner is that there is no tax shortfall even if the ruling is incorrect. Shortfall penalties and interest charges are not applied where there is no tax shortfall.

20. For example, a private ruling is issued to a particular taxpayer stating that a certain type of expense is deductible. The taxpayer relies on this ruling and claims a deduction for this expense in their income tax return. Subsequently, a decision is given by a court in another case that this particular expense is not deductible. The Commissioner is bound by the private ruling and as a result cannot amend the taxpayer's assessment to disallow the deduction for this expense. This is so even though other taxpayers had not claimed the particular expense and were subject to the tax that would otherwise be payable under the law.

21. If a taxpayer relies on a statement in a ruling and is misled by it, the taxpayer will receive protection from shortfall penalty and, if they have acted reasonably and in good faith, from interest charges. A taxpayer may be misled by a statement even if the statement is correct. A statement may mislead because of something contained in it, or because something is omitted from the statement.

22. Theoretically, a statement in a ruling may be so misleading that it is incorrect.[17] Whether this is the case or not depends, in part, on the taxpayer or the class of persons to which it is directed. An assessment that a public ruling is so misleading as to be incorrect needs to be made generally and not on an individual case basis. The misleading nature of the ruling would ordinarily be recognised publicly, for example, by the issue of an addendum or erratum. If a ruling is accepted as being so misleading as to be incorrect then taxpayers who relied on the ruling would be protected from the tax that would otherwise be payable under the law.

23. When the Commissioner is legally bound by a ruling[18] and the correct application of the law is less favourable to a taxpayer than the ruling provides, the ruling protects the taxpayer against the law being applied by the Commissioner in that less favourable way. However, the ruling does not bind the taxpayer, who retains their entitlements under the law where those entitlements are more favourable to the taxpayer than is expressed in the ruling.[19]

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[16] See section 357-60 and section 105-60.

[17] This situation would only happen in very limited circumstances. For example, all public rulings that are notified on the Public Rulings Program (except Taxation Determinations) must be examined by the appropriate Public Rulings Panel before they are issued. Each Rulings Panel comprises several of the most senior ATO staff and external representatives who are respected tax practitioners and/or academics. It is more likely that this could occur in relation to other materials that do not receive the same level of scrutiny and are expressed more generally because they endeavour to provide practical guidance to large numbers of taxpayers to help them meet their tax obligations. See paragraphs 55 to 58.

[18] Paragraphs 31 and 106 of this practice statement explain when the Commissioner is legally bound by a ruling.

[19] See section 357-70.

24. If the Commissioner has made a ruling about a relevant provision[20] and that provision is re-enacted or remade, the ruling is taken to be about the re-enacted or remade provision, to the extent that the new law expresses the same ideas as the old law. However, if the law is substantively changed, the part of the ruling dealing with the changed law ceases to apply.[21]

Public rulings

25. A public ruling is a published statement of the Commissioner's opinion of how a provision of tax law applies, or would apply, to taxpayers in relation to a class of schemes or to a class of taxpayer generally, rather than in respect of the specific circumstances of a particular taxpayer. Public rulings provide advice for taxpayers, their advisers and tax officers on the interpretation of tax laws that affect liability or entitlements under those laws. In addition, public rulings can address administrative and procedural provisions, including those relating to the collection of liabilities. Tax officers should refer to the intranet version of the *Public Rulings Manual* for current procedures on producing a public ruling.

26. The ATO primarily issues formal public rulings grouped in different series according to specific taxes (for example, the 'TR' series covers income tax).[22] However, there can also be other publications not in a formal ruling series which are declared to be public rulings.[23] All public rulings for direct taxes and entitlements are clearly marked as public rulings.

27. Notice of the making of a public ruling is published in the *Commonwealth of Australia Gazette*.[24] Public rulings are accessible via ATOlaw or through the 'Legal database' on the ATO website.

28. Topics on which the ATO is preparing public rulings are listed on the 'Public Rulings Program,' which is also accessible to taxpayers on the ATO website. The relevance and performance of the public rulings program is monitored by the National Tax Liaison Group, which consists of representatives of the major tax, law and accounting professional associations and senior members of the ATO. Topics on the program arise from or reflect suggestions made either internally through ATO issue escalation processes, or from external sources such as tax professional and industry representative bodies. These topics are subject to risk assessment and prioritisation according to 'priority technical issues' procedures.[25]

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[20] The term 'relevant provision' is explained in paragraph 13.
[21] See section 357-85 and also paragraph 49 of Taxation Ruling TR 2006/10 for public rulings and paragraph 51 of Taxation Ruling TR 2006/11 for private rulings.
[22] For further information, see paragraphs 22 to 23 of Taxation Ruling TR 2006/10 Income tax, fringe benefits tax and product grants and benefits: Public Rulings and the *Public Rulings Manual*.
[23] See paragraphs 55 to 56.
[24] Except for indirect tax publications that are not in the form of a formal public ruling. Public indirect tax rulings are explained in further detail in paragraphs 59 to 63.
[25] See Law Administration Practice Statement PS LA 2003/10 The Management of Priority Technical Issues and the *Public Rulings Manual*.

29. The ATO's Public Rulings and Superannuation Panels were established to consider and advise on the proposed interpretation of the law in major rulings. They are comprised of several of the most senior ATO staff as well as external representatives who are respected tax practitioners and/or academics. The primary role of the rulings panels is to discuss the technical and practical merits of the draft ruling presented to them by the authoring team and to advise on our proposed interpretation of the law. The rulings panels are advisory and not decision making bodies. The Rulings Panels are one of a number of measures to ensure the highest quality of public rulings.

Public rulings under Division 358

30. Division 358 provides for the making, application and withdrawal of public rulings. A public ruling is the written expression of the Commissioner's considered view on the way in which a relevant provision[26] applies, or would apply, to an 'entity' or class of entities including in relation to a defined 'scheme' or class of schemes.[27]

31. A public ruling binds the Commissioner from the time it is published or such earlier or later time as specified in the ruling.[28] Where a new public ruling changes the Commissioner's general administrative practice in a way that is less favourable to entities, the new ruling (that is, the proper operation of the law) applies only in relation to schemes that started after the publication date of the new ruling.[29]

32. If there is a change to a general administrative practice the ATO would usually communicate the change by way of a public ruling.[30] However, where there is a change to a general administrative practice that is less favourable for taxpayers and that change is not communicated by way of a public ruling, the ATO will not necessarily amend assessments that were raised consistently with a practice in place at the time of the assessments. As a general rule the ATO will amend assessments only where tax avoidance is involved or the practice has been exploited in an unintended way.

33. In a similar way, if a new public ruling overturns a previously issued private or oral ruling, the taxpayer can rely on either the new public ruling or the existing private or oral ruling if the relevant income year or scheme specified in that ruling has commenced.[31] In some situations a new public ruling may apply in addition to an existing ruling and in this case an entity may choose which ruling to rely on.[32] Taxation Ruling TR 2006/10 addresses this and other aspects of public rulings under Division 358.

[26] See paragraph 13 of this practice statement.
[27] Section 358–5.
[28] Subsection 358-10(1).
[29] Subsection 358-10(2).
[30] In some cases it may not be appropriate or possible for the Commissioner to change a general administrative practice by way of a public ruling. For example, where the general administrative practice concerns an issue beyond the scope of the rulings regime under Division 358. In such cases, some other product would be used to communicate the change.
[31] Item 3 in the table in section 357-75.
[32] Items 1 and 3 in the table in section 357-75.

34. A public ruling provides protection to taxpayers where it is favourable to them until it is withdrawn at the time specified by notice of the withdrawal published in the *Commonwealth of Australia Gazette*[33] or when it specifies that it ceases to apply.[34] The withdrawal takes effect from the time specified in the notice and that time must not be before the time the notice is published.[35] Details of the withdrawal of a public ruling can also be found on ATOlaw or through the 'Legal database' on the ATO website.

35. The Commissioner can have regard to the consequences that an immediate date of withdrawal may have if a replacement ruling provides for different treatment, and may therefore delay the withdrawal to minimise any adverse consequences. The *Public Rulings Manual* found on the intranet provides tax officers with instructions on preparing addenda and withdrawal documents for public rulings.

36. A public ruling may be relied on by anyone to whom it properly applies. An entity does not need to know of the existence of a public ruling to rely[36] on it if, for instance, they have self-assessed in the same way as the ruling provides. An entity may rely on a public ruling at any time unless they are prevented by a time limit imposed by a tax law (such as an entity's period of review for their assessment). It is not necessary to rely on the public ruling at the first opportunity.[37]

37. When self-assessing a liability or entitlement, an entity is not obliged to act in accordance with a public ruling that applies to them. However, if a public ruling applies to an entity and they do not follow it when self-assessing their liability or entitlement, they can expect the ATO to amend their assessment if their assessment is examined later. They then would have the usual rights of objection and appeal against the assessment.[38]

38. Failure to follow a public ruling does not necessarily lead to the application of any shortfall penalties.[39] Such penalties only apply if the taxpayer has failed to take reasonable care, or where a relatively large adjustment is involved in relation to an income tax matter and the taxpayer does not have a reasonably arguable position (or the penalty relates to certain tax avoidance schemes). Taxation Ruling TR 94/5 explains that this will depend on whether the view taken by the taxpayer is about as likely as not to be correct (even if the ATO takes a different view).

39. Where a taxpayer does not follow a public ruling and has a tax shortfall they will not be protected from interest charges. However, some or all of this interest may be remitted depending on the circumstances. In considering any remission, tax officers would need to have regard to the principles in Law Administration Practice Statement PS LA 2006/8 Remission of shortfall interest charge and general interest charge for shortfall periods.

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[33] Section 358-20.
[34] Subsection 358-15(1). Class Rulings and Product Rulings specify the periods for which the ruling has effect.
[35] Subsection 358-20(2).
[36] Relying on a ruling means acting or omitting to act in accordance with the ruling: see paragraph 357-60(1)(b).
[37] Subsection 357–60(2).
[38] A taxpayer who is dissatisfied with their assessment may object to it – see section 175A of the *Income Tax Assessment Act 1936* (ITAA 1936).
[39] See note to subsection 357-65(1).

Existing public rulings under Part IVAAA

40. A public ruling made under (the now repealed) Part IVAAA of the TAA continues in force as if it had been made under Division 358.[40]

Product rulings

41. Product rulings are public rulings on the application of relevant provisions[41] of tax law to a scheme in which a number of taxpayers individually enter into substantially the same transactions with a common entity or group of entities.

42. Product rulings enable taxpayers to obtain the Commissioner's public views on the tax treatment claimed to be applicable to participants in investment or financial schemes (or 'products').[42] The Commissioner has a discretion whether or not to issue a product ruling in relation to any defined scheme, and may decline to do so in some circumstances.[43] A product ruling does not provide any assurance about the commercial or financial viability of the scheme.

43. A written application is required for a product ruling. The information that should be addressed in an application is detailed in a checklist, which can be downloaded from the ATO website. Providing the information required by the checklist will assist in expediting the issue of the product ruling. Applicants are encouraged to notify their intention to apply for a product ruling using the form available from the ATO website. This form should be completed shortly before submitting a formal application for a product ruling.

44. A draft product ruling is sent to the applicant to obtain certain agreements and statements.[44] Unlike the final product ruling it is not intended that the draft product ruling be relied upon. It is not a publication approved in writing by the Commissioner. Consequently, there is no protection against liability for any tax shortfall nor, unless the Commissioner's discretion is exercised, against shortfall penalty and interest charges if a taxpayer seeks to rely on statements in the draft ruling.

45. A final product ruling provides protection to potential participants in respect of the tax treatment of a defined scheme, provided the scheme is carried out in accordance with the way it is described in the product ruling. The highest levels of disclosure are therefore expected of the applicant for the ruling. It should be a full and true disclosure.

46. If the scheme described in the product ruling differs from the scheme that is actually carried out, the Commissioner is not bound by the ruling and consequently participants cannot rely on it. This is because it does not apply to the scheme actually carried out, but to a different scheme. In those circumstances, the Commissioner will consider the nature of the variation found and the ruling may be modified to reflect a difference in the implementation of the scheme. This may occur by way of an 'Addendum' to the product ruling, or by a replacement ruling.

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[40] Subitem 29(1), Schedule *2, Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005.*
[41] See paragraph 13 of this practice statement.
[42] See paragraphs 9 and 10 of Product Ruling PR 2007/71 The Product Rulings system for a discussion of the term 'product'.
[43] See paragraphs 82 to 88 of Product Ruling PR 2007/71.
[44] These include an agreement that the applicant abide by the terms of use of the product ruling and statements that the description of the scheme is accurate, covers all relevant features and that all parties named in the ruling consent to being named. See Chapter 15 of the *Public Rulings Manual*.

47. The relevant product ruling will be withdrawn if the Commissioner finds that there is a material difference in the implementation of the scheme from the scheme described in the product ruling. There will be a material difference in circumstances where the scheme has not been implemented as described in the ruling, and the difference in implementation results in a change in tax outcome for the participants.

48. Prospective participants in a defined scheme may wish to seek assurances from the promoter of the scheme that it will be carried out in the manner described in the product ruling relating to the scheme. They may also seek an independent opinion as to the commercial and financial viability of the product.

49. Further information about product rulings is contained in Product Ruling PR 2007/71.

Class rulings

50. Class rulings are public rulings issued in response to a request from an entity seeking advice about the application of relevant provisions[45] of tax law to several taxpayers in relation to a defined scheme (other than an investment or financial product for which a product ruling can be issued). Class rulings prevent the need for a private ruling to be sought by, or on behalf of, each taxpayer within the class of entity affected by the scheme. In such cases, those seeking a class ruling should make a full and true disclosure about the existing or proposed arrangements.

51. The following are examples of situations where a class ruling may be given:

- advice sought by an employer about the income tax consequences of an employee share acquisition plan for employees
- advice sought by a company about the income tax consequences for its shareholders of a demerger by the company, or of a proposed distribution by the company, and
- advice sought by a Commonwealth, state or territory government or agency about a proposed program, for example, an industry restructure which has tax consequences for participants in that industry.

52. There is no specific form for lodging a class ruling application. Applications should be in writing. The information that should be included in the application is outlined on the ATO website.[46] Providing the information required will assist in expediting the issue of the class ruling.

53. A draft class ruling is sent to the applicant to obtain certain agreements and statements.[47] Unlike the final class ruling it is not intended that the draft class ruling be relied upon. It is not a publication approved in writing by the Commissioner. Consequently, there is no protection against liability for any tax shortfall nor, unless the Commissioner's discretion is exercised, against shortfall penalty and interest charges if a taxpayer seeks to rely on statements in the draft ruling.

[45] See paragraph 13 of this practice statement.
[46] See also paragraph 20 of Class Ruling CR 2001/1.
[47] These include a statement that the description of the scheme is accurate and covers all relevant features, that the parties named in the ruling consent to being named and a statement to the effect that the negotiated date for publication is acceptable. See Chapter 16 of the *Public Rulings Manual*.

54. Further information about class rulings is contained in Class Ruling CR 2001/1.

ATO publications, or statements in publications, declared as public rulings

55. ATO publications not having a public ruling title may nevertheless contain expressions of opinion about the application of relevant provisions of tax law. Such publications, or statements within them, may be declared to be public rulings either for a defined class of entity or more generally (for example, *TaxPack*).

56. Such a publication has to be declared to be a public ruling, by stating expressly that it is a public ruling, and it should explain the level of protection it provides. As with all public rulings under Division 358, notice of the publication of such a document as a public ruling must be published in the *Commonwealth of Australia Gazette.*[48]

57. However, it should be noted that the scenario mentioned in paragraph 55 is not the Commissioner's usual practice. The information contained in general publications is often simply expressed and provides practical, step by step assistance. In the interests of making them easy to understand, legal language is avoided. The use of simple language and the absence of the rigorous review processes associated with public rulings, including *TaxPack*, increases the risk that errors will be made in general publications, and this informs the Commissioner's reluctance to be bound by them.

58. Errors made by the Commissioner, in the taxpayer's favour, in legally binding material impact on the general community. It is the community that forgoes the revenue lost because of the error. In addition, those taxpayers, who are able to rely on that erroneous view of the law, may be able to obtain a benefit that is unavailable to other taxpayers. It is these unfavourable outcomes that the Commissioner is avoiding by not being bound by all general publications.

Public indirect tax rulings

59. All forms of published written rulings or advice involving the interpretation of the indirect tax laws (except fuel tax laws)[49] are public indirect tax rulings.[50] For example, formal series public rulings such as GST rulings, GST determinations, and GST bulletins are public indirect tax rulings for the purposes of section 105-60.[51] In addition, publications such as general information booklets, guides and fact sheets[52] on an indirect tax law (other than a fuel tax law) that are in the nature of advice to taxpayers are also public indirect tax rulings. Given the binding nature of these products they are to be given a high level of scrutiny.

[48] Subsection 358-5(4).
[49] Fuel tax laws are excluded from the legislative framework for indirect tax rulings. Rulings regarding fuel tax are provided for in section 357-55. See discussion at paragraph 13 for further information.
[50] See definitions of 'indirect tax ruling', 'public indirect tax ruling' and 'private indirect tax ruling' in subsection 995-1(1) of the ITAA 1997. A ruling or advice given orally or an assessment is not a public indirect tax ruling.
[51] From 1 July 2006. For this and subsequent references to section 105–60, the corresponding legislative reference before 1 July 2006 was section 37 of the TAA.
[52] Paragraph 11 of Goods and Services Tax Ruling GSTR 1999/1 and paragraph 10 of Wine Equalisation Tax Ruling WETR 2002/1.

60. ATO Interpretative Decisions (ATO IDs), Law Administration Practice Statements and technical skilling materials although published, are not public indirect tax rulings because they do not constitute advice.[53]

61. Rulings in respect of the indirect tax laws (other than fuel tax laws) provide a level of protection in accordance with section 105-60 to entities to whom they properly apply and who rely on them. Broadly, if an entity relies on a public indirect tax ruling that says that the law applies to it in one way and another public indirect tax ruling is later issued advising that the law applies in a different way, the entity will not be liable for any more tax than would have been payable under the original ruling for the period before the change.[54] That is, if an entity has underpaid a net amount, the amount underpaid will cease to be payable if the underpayment occurred in reliance on a public indirect tax ruling. Similarly, an amount overpaid as an indirect tax refund by the Commissioner will be taken to have been payable in full if the overpayment occurred in reliance on a public indirect tax ruling.

62. An entity can rely on a public indirect tax ruling only if it is relevant to their circumstances. If an entity is unsure about the way in which a public indirect tax ruling applies to their particular circumstances, they should request a private indirect tax ruling.

63. A public indirect tax ruling has effect until such time as it is withdrawn or replaced by another public indirect tax ruling.[55]

Draft public rulings

64. A draft public ruling is not a ruling. It is a consultative document which sets out the Commissioner's preliminary view about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entity, in relation to a defined scheme or class of schemes.

65. Unless otherwise stated in the document, reliance on a statement in a current draft ruling provides the same level of protection as written guidance.[56] A taxpayer who relies on a draft ruling that is found to be incorrect, or misleading and makes a mistake as a result, will still be liable for any tax that would be otherwise payable under the law (unless a time limit imposed by the law precludes the liability). However, they are protected against shortfall penalty and, if they have relied on the draft ruling reasonably and in good faith, against interest charges.[57]

66. Where a draft ruling sets out a view on how a relevant provision applies, and that view represents the Commissioner's general administrative practice, then that can affect the commencement date of the final ruling. In such a case, if the final public ruling takes a position that is less favourable to the taxpayer than the draft ruling, the view of the law taken in the final ruling can only be applied to schemes begun to be carried out after the final ruling is published.[58]

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[53] See paragraphs 237 to 251 of this practice statement.
[54] See paragraph 18 of Goods and Services Tax Ruling GSTR 1999/1.
[55] See paragraphs 30 to 31 of Goods and Services Tax Ruling GSTR 1999/1 and paragraphs 30 to 31 of Wine Equalisation Tax Ruling WETR 2002/1 for more information about withdrawing public indirect tax rulings.
[56] The level of protection for written guidance is explained in paragraphs 224 to 227.
[57] See sections 284-215, 298-20 and 361-5 and section 8AAG of the TAA.
[58] Subsection 358–10(2).

67. A draft public indirect tax ruling is not a ruling for the purposes of section 105-60 as it is not a 'ruling' or 'advice'.[59] If a statement in a draft public indirect tax ruling is found to be incorrect or misleading and the taxpayer makes a mistake as a result, they will still be liable for any tax that would otherwise be payable under the law (unless a time limit under the law precludes the liability). However, they are protected against shortfall penalty and, if they have relied on the draft ruling reasonably and in good faith, against interest charges.

Publicly issued rulings that are not legally binding (IT, MT, SGR and SCR series)[60]

68. In the interests of sound administration, the Commissioner has provided advice, in the form of public rulings, about the application of certain laws which do not form part of a legally binding rulings framework.

69. The Income Tax (IT) and Capital Gains Tax (CGT) Determination series were published prior to 1 July 1992 which is before any legislative framework for public rulings was established. Therefore, these two series are not legally binding on the Commissioner.

70. Publicly issued rulings in the Superannuation Guarantee Rulings (SGR), and Superannuation Contributions Rulings (SCR) series are not covered by any current legislative framework. Therefore, the SGR and SCR series of rulings are also not legally binding on the Commissioner.

71. Rulings that are published within the MT series generally deal with tax laws that do not fit easily within any of the other series. However, some or all of a ruling in the MT series may be legally binding on the Commissioner as there may be a discussion of the administration or collection of a relevant provision for a ruling. In these circumstances, this section of the MT ruling is a public ruling under Division 358.

72. When the time comes to assess liability, the law as it then exists must be applied to the facts as established at that time.[61] Where the ruling is not legally binding, the basic administrative policy of the ATO is to stand by what is said in these rulings and to depart from them only if there are good and substantial reasons. Any departure would be confined to situations where:

- there have been legislative changes since the ruling issued
- a tribunal or court decision has affected the ATO's interpretation of the law since the ruling issued, or
- for other reasons, the ruling is no longer considered appropriate.

For example, if commercial practice has changed, the ruling has been exploited in an abusive and unintended way, or the ruling is found on reconsideration to be wrong in law.

73. In the case of a legislative change, the timing of a departure from previous practice will depend on the date of effect of the legislation. In other cases, any such departure would be announced by issuing public advice or guidance, and would normally apply to transactions entered into after the issue of that public advice or guidance, unless particular circumstances warrant another approach.

[59] Paragraph 14 of Goods and Services Tax Ruling GSTR 1999/1 and paragraph 13 of Wine Equalisation Tax Ruling WETR 2002/1.
[60] Income tax, miscellaneous tax, superannuation guarantee and superannuation contributions ruling series.
[61] *Federal Commissioner of Taxation v. Wade* (1951) 84 CLR 105 at 117.

74. In the event of a departure from a ruling of this kind, a taxpayer who relies on the ruling before its withdrawal will be protected from any shortfall penalty that might otherwise arise. In addition, if relying on the ruling would otherwise give rise to an interest charge under a relevant provision,[62] the taxpayer will be protected from interest charges if they relied on the ruling reasonably and in good faith.

Private rulings

75. A private ruling is a written expression of the Commissioner's opinion on how a relevant provision applies, or would apply, to a particular entity in relation to a specified scheme, arrangement or transaction.[63] It provides the taxpayer with advice on how the Commissioner will apply the tax law (which includes its administration or collection) to their particular circumstances. The taxpayer or their agent, may apply for a private ruling under Division 359, or section 105-60 for indirect tax matters in the form approved by the Commissioner. Information about applying for private rulings can be obtained from ATO shopfronts and on the ATO website.

76. One of the basic requirements for taxpayers is to provide a full and true disclosure of the material facts.[64] Otherwise the ruling may not be made in relation to the scheme that actually occurred or that is actually proposed. While not mandatory, for ruling requests made through tax professionals (including in-house tax professionals), applicants are encouraged to also provide a summary of the research and analysis of the technical issues. This ensures that the ATO takes into account the issues the taxpayer considers to be the most relevant to the case and assists with the timeliness of the response.

77. Applications for a *priority* private binding ruling must include a full brief, which includes a draft ruling, all issues identified and the position for and against fully stated. For more information on priority private binding rulings refer to Law Administration Practice Statement PS LA 2005/10 Priority Private Binding Rulings.

78. Tax officers must refer to ORCLA as well as the relevant public rulings and law administration practice statements for guidance in preparing a private ruling, including the approval for issue by authorising officers.[65]

Private rulings under Division 359

79. Section 359–5 provides that a private ruling under Division 359 is a ruling made by the Commissioner on the way in which a relevant provision[66] of tax law applies, or would apply, to an entity in relation to a specified scheme.

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[62] See paragraph 13 of this practice statement.
[63] Section 359–5. See also, Goods and Services Tax Ruling GSTR 1999/1 and Wine Equalisation Tax Ruling WETR 2002/1.
[64] However, this requirement need not be satisfied if the Commissioner provides a private indirect tax ruling in the form of written general advice. See paragraph 130 of this practice statement.
[65] See Law Administration Practice Statement PS LA 2002/13 Authorisation of written binding advice. See also Goods and Services Tax Ruling GSTR 1999/1 and Wine Equalisation Tax Ruling WETR 2002/1.
[66] See paragraph 13 of this practice statement.

80. A private ruling may cover any matter involved in the application of a relevant provision to the specified scheme, including an ultimate conclusion of fact. For example:

- the status of an individual as a resident of Australia for income tax purposes
- whether an activity constitutes the carrying on of a business, or
- the value of a CGT asset.

Taxation Ruling TR 2006/11 addresses this and other aspects of private rulings under Divisions 357 and 359.

Applying for a private ruling under Division 359

81. Subsection 359–10(1) provides that an applicant for a private ruling can be an 'entity', their 'agent', or a 'legal personal representative'. An agent is any person to whom the entity has given authority to apply for a private ruling on their behalf.

82. Usually the ruling applies only to the entity in respect of whom the application was made. However, a private ruling given to a trustee in respect of the tax affairs of a trust continues to apply where a new trustee is appointed, and a ruling relating to the affairs of the trust also applies to the beneficiaries of the trust. In situations where the trustee is replaced, the private ruling continues to apply to the new trustee, or any trustee replacing the new trustee, provided the ruling would have applied to the former trustee.[67]

83. An application for a private ruling must be made in the approved form and must contain such information relating to the ruling as required by the form.[68]

84. To facilitate this, the ATO provides two standard *Private ruling application* forms (one form for tax professionals and another form for others) specifying the requirements of an application.[69] These documents are available from the ATO website. In most cases, all that taxpayers are required to do is add their query, provide the relevant facts and sign the form.

85. Tax professionals (including in-house tax professionals) are encouraged to use these standard forms and follow their requirements. However, the Commissioner does not insist on the use of these standard forms. The application will be in the approved form[70] provided it is in writing and contains all the necessary information, including copies of all relevant documents, the checklisted items and declaration referred to in the relevant standard form. While not mandatory, for ruling requests made through tax professionals (including in-house tax professionals), applicants are encouraged to also provide a summary of research and analysis of the technical issues.[71]

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[67] Section 359–30.
[68] Sections 359–10 and 388–50.
[69] A separate approved form is available for applications for a private ruling on the exercise of the Commissioner's discretion for non-commercial business losses under section 35–55, ITAA 1997. Separate approved forms dealing with other matters may be developed as required.
[70] Subsection 388-50(1A).
[71] See paragraph 76 of this practice statement.

86. A tax agent or business entity that is registered as a user of either the Tax Agent Portal or the Business Portal may lodge their private ruling application via the relevant portal. The portals are secure online environments for communicating with the ATO.

87. If a written request for advice is not in the approved form, the case officer should contact the taxpayer or their agent to ascertain the type of assistance required. If their needs can only be satisfied by a private ruling, they should be invited to supply the necessary information and be given guidance in making a valid application. If another form of assistance could satisfy their needs – for instance, an oral ruling, or guidance such as an ATO publication – the case officer must explain the alternatives available (and their respective levels of protection). They must then invite the taxpayer to choose the form of assistance they prefer, provided the form of assistance is appropriate for the request. For example, oral guidance is generally inappropriate in relation to complex legal or factual matters.[72]

Requirements for a private ruling under Division 359

88. A private ruling can only be given on a particular scheme. The applicant must describe the scheme on which they are seeking a ruling. The ruling is made on the basis of:

- information (including documents identifying that information) provided in the application and by the applicant after the application (such as in response to any request by the ATO for further information)[73]
- any assumptions made by the Commissioner on which the correctness of the ruling might depend, such as about unknowable facts, including for example, about future events[74] (see paragraph 92 of this practice statement), and
- any relevant information from another source (see paragraph 90 of this practice statement).[75]

89. Importantly, if an applicant provides information indicating that the proposed scheme will be entered into in a way that is materially different from that described in the original application, this is to be treated as a new application for a private ruling. ORCLA provides procedural instructions for actioning such cases including amending the existing application in certain circumstances. Whichever procedure is followed the case is to be actioned so that work proceeds without any discontinuity.

[72] Note that tax agents cannot obtain an oral ruling on behalf of a taxpayer. However, an oral ruling may be obtained by a taxpayer's legal personal representative – see subsection 360-5(1).
[73] Section 357-115.
[74] Section 357-110.
[75] Section 357-120.

90. Generally, if additional information is necessary to make a private ruling it must be requested from the applicant.[76] The Commissioner can take into account information provided by an entity other than the applicant, provided that the Commissioner tells the applicant what the information is and that the Commissioner intends to take the information into account.[77] The applicant must be given a reasonable opportunity (ordinarily 28 days) to comment on the use of that information before the ruling is made.[78]

91. Where disclosing information obtained from third parties to the applicant would breach the tax secrecy provisions, privacy legislation or the confidentiality of the entity providing the information, the Commissioner:

- must not use the information in making the private ruling, or
- should decline to rule where the information is material to the outcome of the private ruling.

92. An assumption should not be made if the applicant could reasonably be expected to have knowledge of the relevant fact. If making a private ruling would depend on a fact that may not occur, for instance about a future event, the Commissioner may either decline to make the ruling or make the ruling on the basis of an assumption. If the Commissioner proposes to make an assumption in making the ruling, the applicant must be informed of the assumption proposed to be made and given a reasonable opportunity (ordinarily 28 days) to respond.[79]

93. The *Notice of private ruling* may consist of a number of separate rulings, each stating the Commissioner's opinion of how a relevant provision applies. Ordinarily, private rulings should only be given on the issue(s) raised in the application. However, where a related issue is not directly raised in the application, but is crucial to providing an accurate ruling on the issue(s) raised in the application, a related ruling can be made without first seeking the applicant's consent to rule on the related issue.[80] The important consideration is that the taxpayer should not be misled by the private ruling and its scope should be clear on its face.

94. Where a related issue is not crucial to providing an accurate ruling on issues raised, a private ruling may be made on the related issue if:

- a ruling on the related issue would benefit the recipient of the ruling by informing them of their wider tax obligations in respect of the scheme set out in the application, and
- the applicant consents to those related issues being addressed in the private ruling.

In the absence of that consent, and in accordance with ORCLA procedures, the case officer should insert a note in the *Notice of private ruling* warning the recipient that some related issues have been identified that may be relevant to their scheme. The recipient should be advised that a further application would need to be made to obtain private rulings on those issues. It is important, however, that this process should not unduly delay the provision of advice on the particular matters requested.

[76] Section 357–105.
[77] Paragraph 357-120(a).
[78] Section 357–120.
[79] Section 357–110.
[80] Section 359–45.

95. When considering a request for a private ruling, case officers must consider the application of Part IVA of the ITAA 1936. Case officers should follow the instructions in Law Administration Practice Statement PS LA 2005/24 Application of General Anti-Avoidance Rules[81] and the procedures in ORCLA.

Declining to make a private ruling under Division 359

96. The Commissioner must comply with a private ruling application unless there is a basis to decline to make the ruling. Without attempting to provide an exhaustive set of circumstances, the Commissioner may decline to make a private ruling if:

- making the ruling would prejudice or unduly restrict the administration of a taxation law,[82] for example if:
  - the application is frivolous or vexatious
  - the applicant's liability or entitlement would not be affected by the outcome of the ruling because the assessment review period has ended
  - making the private ruling would require an unreasonable diversion of resources, for instance, if it would require the allocation of resources disproportionate to the subject of the ruling
  - the scheme is speculative, or not developed sufficiently for it reasonably to be considered in serious contemplation at the time of the application
  - the applicant has refused to pay an amount charged for valuation services where a valuation is required to make the private ruling[83]
  - further information necessary to make the ruling has been requested from the applicant and the applicant has not responded within a reasonable time,[84] or
  - information provided by an entity other than the applicant is material to the outcome of the ruling, but conveying that information to the applicant would breach the tax secrecy provisions, privacy legislation or the confidentiality of the person providing the information,[85]
- the correctness of a private ruling would depend on an assumption about a future event or some other matter and it is considered inappropriate to make a private ruling on the basis of that assumption[86]
- the matter sought to be ruled on is already being (or has been) considered by the Commissioner for the entity, for example, in the course of an audit or in deciding an objection against an assessment, or

[81] In particular, case officers should have regard to paragraphs 9 to 13 which concern the situation where the taxpayer has not requested a private ruling on Part IVA.
[82] See paragraph 359-35(2)(a).
[83] See paragraphs 3.81 and 3.90 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) (No. 2) Bill 2005.
[84] See Law Administration Practice Statement 2008/5 Written binding advice – requests for further information, notification of assumptions and intended use of information from sources other than the applicant.
[85] Section 359-35, section 3C of the TAA and paragraph 3.44 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) (No. 2) Bill 2005.
[86] Section 357-110.

- the matter sought to be ruled on is about how the Commissioner would exercise a power under a relevant provision when the Commissioner actually exercises the power or decides that it is not appropriate to do so.

97. Therefore, the Commissioner may decline to rule on a matter relating to the exercise of a discretion if, in the circumstances of the applicant's case, it would be more appropriate to exercise the discretionary power under that provision, or to inform the applicant that the discretionary power will not be exercised. Generally, applicants seeking the exercise of a discretionary power should request the exercise of that power rather than apply for a private ruling on how that power might be exercised. For example, in relation to a discretion to defer the time for payment of tax, the Commissioner may just decide to defer the time at which an amount is payable by the applicant rather than make a private ruling.

98. A decision to decline to make a private ruling must be authorised by an authorising officer.[87] The applicant must be provided with reasons in writing if the making of the private ruling is declined.[88]

Making a private ruling under Division 359

99. A private ruling is made by recording it in writing and giving a copy of it to the applicant.[89]

100. Tax officers should not generally provide pre-ruling opinions, draft private rulings or any other written expressions or written endorsements of informal assistance that may mislead taxpayers if that preliminary view is subsequently changed. File notes of telephone conversations or minutes of interviews may be provided to the taxpayer if they do not contain advice, or if the risk of misleading taxpayers is properly managed. This does not mean that tax officers cannot undertake discussions with the applicant to establish the particulars of the scheme and its purpose. Nor does this mean that a tax officer is precluded from general discussions with a taxpayer in relation to an issue. These processes are encouraged.[90] The tax officer must ensure that the taxpayer is not misled and must clearly explain that any comments made will not be binding on the Commissioner.

101. A private ruling on an interpretative issue is provided by a business line if there is a precedential ATO view of the relevant law or it involves a straightforward application of the law.[91] Where there is no precedential ATO view, the general rule[92] is that the interpretative issue must be referred by the business line to a Centre of Expertise to establish a precedential ATO view on the issue.[93] A private ruling is made after the precedential ATO view has been established.

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[87] See Law Administration Practice Statement PS LA 2002/13 Authorisation of written binding advice.
[88] Section 359–35.
[89] Section 359-15.
[90] Paragraphs 192 to 204 of this practice statement discuss the circumstances when indicative advice may be provided prior to the issue of a private, class or product ruling.
[91] See paragraph 13 of Law Administration Practice Statement PS LA 2003/3 Precedential ATO view, which describes circumstances where tax officers are not required to identify and apply a precedential ATO view. These situations include the exercise of a discretion, making an ultimate conclusion of fact, or determining the value of something.
[92] Note that there are some exceptions to this general rule. See paragraph 13 of Law Administration Practice Statement PS LA 2004/4.
[93] See Law Administration Practice Statements PS LA 2004/4 Referral of issues to Centres of Expertise for the creation of precedential ATO view and PS LA 2003/3 Precedential ATO view.

102. A private ruling must:

- state that it is a private ruling[94]
- identify the entity to which it applies[95]
- specify the scheme and the relevant provision to which the ruling relates,[96] and
- detail any assumptions made.[97]

103. A private ruling should specify the time it begins to apply and the time it ceases to apply, for example, a particular income year.[98] This can be any time in the future or the past.[99]

104. If a private ruling does not specify the date from which it begins, then the ruling applies from the time the ruling is made. If it does not specify an end time, it ceases to apply at the end of the income year or other accounting period in which it started to apply.[100] ORCLA provides guidelines about the time of application for private rulings and on ruling for extended periods.

105. The *Notice of private ruling* given to the applicant displays an authorisation number[101] and is accompanied by an explanatory note setting out its level of protection.

Relying on a private ruling under Division 359

106. A private ruling binds the Commissioner (not the taxpayer) if the ruling applies to the entity and that entity relies on the ruling (by acting, or omitting to act, in accordance with it). In other words, taxpayers who follow a ruling that applies to them can ensure that the Commissioner is bound to assess them as set out in the ruling in relation to a particular matter.[102] However, even if a taxpayer does follow a private ruling, the Commissioner may apply a relevant provision of the law in a way that is more favourable for them than is set out in the ruling if the Commissioner subsequently comes to the view that the ruling is incorrect and that it disadvantages the taxpayer (provided the Commissioner is not prevented from doing so by a time limit imposed by the law).[103]

107. A private ruling applies to an entity if it is given in response to an application by, or on behalf of, that entity and the facts, assumptions and conditions set out in the ruling are met.

108. The benefit derived by the entity having a private ruling is that the Commissioner must not apply the law in a way that is inconsistent with the ruling to the entity's detriment. However, if the scheme is not implemented in the way set out in the ruling, or if material facts were omitted from the ruling application, or misleadingly or inaccurately stated, the ruling does not bind the Commissioner.

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[94] Subsection 359-20(1).
[95] Subsection 359-20(2).
[96] Subsection 359–20(2).
[97] Section 357-110.
[98] Subsection 359-25(1).
[99] Subsection 359-25(2).
[100] Subsections 359–25(3) and (4).
[101] See ORCLA.
[102] Section 357–60.
[103] Section 357-70.

109. An entity is not obliged to act in accordance with a private ruling and is not subject to any special sanction if they fail to follow the ruling.[104] The entity can always take a more favourable position if that is open under the tax law.

110. The entity is not liable for shortfall penalty merely because they have not followed a private ruling applicable to them in relation to a particular matter. Such penalties only apply if the taxpayer has failed to take reasonable care,[105] or where a relatively large adjustment is involved in relation to an income tax matter and the taxpayer does not have a reasonably arguable position[106] (or the penalty relates to certain tax avoidance schemes).[107]

111. Where a taxpayer does not follow a private ruling they will not be protected from interest charges. However, some or all of this interest may be remitted. In considering any remission tax officers would need to have regard to the principles in Law Administration Practice Statement PS LA 2006/8 Remission of shortfall interest charge and general interest charge for shortfall periods.

112. In the event of an inconsistency between a public ruling and a later private ruling, an entity may choose to rely on the public ruling that applies to them or the private ruling that specifically addresses their circumstances and applies to them, notwithstanding the inconsistency with a prior public ruling.[108]

113. However, there are special rules which limit the ability to rely on a private ruling where it is inconsistent in some respect with a later public or private ruling.[109] A private ruling that is inconsistent with a later public ruling is taken not to have been made if, when the public ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun, and
- the scheme to which the rulings relate has not begun to be carried out.

114. The recipient of a private ruling may also check or clarify the ruling by applying for a new ruling. If the recipient informed the Commissioner about the earlier private or oral ruling when they applied for the new ruling then the new ruling applies. However, if the recipient did not inform the Commissioner about the earlier private or oral ruling when they applied for the new ruling then the earlier private or oral ruling applies.[110]

Special procedures relating to private rulings under Division 359

Existing private rulings under Part IVAA

115. A private ruling made under (the now repealed) Part IVAA of the TAA continues in force as if it had been made under Division 359.[111]

[104] Section 357–65.
[105] Subsection 284-215(2).
[106] Subsections 284-75(2) and 284-90(1).
[107] Section 284-145.
[108] Section 357-75.
[109] Section 357–75.
[110] See item 2 in the table in subsection 357-75(1).
[111] Subitem 29(2), Schedule 2, *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005.*

General anti-avoidance rules

116. Tax officers must consider the application of the relevant general anti-avoidance rules in accordance with Law Administration Practice Statement PS LA 2005/24 Application of General Anti-Avoidance Rules. This instruction applies irrespective of whether a private ruling application expressly seeks a ruling on the applicability of a general anti-avoidance rule. ORCLA contains procedural instructions to tax officers in considering the application of general anti-avoidance rules.

Revising a private ruling

117. The Commissioner may revise a private ruling but only if the scheme to which the original private ruling relates and the relevant income year or accounting period have not begun.[112] After this time, if the Commissioner concludes that the ruling was wrong, the Commissioner may adopt the correct position if it is more favourable to the taxpayer than was set out in the ruling.[113]

Timeframes – ATO service standards

118. In accordance with the ATO service standards we aim to provide a response to an application for a private ruling within 28 days of receiving all the necessary information. If all the necessary information has not been supplied in the application, the ATO aims to contact the applicant within 14 days of receiving the application to ask for the information. If the application raises a valuation matter or a complex matter that will take more than 28 days to resolve after receiving all the required information, the ATO aims to contact the applicant within 14 days of receiving all necessary information to negotiate an extended reply date.[114]

Timeframes – legislation

119. If the ruling has not been made (or the Commissioner has not declined, with reasons, to issue the ruling requested) within the statutory period, an applicant may notify the Commissioner in writing requiring the private ruling to be made. The statutory period is 60 days from the time the application was made, extended in the following circumstances (but ignoring any overlap) by:[115]

- the number of days between the day on which additional information was requested and the day on which it was received by the Commissioner
- the number of days between the day on which the Commissioner tells the applicant about an assumption proposed to be relied on in making the ruling and the day on which the applicant's response about the assumption is received by the Commissioner

[112] Subsections 359–55(1) and (2).
[113] Section 357-60 and 357-70.
[114] The ATO has put in place the priority private binding ruling process to manage the provision of advice for certain significant commercial transactions that meet particular criteria. The process is intended to mitigate the risk of being unable to provide advice in timeframes consistent with taxpayers' business needs around those transactions. In those cases, the requested timeframe for response is part of a case plan agreed with the applicant. The applicant is notified as soon as possible of any additional information requirements or changes to the case plan. See PS LA 2005/10.
[115] Subsection 359–50(2).

- the number of days between the day on which the Commissioner tells the applicant about information from another source proposed to be relied on in making the ruling and the day on which the applicant's response about that information is received by the Commissioner, and
- the number of days between the day on which the Commissioner tells the applicant that a valuation matter has been referred to a valuer and the day on which the Commissioner informs the applicant that the valuer's work on the matter has been completed.

120. If the Commissioner has neither made the ruling nor declined to make the ruling within 30 days of the applicant's notice, the applicant may exercise a right of objection against the failure to make the ruling. To do so, the applicant must lodge the objection within 60 days after the end of that 30 day period, in the approved form, together with a draft private ruling.[116]

121. If, within the specified time period, the Commissioner does not issue a private ruling, either in the form of the applicant's draft or in some other form, the objection is taken to have been disallowed by the Commissioner.[117] The specified time period is the later of 60 days:

- after the objection was lodged with the Commissioner, or
- the day on which a decision was made to agree to a request to deal with the objection as if it had been lodged within time.

122. The usual appeal rights against a disallowed objection to either the Administrative Appeals Tribunal or Federal Court are then available to the applicant.[118]

Valuation matters

123. If a private ruling application requires the value of something to be determined,[119] the Commissioner may seek a valuation from a valuer. If a valuation is provided by the applicant, the Commissioner may seek a review of the valuation. The Commissioner may charge the applicant for the valuation, or review of the valuation, by a valuer.[120]

124. The applicant must be informed, initially, that the valuation matter has been referred to a valuer, and later, when the valuer's work in relation to the matter has been completed.[121]

125. Tax officers should follow the procedures in ORCLA that deal with valuation matters.

Withdrawal of application

126. An applicant may withdraw their application, either orally or in writing, at any time before the ruling is made and the Commissioner must provide written confirmation of the withdrawal.[122]

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[116] Subsection 359–50(3) and paragraph 14ZW(1)(ba) of the TAA. The objection period may be extended – see subsection 14ZW(2) and section 14ZX of the TAA.
[117] Section 14ZYB of the TAA.
[118] Section 14ZZ of the TAA.
[119] Other than the valuation of a gift or contribution for the purposes of Division 30 of the ITAA 1997.
[120] Section 359–40.
[121] Subsections 359–40(2) and (3).

Review of a private ruling under Division 359

127. If an entity is dissatisfied with their private ruling, they may formally object against it. However, objections must be lodged before an assessment is made for the income year or accounting period to which the ruling relates, or before the tax is due and payable in the case of a withholding tax matter.[123] If the objection against the private ruling is not lodged before the assessment is issued, the objection must be lodged against the relevant assessment. Further rights of appeal to either the Administrative Appeals Tribunal or Federal Court are available if the objection is disallowed.[124]

128. A private ruling has effect as altered by an objection decision if:

- a decision has been made to allow the objection in whole or part, and
- the period for appeal has ended without an appeal being made.[125]

Private indirect tax rulings

129. Any written ruling or advice about indirect tax laws (other than fuel tax laws) given by the ATO to a particular entity is a private indirect tax ruling for the purposes of section 105–60.[126]

130. There are two types of private indirect tax rulings:

- 'specific private ruling' – specific advice to an entity about how the indirect tax law applies to its particular circumstances, and
- 'written general advice' – general advice to an entity which simply restates parts of a public indirect tax ruling or law without applying the public indirect tax ruling or law to the entity's particular circumstances.

131. A document forming part of, or leading up to, the making of an assessment is not a private indirect tax ruling, for example:

- a draft compliance activity report or position paper issued before finalising an assessment, or
- a letter issued at the end of an audit explaining the basis for the assessment.

Such documents help explain the proposed treatment or final outcome to the entity.[127] They are not prepared for the purposes of providing a written ruling or advice but to support an assessment process. An assessment is also not a private indirect tax ruling.[128]

Applying for a specific private ruling

132. An entity, or their agent, may apply for a specific private ruling using the appropriate *Private ruling application* form available from the ATO website.

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[122] Subsection 359–10(3).
[123] Section 359–60. The reference to a withholding tax matter also includes mining withholding tax.
[124] Section 14ZZ of the TAA.
[125] Section 359-70.
[126] See definitions of 'indirect tax ruling' and 'private indirect tax ruling' in subsection 995-1(1) of the ITAA 1997.
[127] *Federal Commissioner of Taxation v. Reynolds* (1981) 11 ATR 629 at 638; 81 ATC 4131 at 4139.
[128] See the definition of 'indirect tax ruling' in subsection 995-1(1) of the ITAA 1997.

133. Tax professionals (including in-house tax professionals) are encouraged to use the standard form. However, the Commissioner does not insist on the use of the standard form. A written application can also be submitted containing all the necessary information, including copies of all relevant documents, the checklisted items and declaration referred to in the standard form. While not mandatory, for ruling requests made through tax professionals (including in-house tax professionals), applicants are encouraged to also provide a summary of research and analysis of the technical issues.[129]

134. A tax agent or business entity that is registered as a user of either the Tax Agent Portal or the Business Portal may lodge their specific private ruling application via the relevant portal. The portals are secure online environments for communicating with the ATO.

Requirements for a specific private ruling

135. The applicant must describe the facts on which the request is based, including where relevant, the tax period.[130] The ruling is made on the basis of:

- information (including documents identifying that information) provided in the application and by the applicant after the application (such as in response to any request by the ATO for further information), and
- any assumptions made by the Commissioner on which the correctness of the ruling might depend, such as about unknowable facts.

136. Importantly, if an applicant provides further information indicating that the facts on which the request is based are materially different from that described in the original application, this is to be treated as a new application for a specific private ruling. ORCLA provides procedural instructions for actioning such cases including amending the existing application in certain circumstances. Whichever procedure is followed, the case is to be actioned so that work proceeds without any discontinuity.

137. When deciding indirect tax issues, tax officers must attempt to identify all the facts necessary to arrive at a decision. If making a private indirect tax ruling would depend on a fact that may not occur, for instance about a future event, the Commissioner may either decline to make the ruling or make the ruling on the basis of an assumption. If the applicant could reasonably be expected to have knowledge of the relevant fact, then an assumption should not be made.

138. Generally, if a client does not provide enough information to allow a specific private ruling to be given, tax officers must attempt to provide written general advice (that is, quote some or all of a public ruling and allow the client to apply the law as stated to their circumstances).[131]

[129] See paragraph 85 of this practice statement.
[130] Paragraph 27 of GSTR 1999/1.
[131] See explanation in ORCLA. Note that written general advice to an entity which simply restates parts of a public indirect tax ruling or law without applying it to the entity's particular circumstances is also a private indirect tax ruling.

Declining to make a specific private ruling

139. A request for a specific private ruling may be declined if:[132]

- the entity already has a ruling on the issue and the particular request is considered unnecessary
- the entity is, at the time of the request, the subject of an audit relating to the particular question being raised (although the entity may seek clarification from the auditor)
- it relates to a 'reviewable GST decision' under section 110–50 or a 'reviewable wine tax decision' under section 111–50[133]
- the topic to be covered is, at the time of the request, the subject of a formal dispute with the Commissioner (for example, an objection), or
- the matter has already been decided for the purposes of an assessment.

140. A request for a specific private ruling may also be declined where an entity does not provide the additional information requested by the Commissioner within a reasonable time.[134]

141. Applicants seeking the exercise of an administrative discretion, for example, to treat a document as a tax invoice under subsection 29–70(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) should request the exercise of that power rather than apply for a specific private ruling on how that power might be exercised.

Making a specific private ruling

142. A specific private ruling is given in writing to the applicant.

143. Tax officers should not generally provide pre-ruling opinions, draft private rulings or any other written expressions or written endorsements of informal assistance that may mislead taxpayers if that preliminary view is subsequently changed. File notes of telephone conversations or minutes of interviews may be provided to the taxpayer if they do not contain advice, or if the risk of misleading taxpayers is properly managed. This does not mean that tax officers cannot undertake discussions with the applicant to establish the particulars of the scheme and its purpose. Nor does this mean that a tax officer is precluded from general discussions with a taxpayer in relation to an issue. These processes are encouraged.[135] Also, the tax officer must ensure that the taxpayer is not misled and must clearly explain that any comments made will not be binding on the Commissioner.

[132] See paragraph 29 of Goods and Services Tax Ruling GSTR 1999/1 and paragraph 29 of Wine Equalisation Tax Ruling WETR 2002/1.
[133] From 1 July 2006 (section 62 of the TAA before 1 July 2006).
[134] See Law Administration Practice Statement PS LA 2008/5 Written binding advice – requests for further information, notification of assumptions and intended use of information from sources other than the applicant.
[135] Paragraphs 192 to 204 of this practice statement discuss the circumstances when indicative advice may be provided prior to the issue of a private, class or product ruling.

144. A specific private ruling on an interpretative issue is provided by a business line if there is a precedential ATO view of the relevant law or it involves a straightforward application of the law.[136] Where there is no precedential ATO view, the general rule[137] is that the interpretative issue must be referred by the business line to a Centre of Expertise to establish a precedential ATO view on the issue.[138] A specific private ruling is made after the precedential ATO view has been established.

145. A specific private ruling:

- states that it is a specific private ruling, and
- identifies the entity to which it applies.

146. The specific private ruling given to the applicant displays an authorisation number[139] and is accompanied by an explanatory note setting out its level of protection.

Written general advice on an indirect tax law (other than a fuel tax law)

147. Written general advice to an entity simply restates part of a public indirect tax ruling or law without applying the public indirect tax ruling or law to the entity's particular circumstances. Such written general advice must contain a statement explaining its form and status.

148. Written general advice is a private indirect tax ruling and an entity can rely on it.[140] That is, to the extent that the general view of the law applies to the entity's circumstances, the Commissioner will be bound by that advice.

149. Tax officers should refer to ORCLA for instructions on preparing written general advice on an indirect tax matter. Given the binding nature of this advice, many of the processes applying to specific private rulings apply.

150. On matters of a general, straightforward or simple nature, tax officers may provide oral guidance rather than a private indirect tax ruling. Tax officers should refer to the *GST Technical Advice quick reference guide* that contains procedures for these cases.

151. Guidance given orally on indirect tax matters is not an indirect tax ruling for the purposes of section 105-60.

[136] See paragraph 13 of Law Administration Practice Statement PS LA 2003/3 Precedential ATO View, which describes circumstances where tax officers are not required to identify and apply a precedential ATO view. These situations include the exercise of a discretion, making an ultimate conclusion of fact, or determining the value of something.

[137] Note that there are some exceptions to this general rule. See paragraph 13 of Law Administration Practice Statement PS LA 2004/4.

[138] See Law Administration Practice Statements PS LA 2004/4 Referral of issues to Centres of Expertise for the creation of precedential ATO view and PS LA 2003/3 Precedential ATO view.

[139] See ORCLA.

[140] This contrasts with written guidance on the application of other taxation laws which do not give a similar level of protection against liability for tax shortfall if the guidance is incorrect, or misleading and the taxpayer makes a mistake as a result – see paragraphs 224 to 227 of this practice statement.

Relying on a private indirect tax ruling

152. A private indirect tax ruling applies only to the entity to whom it is given.[141] They can rely on that ruling. However, this is subject to the Commissioner being satisfied that the entity did not contribute to the giving, or continuing in force, of the ruling by a misstatement or by suppressing a material fact.[142]

153. If a private indirect tax ruling is given to an entity and a subsequent public indirect tax ruling is issued which conflicts with the private indirect tax ruling, the public indirect tax ruling will prevail.[143]

154. If a private indirect tax ruling is issued which conflicts with an earlier public indirect tax ruling, the private indirect tax ruling will prevail.[144]

155. If an entity has a private indirect tax ruling and there is a change in the law, it will protect the entity up to the date of effect of that change.

Special procedures relating to private indirect tax rulings

General anti-avoidance rules

156. Tax officers should follow the relevant indirect tax instructions in Law Administration Practice Statement PS LA 2005/24 Application of General Anti-Avoidance Rules.

Timeframes – ATO service standards

157. The ATO aims to provide a response to an application for a private indirect tax ruling within 21 days of receiving all the necessary information. If all the necessary information has not been supplied in the application, the ATO aims to contact the applicant within 14 days of receiving the application to ask for the information. If the application is a complex matter that will take more than 21 days to resolve after receiving all the required information, the ATO aims to contact the applicant within 14 days of receiving all necessary information to negotiate an extended reply date.

Withdrawal of applications

158. An applicant may withdraw their application, either orally or in writing, at any time before the ruling is made. The Commissioner will provide written confirmation of the withdrawal.[145]

[141] Paragraph 105–60(3)(a).
[142] Subsection 105-60(2).
[143] Paragraph 105-60(3)(c).
[144] Paragraph 105-60(3)(b).
[145] See paragraph 32 of Goods and Services Tax Ruling GSTR 1999/1 and paragraph 32 of Wine Equalisation Tax Ruling WETR 2002/1.

Review of a private indirect tax ruling

159. A private indirect tax ruling cannot be reviewed under the provisions of the TAA as it is not a reviewable decision.[146] While an entity that is dissatisfied with their private indirect tax ruling cannot object against their ruling directly, they may request that the Commissioner make an assessment of their net tax amount for a tax period.[147] The entity may then object against the assessment.[148]

160. However, in the interests of sound administration, private indirect tax rulings are reviewed by the ATO on request. The entity should contact the case officer, or the relevant area of the ATO where the decision was made, and request a review of the ruling. The review is ordinarily conducted by a tax officer who was not involved in making the original decision.

Oral rulings under Division 360

161. An oral ruling is a form of legally binding advice that the ATO can provide in response to a taxpayer's oral application. If a taxpayer[149] relies on an oral ruling the Commissioner is bound to assess the taxpayer's liability in accordance with the oral ruling that is given and applies to them.

162. However, if the oral ruling is incorrect and disadvantages the taxpayer, then the law may be applied in a way that is more favourable for the taxpayer, provided the Commissioner is not prevented from doing so by a time limit imposed by the law.[150]

Applying for an oral ruling

163. The Commissioner may make an oral ruling on how a relevant provision applies or would apply to an individual in relation to a specified scheme. In practice this means that oral rulings are generally given on a provision of the law relating to personal income tax or Medicare levy. This is because other provisions[151] on which oral rulings may be given (such as withholding tax and fringe benefits tax) usually relate to obligations that generally fall on employers (in a business context) rather than on an individual. Oral rulings cannot be given on indirect tax matters.

164. A 'legal personal representative' can also apply for an oral ruling on an individual's behalf. A parent can apply for an oral ruling on behalf of a minor if they are a legal personal representative, for example, if they are the trustee of a trust that holds shares in a company for the minor's benefit.

[146] Section 110–50 or 111–50 (subsection 62(2) of the TAA, before 1 July 2006).
[147] Section 105–10 (section 23 of the TAA, before 1 July 2006).
[148] Subsection 105–40(2) (subsection 62(3) of the TAA, before 1 July 2006).
[149] A reference to 'taxpayer' in this section about oral rulings under Division 360 means the individual or their legal personal representative.
[150] Section 357-70.
[151] See paragraph 13 of this practice statement.

165. A taxpayer must apply for an oral ruling orally, in the manner approved by the Commissioner.[152] This means contacting the ATO to request advice in the form of an oral ruling about the application of a relevant provision of tax law to a specified scheme, and satisfying proof of identity requirements. If a taxpayer does not actually request an oral ruling but the request satisfies the requirements, an authorised tax officer[153] handling the call can ask the taxpayer if they would like the response to be recorded as an oral ruling.

166. If a taxpayer has made a written request for advice which could be satisfied by providing an oral ruling, the tax officer handling the written request can telephone the taxpayer and ask if they would like the request to be handled as an oral ruling. Before an oral ruling can be given, the taxpayer must indicate their willingness to withdraw their written advice request.

Requirements for an oral ruling

167. Not all oral enquiries can be satisfied with an oral ruling. To be eligible for an oral ruling:

- the advice sought must not relate to a business matter
- it must not be complex, and
- the matter sought to be ruled on must not be one that is already being, or has been, considered by the Commissioner for that taxpayer.[154]

168. The term 'business' is defined as including any profession, trade, employment, vocation or calling, but does not include occupation as an employee.[155] Consequently, taxpayers eligible for oral rulings will generally be employees or retired persons. However, an individual conducting a business may seek an oral ruling on a non-business matter.

169. Matters will be 'complex' and ineligible for an oral ruling if, for example:

- the decision turns on the interpretation of facts that require examination of documents
- the facts and circumstances on which the answer is to be based are open to a number of possible interpretations and therefore require further consideration and/or research
- the decision turns on a chain of conclusions to reach the final decision and therefore is not easily answered orally
- the relevant law is complex and would require considerable research or analysis, or
- it involves a calculation that is not covered by an online calculation tool.

170. For oral ruling purposes, a matter will not be considered to be complex if there is an approved response which clearly applies to the case and the question can be fully answered from the response.[156]

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[152] Subsection 360–5(2) and section 360–15.
[153] In this context 'authorised tax officer' means an officer with the requisite skill set that specifically includes the providing of oral rulings.
[154] Subsection 360–5(3).
[155] Subsection 995–1(1) of the ITAA 1997.
[156] See paragraphs 182 to 185 of this practice statement for further information on the approved response.

171. If the query concerns a business or complex matter, tax officers should advise the taxpayer to apply for a private ruling and, as appropriate, provide guidance in making a valid application.

172. A taxpayer should have all relevant information (that is, all the facts necessary to make an oral ruling) at the time they apply for an oral ruling. If the taxpayer cannot provide all the relevant information at the time of the application, they should be advised to call back when they have the necessary information and request an oral ruling at that time.

173. The Commissioner may decline to give an oral ruling if further information necessary to make the ruling has been requested from the taxpayer and it has not been supplied.[157]

174. If the taxpayer still wants some immediate assistance, it must be clearly explained to them that any assistance given can only be of a general nature, and is not an oral ruling, because they have not provided all the information necessary for a legally binding ruling.[158]

175. If the matter does not satisfy the criteria for an oral ruling, the taxpayer should be advised that any oral assistance given to them can only be in the nature of guidance (with the corresponding level of protection).[159] The taxpayer should also be advised that, if they want the Commissioner to provide binding advice they should apply for a private ruling.

Providing an oral ruling

176. An oral ruling may only be given by an appropriately 'authorised tax officer'.[160]

177. Tax officers must follow the relevant instructions contained in ORCLA and in *Reference Manager*.[161]

178. If an application is valid, the tax officer must confirm with the taxpayer all the facts and any assumptions that are made and, if appropriate, give the taxpayer an opportunity to respond before providing an oral ruling.

Assumptions

179. Although an oral ruling can be given on the basis of an assumption, an assumption should not be made if the taxpayer could reasonably be expected to provide the required information.

180. If it is considered that correctly making an oral ruling would depend on an assumption, this should be explained to the taxpayer who should then be asked whether they know of anything that might negate that assumption. If there is doubt about the reliability of the assumption, the tax officer should decline to give an oral ruling.

[157] Section 357–105.
[158] See paragraphs 258 to 271 of this practice statement for further information about oral guidance.
[159] See paragraphs 258 to 271 of this practice statement for further information about oral guidance.
[160] In this context 'authorised tax officer' means an officer with the requisite skill set that specifically includes the providing of oral rulings.
[161] *Reference Manager* is an intranet reference tool for frontline contact tax officers.

181. The Commissioner may decline to give an oral ruling if the correctness of the ruling would depend on an assumption, for instance, about the occurrence of a future event, which it would not be appropriate to make in an oral ruling context.[162]

Approved response

182. Tax officers should only provide an oral ruling if the question posed is covered by an approved response that fully answers the query. Generally, an approved response will be in the form of an existing client contact script. Where an approved response does not exist and an oral ruling is appropriate, the response will need to be cleared by a technical specialist based on the specific facts of the case.[163]

183. The approved response must be consistent with the precedential ATO view in relation to any interpretative issue raised by the taxpayer. Law Administration Practice Statement PS LA 2003/3 Precedential ATO view identifies the ATO documents that contain those views.

184. For the purpose of providing an oral ruling, tax officers may also refer to the following ATO documents that either reflect precedential ATO views or contain a clear, unambiguous interpretation of the relevant legislation:

- online reference materials (for example, client contact scripts)
- current ATO publications (not otherwise included in the *Schedule of documents containing precedential ATO views*), and
- ATO website material (other than that produced by external publishers).

185. A judgment on whether a matter can be fully answered from an approved response may depend on the expertise and experience of the tax officer handling the enquiry. The ATO has procedures in place for escalating matters to specialist advisers. For example, call centre officers can seek the assistance of a technical specialist. In appropriate cases, call centre officers can refer enquiries in accordance with business line escalation procedures.

Issuing an oral ruling

186. An oral ruling must be accompanied by a registration identifier for the ruling.[164]

187. A taxpayer who receives an oral ruling is not entitled to a written record of the ruling. If they prefer advice in a written form they may apply for a private ruling.[165]

188. An oral ruling provided under the former Division 360 continues in force as if it had been provided under the present Division 360.[166]

[162] Section 357–110.
[163] The procedures for obtaining clearance of the response by a technical specialist are set out in *Reference Manager*.
[164] Subsection 360–5(4).
[165] Subsection 360–5(5).
[166] Subitem 29(3), Schedule 2, *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005.*

Inconsistent rulings

189. The rules concerning inconsistent rulings (which are explained in paragraphs 112 to 113 of this practice statement) apply equally to oral rulings.

Withdrawing an application for an oral ruling

190. A taxpayer may withdraw their oral ruling application at any time before the oral ruling is given. The withdrawal must be given orally and in a manner determined by the Commissioner.[167] They may choose to withdraw their oral ruling application if they decide a private ruling or oral general guidance would better suit their needs.[168] Oral general guidance may include a reference to a public ruling that could apply to the taxpayer's circumstances.

Review of an oral ruling

191. A taxpayer can also choose not to rely on an oral ruling but, unlike private rulings, oral rulings are not reviewable.[169]

Providing indicative advice prior to issuing a private, class or product ruling

192. In the course of preparing a private, class or product ruling, tax officers may be asked to provide an indication of the likely ATO view of the law in relation to a scheme. Subject to paragraph 194, tax officers are not to provide indicative advice. This is to ensure that no binding advice is provided unless the actual details of the proposed scheme and its purpose have been firmly established, and the ATO has finalised its view about the tax consequences of the scheme, so as not to mislead taxpayers. However, tax officers can undertake informal discussions with taxpayers raising, for example, areas of possible concern.[170]

193. Providing indicative advice before, say, the actual details of the proposed scheme and its purpose have been firmly established may create expectations that the ATO will adopt a particular view in relation to a particular scheme that may not subsequently be met. This has the potential to undermine confidence in the ATO's administration of the tax system.

194. Nevertheless, there may be occasions (where the ATO has established the details of the proposed scheme, but has not finalised the position on the tax consequences) that call for the provision of indicative advice. For example, the provision of favourable indicative advice could occur where all the following conditions are met.

- There is:
  - a substantial and time dependent business need
  - a very low risk of a different view being taken
  - appropriate documentation and transparency, and

[167] Section 360–15.
[168] Section 360–10.
[169] There is no provision in Division 360 that provides objection rights in relation to an oral ruling.
[170] The discussion about indicative advice in this section applies generally to private, class and product rulings. However, there are special procedures in the *Public Rulings Manual* which must be followed when issuing draft class or product rulings to the taxpayer. See Part 15 (for product rulings) and Part 16 (for class rulings).

- involvement of appropriate tax officers, including the case manager as well as relevant technical specialists.

- The taxpayer is fully aware and acknowledges that:
  - the matter is still under consideration and therefore the advice is preliminary only, and
  - the advice is not binding on the Commissioner and should not be relied on as representing the ATO view of the law on the matter.

There must be no undue delay by the tax officer in providing the final ruling, and the taxpayer must be kept informed of the progress of the ruling at appropriate intervals.

195. Where the indicative advice is provided to an applicant for a class or product ruling, and that advice may be conveyed to third parties, the tax officer must request the applicant to ensure that the conditions on which the ATO's advice is provided are also explained to the third parties.

196. Indicative advice will not provide protection from tax that would otherwise be payable under the law, shortfall penalties or interest charges.

197. Consistent with corporate record keeping requirements, accurate and complete notes must be made of all discussions prior to, and in the course of dealing with, an application for a private, class or product ruling. Where indicative advice is provided in connection with a request for written advice, a record of the indicative advice must be attached to the case record on the relevant case management system.

Informal discussions

198. As mentioned in paragraph 192 of this practice statement, tax officers can have informal discussions with taxpayers and/or their advisers on technical matters. Tax Officers are encouraged to do so, especially where there is an opportunity to clarify matters or to understand better the taxpayer's position.

199. Informal discussions can be undertaken with a taxpayer or their adviser about a particular scheme, either prior to or following the receipt of a written request for advice. Indeed, such discussions may reveal the need for a written request for advice, and shed light on the information and material that should be provided with the request, or is needed to answer an existing request.[171]

200. If the ATO receives a request for a private, class or product ruling involving complex matters, general discussions around ambiguity in the law or its application are often a necessary part of ensuring that all relevant material is provided and considered, to enable the facts to be correctly established. Such discussions may also highlight to the taxpayer or adviser those areas where the ATO has concerns.

[171] See the discussion under the *Pre-lodgment meeting* heading of PS LA 2005/10 which may also apply, as appropriate, to ruling applications other than priority cases.

201. Where a case officer, in consultation with the case manager and any relevant technical specialists, believes that those concerns may lead to an unfavourable response from the ATO, it is often appropriate to inform the taxpayer or their adviser accordingly. In these circumstances, the case manager and, if appropriate, the relevant technical specialist, are to explain the basis of the concerns to the taxpayer or their adviser. It must be made clear to them at the time of this discussion that:

- these concerns are being communicated so that they can take the possibility of a final unfavourable view into account in deciding whether to continue to expend time and money preparing to implement the proposed scheme, and
- communicating concerns in this informal way does not constitute an indication of the ATO's view of the law in relation to the scheme.

202. In undertaking these discussions, the tax officer must ensure that the taxpayer is not misled, and must clearly explain that any comments made will not be binding on the Commissioner. Relevant documentation is to be prepared and, where appropriate, captured on the relevant case management system.

203. Should the taxpayer or their adviser submit material changes to the scheme upon which the ruling is sought following the discussions, the revised scheme should be treated as a new application. However, the priority already afforded to the original request is to be maintained.[172]

204. If after providing indicative advice, or following informal discussions about a particular scheme, the taxpayer or their adviser withdraws their request, and considerable effort has gone into developing a precedential ATO view, consideration should be given to preparing a public ruling or an ATO ID on the proposed scheme.[173]

Administratively binding advice

205. The ATO is not obliged to provide written advice addressing an entity's specific circumstances other than in the form of a private ruling under Division 359.

206. However, in the interests of sound administration, the ATO's practice has been to provide administratively binding advice in a limited range of circumstances in response to a taxpayer's request for advice. In addition, the ATO provides a substantial amount of guidance through publications, its website and its client contact areas.

207. Attachment B contains an exhaustive list of those circumstances in which the ATO can provide administratively binding advice to a taxpayer.

208. If a taxpayer requests written advice on any of the listed topics in connection with their own particular circumstances, it must be treated as a request for administratively binding advice. The request must be in writing. It must fully and accurately identify the parties to the arrangement and disclose all relevant facts. Furthermore, no fundamental assumptions can be made about the arrangement. The arrangement must be in such serious contemplation that its material elements are settled and clearly stated by the taxpayer.

[172] See paragraph 89 of this practice statement.
[173] See paragraph 27 of Law Administration Practice Statement PS LA 2001/8 ATO Interpretative Decisions.

209. The provision about which administratively binding advice is given need not be a provision of income tax law. It can be about a superannuation, excise or any other law administered by the Commissioner under which extent of liability is worked out and is a law which does not have a legally binding rulings system (for example superannuation guarantee charge).

210. Administratively binding advice may also be given to an entity other than that to which the provision applies. For example, in relation to corporate restructuring, takeovers and arrangements that would be undertaken by a company when it is incorporated.[174] However, in these circumstances, the entity requesting advice may not be in a position to provide detailed information about the entity to which the advice is to apply, so tax officers will need to ensure that there are sufficient facts on which to base the advice.

211. The ATO's administrative practice for administratively binding advice where a provision has been re-enacted or remade is to adopt the same approach as is taken for legally binding rulings.[175] That is, if the Commissioner has provided administratively binding advice about a provision and that provision is re-enacted or remade, the advice is taken to be about the re-enacted or remade provision, to the extent that the new law expresses the same ideas as the old law. However, if the law is substantively changed, the part of the advice dealing with the changed law ceases to apply.

212. Administratively binding advice is not legally binding on the Commissioner. When the time comes to assess liability to tax, the law as it then exists must be applied to the facts as established at that time.[176] However, the ATO will stand by what is said in such advice and will not depart from it unless:

- there have been legislative changes since the advice was given
- a tribunal or court decision has affected our interpretation of the law since the advice was given, or
- for other reasons, the advice is no longer considered appropriate.

For example, if commercial practice has changed, the advice has been exploited in an abusive and unintended way, or the advice is found on reconsideration to be wrong in law.

213. Where the ATO departs from its earlier administratively binding advice because of a legislative change, it will apply the change from the date of effect of the amending legislation. If the ATO departs from its earlier advice for other reasons, normally departure from that advice would be on a prospective basis only, unless particular circumstances warrant another approach (for example, if the advice has been exploited in an abusive and unintended way).

214. The outcome of an arrangement may also be different from that detailed in the advice request. If the underlying facts change in a material way, the advice cannot provide any protection to those who seek to rely on it.

215. Where the Commissioner stands by the administratively binding advice, the taxpayer who relies on the advice will be protected against the tax that would otherwise be payable under the law, shortfall penalty and interest charges.

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[174] This should be distinguished from a situation where the request for advice is about the application of a relevant provision to a large number of persons who would be affected by the arrangement proposed by the entity requesting the advice – in which case the entity should request a class ruling.
[175] See paragraph 24 of this practice statement.
[176] *Federal Commissioner of Taxation v. Wade* (1951) 84 CLR 105 at 117.

216. Where the Commissioner is unable to stand by the advice, the taxpayer who relies on the advice will be liable for any tax that would otherwise be payable under the law (unless a time limit imposed by the law precludes the liability). However, they are protected against shortfall penalty and, if they have relied on the advice reasonably and in good faith, against interest charges.[177]

PART B – GUIDANCE

217. Assistance provided in a form other than a ruling may fulfil a taxpayer's need for information without them having to satisfy the conditions that apply to the making of a binding ruling. Guidance may be given in writing or orally, including by way of an ATO publication.

218. ATO guidance is provided to help taxpayers understand their obligations and entitlements under the laws administered by the Commissioner. Guidance is not binding on the Commissioner.

219. If a taxpayer wants the Commissioner to provide binding advice about the applicability of the law to their individual circumstances, they should apply for a private ruling or an oral ruling.[178]

220. It may sometimes be difficult to draw a distinction between requests for guidance and binding advice. That is, whether a taxpayer has a specific transaction in mind and is expecting binding advice or whether they are just broadly considering a course of action and are only expecting general guidance. For example, where a history teacher simply asks if self-education deductions are available for travel to places of historical significance and provides no other information about their specific circumstances.

221. If there is any doubt whether the request is for guidance or binding advice, the taxpayer should be contacted and their needs ascertained. If their needs can only be satisfied by a private ruling, they must be invited to supply the necessary information and be given information about how to make a valid application. The tax officer should also consider whether it would be appropriate, in the taxpayer's circumstances, to offer an oral ruling.[179]

Written guidance

222. Written guidance is issued to help taxpayers understand their obligations and entitlements under the laws administered by the Commissioner. It provides only general assistance and cannot cover all possibilities or the circumstances of every taxpayer. Written guidance may also be in the form of an ATO publication.

223. Written guidance (other than in relation to an indirect tax matter)[180] is usually provided if the taxpayer has enquired about the broad operation of the law and has not provided details of their specific circumstances. A taxpayer who receives written guidance must decide how the guidance applies to their circumstances. Tax officers should refer to ORCLA for further information about providing written guidance.

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[177] Sections 284–215, 361-5, 280-160 and 8AAG of the TAA.
[178] Except for indirect tax matters where an indirect tax ruling does not include one given orally.
[179] See paragraphs 161 to 191 of this practice statement.
[180] See paragraphs 147 to 151 of this practice statement. Note that assistance on an indirect tax matter can be a public indirect tax ruling, see paragraphs 59 to 63 of this practice statement.

Protection level

224. A taxpayer who relies on written guidance, including a statement in an approved publication, will remain liable for the tax that would otherwise be payable under the law where the guidance is incorrect, or misleading and the taxpayer makes a mistake as a result (unless prevented by a relevant time limit in the law). However, they will be protected against the shortfall penalty that might otherwise arise.[181]

225. In addition, if the shortfall arises under a relevant provision,[182] a taxpayer will be protected against any interest charges if they relied on the guidance reasonably and in good faith.[183]

226. If the shortfall does not arise under a relevant provision, the level of protection against interest charges from reliance on written guidance depends on the exercise of the power to remit interest charges under section 280-160 and section 8AAG of the TAA.[184]

227. Taxpayers should not rely on publications that are out of date. If they do, they may not be protected against any interest charges. This is because generally reliance on an earlier document at a given point in time where a later publication that correctly reflects the law is available would not be reasonable and in good faith. Nevertheless, they will still be protected from shortfall penalty. However, if a taxpayer can demonstrate that in their circumstances reliance on the out of date publication was reasonable and in good faith, they will be protected from both shortfall penalty and interest charges.[185]

Published speeches and minutes of consultative forums

228. Speeches by senior tax officers and minutes of consultative forums reflect our current thinking on particular issues. Minutes are a record of proceedings at a consultative forum and reflect the discussion between the ATO and the other attendees. They are published for transparency reasons.

229. Speeches and minutes that are published on the ATO website would ordinarily be publications approved in writing by the Commissioner. To be such a publication the approval by the Commissioner, delegate or authorised officer must be in writing. If they are so approved, and provided that they are not stated to be non-binding,[186] they provide the same level of protection as written guidance.[187] Speeches and minutes are not in the nature of 'advice' and therefore cannot be rulings for indirect tax purposes.

230. A taxpayer who needs formal advice about the applicability to their own specific circumstances of information contained in published speeches or minutes should apply for a private ruling.

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[181] Subsection 284–215(1) and section 298-20.
[182] See paragraph 13 of this practice statement.
[183] See section 361-5.
[184] Law Administration Practice Statement PS LA 2006/8 Remission of shortfall interest charge and general interest charge for shortfall periods contains guidelines on the remission of interest charges.
[185] Subsection 284-215(1) and section 361-5.
[186] See paragraphs 253 to 254 of this practice statement for the level of protection for publications stated to be non-binding.
[187] See paragraphs 224 to 227 of this practice statement.

Media releases

231. Media releases are used to communicate to taxpayers what our intention is in relation to certain issues. As such media releases may contain statements intended to be relied on. If they do, they will provide the same level of protection as written guidance.[188] To the extent they contain advice on an indirect tax matter, they are public indirect tax rulings for the purposes of section 105–60, although this is likely to be rare in practice.[189]

232. Media releases may also refer to some other ATO publication such as a public ruling, draft public ruling or law administration practice statement that would have a more detailed explanation of the subject matter. In this case a taxpayer may rely on a statement in the other publication. If the statement in the other publication is later found to be incorrect, or misleading and the taxpayer makes a mistake, they will receive the level of protection that is applicable to the other publication.[190]

233. Although a media release reflects the ATO's position at the time of its publication, updated information on the topic may be contained in a subsequent ATO publication. If a taxpayer relies on a media release in these circumstances, they will still be protected from any shortfall penalties[191] that may apply and consideration will be given to the particular facts and circumstances in relation to remitting interest charges.[192] For example, they may not be protected against all interest charges where a subsequent ATO publication that correctly reflects the law was readily available and accessible to them at that time.

Decision impact statements

234. Decision impact statements[193] are published in the 'Legal database' on the ATO website to communicate to the community the ATO reaction to adverse and other significant court or tribunal decisions. They include a summary of the case details, a summary of the facts and issues decided, and they note any consequences in relation to public rulings. They set out how the law will be administered as a consequence of the decision, pending any change to existing ATO rulings, but are not normally expected to contain advice. They are not public rulings for the purposes of Part 5-5. To the extent they contain advice on an indirect tax law (other than a fuel tax law) that affects an entity's liability or entitlements, they may be public indirect tax rulings for the purposes of section 105–60.

235. A taxpayer who relies on a decision impact statement that is not a public indirect tax ruling, and makes a mistake as a result of the statement being incorrect or misleading, will receive the same penalty and interest protection as for written guidance.[194]

236. Where a decision impact statement does contain advice on how the Commissioner would interpret an indirect tax law (other than a fuel tax law), the decision impact statement will state that the advice is a public indirect tax ruling

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[188] See paragraphs 224 to 227 of this practice statement.
[189] The protection level for public indirect tax rulings is explained in paragraph 19 of this practice statement.
[190] Taxpayer alerts are excluded from the scope of this practice statement – see paragraph 6.
[191] Subsection 284-215(1).
[192] Section 361-5.
[193] See Law Administration Practice Statement PS LA 2007/2 Management of Decisions of Courts and Tribunals.
[194] See paragraphs 224 to 226 of this practice statement.

for the purposes of section 105-60 and the taxpayer will receive the same protection that applies for public indirect tax rulings.[195]

Published materials produced for internal ATO purposes

ATO Interpretative Decisions (ATO IDs)

237. An ATO ID is an edited and summarised decision on an interpretative matter that is indicative of how a provision of the law might be applied. ATO IDs do not provide advice to taxpayers and are not rulings under section 105–60 or under Part 5–5 and therefore the tax that would otherwise be payable under the law remains payable. ATO IDs represent a precedential ATO view that tax officers must apply in resolving interpretative issues or, if they consider the application of the precedent will result in an incorrect decision or unintended outcome, escalate the matter for review.[196]

238. An ATO ID provides authority for a private ruling or other advice to be given to a taxpayer in relation to the interpretative matter it covers, and for dispute resolution and compliance activity by tax officers, but do not in themselves represent any established general administrative practice. Further information about ATO IDs is contained in Law Administration Practice Statement PS LA 2001/8 ATO Interpretative Decisions.

239. ATO IDs are produced for the purpose of facilitating consistent and timely interpretative decision making by tax officers. However, they may not always contain a complete statement of all the facts in summarising the application of the law to complex circumstances. For transparency reasons, they are made publicly available through the 'Legal database' on the ATO website.

240. ATO IDs state the date of the decision and are withdrawn if a review finds that they are no longer accurate.

241. If a taxpayer relies on a current ATO ID where their own circumstances are not materially different from those described in the ATO ID, but the ATO ID is later found to be incorrect, or misleading and the taxpayer makes a mistake as a result, they will receive the same penalty and interest protection as for written guidance.[197]

Law administration practice statements

242. Law administration practice statements are produced principally to provide direction and assistance to tax officers on approaches to be taken in performing duties involving the application of laws administered by the Commissioner.

243. They are published primarily for transparency and accountability reasons. They are not intended to provide interpretative advice but may provide guidance on the law in the course of providing directions to tax officers.

244. Law administration practice statements (general administration) derive their authority from the Commissioner's powers of general administration as set out in the various Acts administered by the Commissioner. These practice statements

[195] The protection level for public indirect tax rulings is explained in paragraph 19 of this practice statement.
[196] See Law Administration Practice Statement PS LA 2003/3 Precedential ATO view.
[197] See paragraphs 224 to 226 of this practice statement.

focus on practical administration of the tax system and aim to help reduce compliance costs for taxpayers.

245. Tax officers are required to follow law administration practice statements unless they consider that the application of a particular practice statement would have unintended consequences or is otherwise incorrect. Where this occurs officers must follow their business line's escalation process.

246. A taxpayer who relies on a law administration practice statement that is incorrect, or misleading and makes a mistake as a result, will receive the same penalty and interest protection as for written guidance.[198]

247. Law administration practice statements are not rulings under section 105–60 or under Part 5–5, and therefore the tax that would otherwise be payable under the law remains payable. Further information about law administration practice statements is contained in Law Administration Practice Statement PS LA 1998/1 Law Administration Practice Statements.

Technical skilling materials

248. The ATO produces educational material for the purpose of enhancing the knowledge and skills of tax officers engaged in technical decision making. Some of this material is published to assist tax practitioners who have corresponding educational needs. Technical skilling materials are not public rulings for the purposes of section 105-60 or under Part 5-5 as they do not constitute advice given or published by the Commissioner.

249. Technical skilling materials are often prepared at the time of legislative change and may not reflect developments in the law that have emerged since the time they were prepared. Furthermore, the coverage of this material is unlikely to address the less common and more complex issues that actually occur. Ordinarily, taxpayers seeking general guidance on the topic covered by this material should refer to other ATO publications covering the same topic. Publications other than skilling materials are more likely to reflect the current ATO position on a particular topic.

250. If a taxpayer does rely on a statement in the technical skilling material that is later found to be incorrect, or misleading and the taxpayer makes a mistake as a result, they will receive the same penalty and interest protection as for written guidance.[199]

251. If at the time the taxpayer seeks to rely on the statement, there is available an ATO publication that correctly reflects the law, they may not be protected against all interest charges depending on the facts and circumstances. However, if a taxpayer can demonstrate that in their circumstances reliance on the earlier release was reasonable and in good faith, they will be protected from both shortfall penalty and interest charges.[200]

[198] See paragraphs 224 to 226 of this practice statement.
[199] See paragraphs 224 to 227 of this practice statement.
[200] Subsection 284-215(1), section 361-5 and section 8AAG of the TAA.

ATO communications not intended to be relied on

252. In limited circumstances the Commissioner may publish documents that are specifically labelled as non-binding or not intended to be relied on. Accordingly, these publications cannot be described as guidance.

Non-binding publications

253. Where a taxpayer relies on a statement in an ATO publication that expressly states that it is non-binding they will be liable for any tax that would otherwise be payable under the law where the statement is incorrect or misleading and the taxpayer makes a mistake as a result.

254. Subject to the exception explained in paragraph 255 of this practice statement, no shortfall penalty will be imposed. However, there is no protection against interest charges under section 361-5. Although, consideration should be given to remitting any interest charged under section 280-160 or section 8AAG of the TAA, either in whole or in part.

Documents not intended to be relied on

255. No penalty or interest protection is provided where an ATO publication, or a statement in an ATO publication states that it is not intended to be relied on. Such communications should state that they are not a publication approved in writing by the Commissioner so that readers are not misled. An example of this type of document would be a draft discussion paper dealing with an emerging topic where the application of tax laws is unresolved.

Edited versions

256. Edited versions of private rulings and other written binding advice are published in the *Register of private binding rulings* to improve the integrity of ATO advice. They constitute a historical record of the written binding advice issued. Consequently they remain on the register even where, for example, later changes to the law may make them inaccurate, until they are archived.

257. They should not be relied on by taxpayers or their advisers in any way. They are not intended to convey advice and are not rulings under section 105–60 or under Part 5-5. They are not publications approved in writing by the Commissioner and no penalty or interest protection is provided. [201]

Oral guidance

258. Tax officers may provide oral guidance about the application of tax laws when the taxpayer does not require an oral ruling or a request for an oral ruling does not satisfy the requirements for an oral ruling.[202]

259. Oral guidance is to be provided only on matters of a general, straightforward or simple nature.

[201] Refer to Law Administration Practice Statement PS LA 2008/4 Publication of written binding advice.
[202] See paragraphs 167 to 175 of this practice statement about the requirements for an oral ruling to be given.

260. Oral guidance must be consistent with the precedential ATO view in relation to any interpretative issue raised by the taxpayer.[203]

261. Reference may also be made to the following ATO documents that either reflect precedential ATO views or contain a clear, unambiguous interpretation of the relevant legislation:

- online reference materials (for example, client contact scripts)
- current ATO publications (not otherwise included in the *Schedule of documents containing precedential ATO views*), and
- ATO website material (other than that produced by external publishers).

Procedures for providing oral guidance

262. Tax officers provide oral guidance by phone or in person where guidance is orally requested and it is appropriate to respond orally. This form of assistance is ordinarily provided through ATO call centres and shopfronts. It may also be provided when enquiries are referred by client contact officers in accordance with business line escalation procedures.

263. Tax officers must take care in providing oral guidance. Before tax officers give any oral guidance, they must take all reasonable steps to ensure that all relevant information has been obtained from the taxpayer.

264. Where a taxpayer seeks assistance on a matter that is not of a general, straightforward or simple nature, the tax officer should suggest that they apply for a private ruling[204] or otherwise request written guidance[205] and, as appropriate, provide information about making a valid application. This ensures that the taxpayer receives a properly considered opinion on the application of the law to the taxpayer's circumstances.

265. A judgment on whether a matter is general, straightforward or simple, and whether a relevant ATO view applies, may depend on the expertise and experience of the tax officer responding to the enquiry. Tax officers must refer requests for oral guidance that are not appropriate for them to provide, or requests for an oral ruling, to the relevant ATO call centre or shopfront. Alternatively, a tax officer may note the query and provide a timely response after researching the matter, or arrange for a call back by a specialist adviser or other tax officer who can more appropriately provide the guidance.

266. For tax officers in ATO call centres or shopfronts, a matter may be considered complex if:

- it is not covered by a call centre script
- the facts of the arrangement are such that they are not easily compiled or understood, or
- in depth consideration should, be given to the matter.

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[203] 'Precedential ATO view' is defined in Law Administration Practice Statement PS LA 2003/3. This practice statement also identifies the ATO documents that contain those views.

[204] See paragraphs 79 to 95 of this practice statement, which explain the requirements for a valid application for a private ruling.

[205] This would include administratively binding advice (see paragraphs 205 to 216 of this practice statement) and written guidance (see paragraphs 222 to 227 of this practice statement).

267. It is important that oral guidance on a particular topic is provided by an appropriate officer, that is, an officer who, by virtue of their position, is able to provide advice on that topic in the normal course of their duties.

268. It would not be appropriate for a tax officer to provide oral guidance if:

- the query concerns an area of law beyond their capability
- they are unable to identify the relevant law or the precedential ATO view, or
- the facts of the relevant arrangement are such that they are not easily compiled or understood.

In these circumstances, tax officers should either refer the issue to an appropriate officer, or assist the taxpayer in seeking the form of assistance which best suits their needs.

269. The ATO has procedures in place for escalating matters to specialist advisers. For example, call centre officers can seek the assistance of a technical specialist or escalate the matter within their business line to ascertain whether oral guidance can be provided.

270. If a tax officer is asked a question on a matter beyond the normal scope of their duties, they should refer the taxpayer to the appropriate area.

Level of protection

271. A taxpayer who relies on oral guidance that is later found to be incorrect, or misleading and the taxpayer makes a mistake as a result, will still be liable for any tax that would otherwise be payable under the law (unless prevented by a relevant time limit in the law). Where a taxpayer has made a full and true disclosure of the material facts relevant to their enquiry, no shortfall penalties will be payable.[206] Also, interest charges will not be payable if they relied on the guidance reasonably and in good faith.[207]

Guidance about proposed changes to laws administered by the Commissioner

272. Broadly, tax officers do not have the authority to provide indicative advice or guidance about legislation prior to its Royal Assent, or on regulations prior to their registration on the Federal Register of Legislative Instruments.

273. Any guidance provided to taxpayers about announced proposed changes to the laws or regulations should be limited to the public announcement and other publicly released information in the source documents that announced the proposed law change, for example, a minister's media release or the Explanatory Memorandum to the Bill.

274. Tax officers should refer to Law Administration Practice Statement PS LA 2004/6[208] for instructions on responding to taxpayers who enquire about the potential effect of proposed legislative changes announced by the government.

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[206] See subsection 284-215(1).
[207] See section 361-5 and section 8AAG of the TAA.
[208] The ATO's role in providing information or advice on the potential application of announced changes to the tax law, or where legislative change is contemplated but not announced, is explained in Law Administration Practice Statement PS LA 2004/6.

SUMMARY OF LEVELS OF PROTECTION

The various levels of protection (against tax shortfall, shortfall penalty and interest charges) attaching to ATO assistance, ranked from highest to lowest, are:

Level of protection	Tax shortfall protection	Shortfall penalty protection	Interest charges protection
1	**Yes**	**n/a**	**n/a**
2	**No**	**Yes**	**Yes**
3	**No**	**No[a]**	**No[b]**

[a] Note that in some cases a taxpayer may be protected from shortfall penalty. Notwithstanding that a publication is labelled non-binding, protection against shortfall penalty will be available if the document has been approved in writing by the Commissioner. Also penalties may be remitted in the circumstances of the individual case for reasons unrelated to the guidance relied on.

[b] Note that interest charges may be remitted in the circumstances of the individual case for reasons unrelated to the guidance relied on.

Protection against interest on the shortfall is available where the taxpayer is acting reasonably and in good faith. It does not cover the general interest charge for late payment of the tax shortfall, that is, after 21 days of the Commissioner notifying the taxpayer of the correct position. Also, for superannuation guarantee charge matters, the protection does not extend to the nominal interest component of a superannuation guarantee shortfall under section 31 of the *Superannuation Guarantee (Administration) Act 1992*.

The following tables indicate the level of protection provided by each form of assistance if it is found to be incorrect.

Assistance provided to a particular taxpayer

Form of assistance	Level of protection	Paragraphs
Private ruling under Division 359	1	79-128
Private indirect tax ruling • specific private ruling for entity • written general advice that applies to entity	 1 1	129-160
Oral ruling under Division 360	1	161-191
Administratively binding advice	1[c]	205-216
Written guidance (other than on indirect tax matters)	2	222-227
Oral guidance	2	258-271
ATO communications not intended to be relied on	3	252-257

[c] This level of protection is subject to the conditions set out in paragraph 212.

Assistance provided to taxpayers generally

Form of assistance	Level of protection	Paragraphs
Public ruling under Division 358 (including a product ruling or class ruling)	1	30-58
Public indirect tax ruling (including a publication that contains advice on an indirect tax matter)	1	59-63
Other publicly-issued ruling	1[d]	68-74
Draft public ruling	2	64-67
Publications (including ATO IDs) other than: • public rulings (as mentioned above) or • ATO communications not intended to be relied on	2	222-251
ATO communications not intended to be relied on	3	252-257

[d] Generally the ATO stands by what is said in these rulings but may depart from them if there are good and substantial reasons in which case the taxpayer will only receive Level 2 protection.

Misleading information

Sometimes a statement in an ATO publication might be correct, but a particular taxpayer may have been misled by it on reasonable grounds. Taxpayers who rely on ATO publications (except those specified as non-binding) that are relevant to their circumstances but are misleading to their intended audience, and who make a mistake as a result of reliance on the publication, will receive Level 2 protection.

Genuine effort to follow ATO information

Where a taxpayer takes reasonable care to follow ATO information but makes an honest mistake they will receive Level 2 protection.

Attachment B

ADMINISTRATIVELY BINDING ADVICE[209] – EXHAUSTIVE LIST OF TOPICS

Where the requirements of this practice statement have otherwise been met, and pending the outcome of the further review of the application to other federal taxes of improvements to the income tax ruling system, administratively binding advice can continue to be provided on the following topics.

- Advice on a superannuation, excise or any other law administered by the Commissioner under which the extent of liability is worked out and is a law which does not have a legally binding rulings system (for example, superannuation guarantee charge and excess contributions tax).
- Advice on an arrangement where a company intends to launch a takeover of a target company and the first company wants advice (without getting consent from the target company) on the tax consequences for the target company.
- Advice on a proposed scheme that would be undertaken by a company, (including a corporate trustee) when it is incorporated or a trust when it is settled.
- Advice to a Commonwealth, state or territory government or one of their agencies about the tax consequences for a taxable purchaser under a proposed privatisation.
- Advice to a Commonwealth, state or territory government or one of their government authorities about a proposed transaction, for example, an industry restructure which has tax consequences for any new entity to be created as part of the restructure.
- Advice on a scheme where private or public infrastructure matters are raised and there are no entities presently in existence capable of requesting a private ruling.

[209] Paragraphs 205 to 216 of this practice statement explain when administratively binding advice may be provided to a taxpayer.

Amendment history

Date of amendment	Part	Comment
8 April 2011	Various Contact details	'Tax Office' updated to 'ATO' as per Style Guide recommendations. Updated.
22 October 2008	Footnote 4 and references	Updated.

Subject references	advice, administratively binding advice; advice about proposed changes to tax laws; class ruling; guidance, indirect tax ruling; oral general advice; oral ruling; publications; private ruling; product grants and benefits ruling; product ruling; public ruling; written general advice
Legislative references	A New Tax System (Australian Business Number) Act 1999 A New Tax System (Goods and Service Tax) Act 1999 29-70 A New Tax System (Goods and Service Tax) Act 1999 184-1 Fuel Tax Act 2006 60-5 ITAA 1936 175A ITAA 1997 Div 30 ITAA 1997 35–55 ITAA 1997 960–100 ITAA 1997 995–1 TAA 1953 3C TAA 1953 8AAG TAA 1953 14ZW TAA 1953 14ZX TAA 1953 14ZYB TAA 1953 14ZZ TAA 1953 23 TAA 1953 37 TAA 1953 62 TAA 1953 63 TAA 1953 Sch 1 105–10 TAA 1953 Sch 1 105–40 TAA 1953 Sch 1 105–60 TAA 1953 Sch 1 110–50 TAA 1953 Sch 1 111–50 TAA 1953 Sch 1 Div 280 TAA 1953 Sch 1 Subdiv 284-B TAA 1953 Sch 1 284-75 TAA 1953 Sch 1 284-90 TAA 1953 Sch 1 284-145 TAA 1953 Sch 1 284–215 TAA 1953 Sch 1 298-20 TAA 1953 Sch 1 356-5 TAA 1953 Sch 1 Div 357 TAA 1953 Sch 1 357–55 TAA 1953 Sch 1 357–60 TAA 1953 Sch 1 357–65 TAA 1953 Sch 1 357-70 TAA 1953 Sch 1 357–75 TAA 1953 Sch 1 357-85 TAA 1953 Sch 1 357–105 TAA 1953 Sch 1 357-110 TAA 1953 Sch 1 357–115 TAA 1953 Sch 1 357–120 TAA 1953 Sch 1 356-5 TAA 1953 Sch 1 Div 358 TAA 1953 Sch 1 358–5 TAA 1953 Sch 1 358–10 TAA 1953 Sch 1 358–20 TAA 1953 Sch 1 Div 359 TAA 1953 Sch 1 359–5 TAA 1953 Sch 1 359–10

	TAA 1953 Sch 1 359-15 TAA 1953 Sch 1 359-20 TAA 1953 Sch 1 359-25 TAA 1953 Sch 1 359–30 TAA 1953 Sch 1 359–35 TAA 1953 Sch 1 359–40 TAA 1953 Sch 1 359–45 TAA 1953 Sch 1 359–50 TAA 1953 Sch 1 359–55 TAA 1953 Sch 1 359–60 TAA 1953 Sch 1 Div 360 TAA 1953 Sch 1 360–5 TAA 1953 Sch 1 360–10 TAA 1953 Sch 1 360–15 TAA 1953 Sch 1 361–5 TAA 1953 Sch 1 388-50 Product Grants and Benefits Administration Act 2000 8 Small Superannuation Accounts Act 1995 Superannuation Guarantee (Administration) Act 1992 Superannuation Industry (Supervision) Act 1993 Superannuation (Unclaimed Money and Lost Members) Act 1999 Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005
Related public rulings	TR 94/5; TR 2006/10; TR 2006/11; CR 2001/1; GSTR 1999/1; PR 2007/71; WETR 2002/1; MT 2006/1
Related practice statements	PS LA 1998/1; PS LA 2001/8; PS LA 2003/3; PS LA 2003/9; PS LA 2003/10; PS LA 2004/4; PS LA 2004/6; PS LA 2005/10; PS LA 2008/15; PS LA 2005/24; PS LA 2006/2; PS LA 2006/8; PS LA 2008/4; PS LA 2008/5, PS LA 2007/2
Case references	Federal Commissioner of Taxation v. Reynolds (1981) 11 ATR 629; 81 ATC 4131 Federal Commissioner of Taxation v. Wade (1951) 84 CLR 105; 9 ATD 337
File references	05/13223; 06/4284; 06/8967; 06/12189
Date issued	28 February 2008
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Other business lines consulted	ATO Relations, Excise, GST, Large Business & International, Debt, Client Account Services, Micro Enterprises and Individuals, Small & Medium Enterprises, Superannuation