PS LA 2008/4 - Publication of edited versions of written binding advice

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2008/4

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 Tax Office staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs Tax Office staff must follow their business line's escalation process.

SUBJECT: **Publication of edited versions of written binding advice**

PURPOSE: **To provide guidance on:**

- **the requirement to publish edited versions of written binding advice**
- **editing written binding advice for publication, and**
- **the review mechanisms available to taxpayers in respect of edited versions of written binding advice intended for publication**

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STATEMENT

1. This practice statement should be read in conjunction with Law Administration Practice Statements PS LA 2008/3 – Provision of advice and guidance by the Tax Office, PS LA 2002/13 – Authorisation of written binding advice, and the Online Resource Centre for Law Administration (ORCLA) – which is available only on the Tax Office intranet.

2. To improve the integrity of its advice processes, the Tax Office publishes edited versions of all written binding advice (referred to as edited versions) provided to taxpayers. Edited versions are published in the Register of Private Binding Rulings (the register) on the Tax Office website.

3. The register provides a public historical record of all edited written binding advice issued by the Tax Office. Therefore, documents published in the register will not be updated to reflect changes in the law, withdrawal of advice or any other changes.

4. The Commissioner **is not bound** by an edited version in relation to any taxpayer. An edited version is not:

   - intended to provide taxpayers with advice or guidance, or
   - a publication approved in writing by the Commissioner.

5. Accordingly, a taxpayer that relies on information contained in an edited version is not protected[1] from:

   - tax that would otherwise be payable or repaying an otherwise overpaid entitlement
   - interest, or
   - penalty.

6. However, written binding advice that is provided to a taxpayer (from which the edited version is created), is either legally or administratively binding on the Commissioner in accordance with the principles outlined in PS LA 2008/3. That advice is binding only for the taxpayer to whom it applies.

7. The forms of written binding advice to which this practice statement applies are:

   - private rulings issued under Division 359 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)
   - indirect tax private rulings (other than written general advice) issued under section 105-60 of Schedule 1 to the TAA. Indirect taxes are the goods and services tax (GST), the wine equalisation tax (WET) and the luxury car tax (LCT), and
   - administratively binding advice (refer to PS LA 2008/3).

8. The Tax Office publishes edited versions of:

   - indirect tax specific private rulings issued in response to applications received after 30 June 2001, and
   - all other written binding advice (other than indirect tax written general advice) issued in response to applications received after 31 March 2001.

[1] Refer to section 284-215, subsection 290-55(3) and section 361-5 of Schedule 1 to the *Taxation Administration Act 1953*.

Preparing the edited version

9. For the purposes of this practice statement a distinction is drawn between:

   - the taxpayer (the persons or entities who have applied for, and/or whose tax affairs are the subject of, or will be affected by the advice), and
   - third parties (whose tax affairs are not the primary subject of the advice).

10. Taxation laws, including section 16 of the *Income Tax Assessment Act 1936*, impose a number of secrecy obligations on Tax Office staff. Further obligations to protect the privacy of individual taxpayers are imposed by the *Privacy Act 1988*. A publicly accessible register containing edited versions requires Tax Office staff to take particular care to ensure that a taxpayer's information and identity are protected.

11. Tax Office staff must follow a four step approach in performing the editing process. These four steps involve the removal or replacement of information that:

    (1) specifically identifies a taxpayer

    (2) may enable the identity of the taxpayer to be ascertained

    (3) might enable a reader to identify third parties where such information would breach privacy or secrecy guidelines or information that specifically identifies third parties except where:

    - the information pertaining to the third party is in the public domain (refer Attachment A), and
    - the taxpayer's identity can not be ascertained by identifying the third party, and

    (4) is confidential to the taxpayer or third parties (refer to paragraph 35 in Attachment B).

12. Third parties may be named where no confidential information is revealed, and where the naming of the third party will not lead to the identification of the taxpayer. The third party could for example, be a public company or a public institution. If there is any risk of identification through association, then third party information must be excluded in accordance with paragraph 11 of Attachment B. Third parties who may be named are referred to as **excepted third parties** for the purposes of this practice statement (see examples B to E in step 2 of Attachment B). Where, after seeking advice (refer to paragraph 6 of Attachment A) from the Practice Management Unit (PMU), there is any doubt whether particular information is in the public domain, such information must be omitted from the edited version.

13. The published edited version must be comprehensible and accurately reflect the written binding advice given, to the extent possible, after removal of the information referred to in paragraph 11 of this practice statement. The edited version must include the 'Explanation' or 'Reasons for Decision'.

14. In some exceptional cases, it may not be possible to accurately reflect the issues and the decision without identifying the taxpayer or revealing the confidential information of another entity. In these cases, officers must prepare a summary of the case in general terms and this will be the edited version. The PMU can provide assistance to case officers when preparing a summary edited version.

15. The case officer must refer both the written binding advice and edited version to their duly authorised Authorising Officer[2] for approval.

16. In approving the issue of the written binding advice and the edited version, each duly authorised Authorising Officer must ensure that the edited version:

    - has been edited in accordance with this practice statement, and
    - is comprehensible and accurately reflects the written binding advice, to the extent possible, after removal of the information referred to in paragraph 11 of this practice statement.

17. The case officer must ensure that the authorised edited version is sent to the taxpayer for comment **at the same time** as the written binding advice is issued.

18. Attachment B sets out guidelines for editing written binding advice.

Review mechanisms available to taxpayers

19. The case officer must consider all submissions on secrecy, privacy or confidentiality grounds about the content of the edited version made by the taxpayer at the time of their request for advice. The case officer must document the reasons for not agreeing with any of the taxpayer's submissions.

20. Taxpayers may make submissions after receipt of the edited version. They will be given the opportunity to seek a further review if they do not agree with the version that the Tax Office proposes to publish.

Process for comments and review

21. If the taxpayer does not provide comments about the edited version within 28 days from the issue date of the written binding advice, the edited version will be referred for publication in the register.

22. If the taxpayer does provide comments relating to secrecy, privacy or confidentiality matters within 28 days of the issue date of the edited version, these comments will be considered by the PMU. The PMU will apply the guidelines set out in Attachment B and advise the taxpayer of its decision. The PMU must liaise with the case officer and duly authorised Authorising Officer when considering substantive issues raised by a taxpayer.

23. If a further edited version is prepared, the PMU must send this version to the taxpayer. If the taxpayer does not respond within 28 days from the date of issue of the revised edited version, it will be referred for publication in the register.

24. If a taxpayer does not agree with the decision of the PMU, they may make a written request for a further review of the decision by the Tax Office, on the grounds of secrecy, privacy or confidentiality, within 28 days of the issue of the revised edited version. The Tax Office will refer the request to the Publication Advisory Committee (PAC) via the PAC Secretariat, located within Law and Practice (L&P). The PAC Secretariat will ensure that appropriate documentation is referred to the PAC. The PAC will consider the taxpayer's submissions and make recommendations. The PAC includes members from outside the Tax Office.

[2] See PS LA 2002/13 Authorisation of written binding advice.

25. The Law Infrastructure Branch of L&P will consider the PAC recommendations and make a decision about the form in which the edited version will be published. The PAC Secretariat will advise the taxpayer of the decision and the reasons for it, and provide them with a copy of the version that will be published after 14 days from the issue of the advice. The PAC Secretariat will notify the PMU of the decision and the PMU will then notify the case officer and duly authorised Authorising Officer.

26. Attachment C contains a flowchart of the process for review and publication of the edited version.

Subject references	provision of advice publication of written binding advice written binding advice
Legislative references	ITAA 1936 16 TAA 1953 Sch 1 105-60 TAA 1953 Sch 1 284-215 TAA 1953 Sch 1 290-55(3) TAA 1953 Sch 1 Div 359 TAA 1953 Sch 1 361-5 Privacy Act 1988 6(1)
Related Practice Statements	PS LA 2008/3 PS LA 2002/13
Case references	*O'Brien v. Komesaroff* (1982) 150 CLR 310
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Information that is in the public domain

1. There may be instances where the identity of third parties, or the nature of transactions has been widely publicised and advertised, and is so widely known that the removal of **all** the information which might identify those third parties serves no useful purpose and may hinder the meaning of the edited version. Further, the removal of all such information may impose a significant burden on the productivity of case officers.

   In a situation where a taxpayer has purchased shares in a large company which has recently been listed on the stock exchange, all of the facts surrounding the listing (including dates, times, amounts) would have to be removed in order to sanitise the edited version to prevent this company from being identified. Where shares in the company are widely held, and its listing has been widely and publicly discussed and advertised, removal of the company's identifying details may make the task of preparing a meaningful edited version overly complex, and may be unnecessary in terms of:

   - preserving the company's privacy, and
   - preventing identification of the taxpayer.

2. Edited versions may therefore include information which is in the public domain **where that information will not lead to the identification of the taxpayer and will not breach the confidential information of a third party.**

3. Categories of information relating to third parties (**not** the taxpayer) that may be published include the following (this list is not exhaustive):

   (a) The names/transactions of public companies where the information has been disclosed in:

   - a prospectus
   - an annual report
   - a media release/press conference, or
   - a report to a stock exchange (for example, information concerning mergers/acquisitions, share buybacks, share splits).

   (b) The names and products of third parties that provide goods or services to significant numbers of the public (sufficient that the naming of the third party or their products could not identify the taxpayer). For example:

   - universities and other places of education
   - clubs and associations with large memberships, or
   - statutory authorities, such as councils and public utilities.

   (c) Where the goods or services provided by a third party are advertised to the public, and the client base is *potentially* large, the edited version may identify the third party and name or describe the product or service they offer.

   For example: a taxpayer seeks advice on the tax effect of an investment product that they have invested in (or are considering investing in). The product has been marketed to the general public and the product potentially has a large number of investors. The naming of the product or the product provider would not identify the taxpayer and will not reveal information which is not in the public domain.

4. Special care needs to be taken when editing documents under category (c):

   - the transaction or arrangement must be one that is very common and used by, or available to, large numbers of people or organisations, and
   - the transaction or arrangement must in no way identify the taxpayer to a knowledgeable person or to a person within that community of interest.

   Unless all these conditions are met, specific information relating to the third party or its products or services must be removed.

5. For all three categories, information which has been previously published in a publicly available Tax Office document, may also be taken to be in the public domain. This includes public rulings and determinations, product rulings, class rulings, media releases and taxpayer alerts.

6. If case officers or duly authorised Authorising Officers are preparing edited versions for publication and are unsure whether particular information is in the public domain, they should seek advice from the PMU.

Attachment B

Guidelines for editing written binding advice

1. The overall objective of the editing process is to prepare a version of the written binding advice that accurately reflects that advice and is suitable for publication.

2. Case officers, duly authorised Authorising Officers and PMU officers (editing officers) must exercise care in preparing edited versions.

3. The editing officer must remove any information which may reveal a taxpayer's identity or constitute a breach of confidence. Where the advice turns on information that may reveal a taxpayer's identity or breach their confidence, it must be replaced with more general terms which ensure that the edited version is comprehensible and accurately reflects the written binding advice.

4. Editing officers must remove or replace individual facts that in isolation may not identify the taxpayer but which, when combined with other information, may allow the identity of the taxpayer to be ascertained.

5. The examples given below are not intended to be exhaustive.

Step 1: Removing information that specifically identifies the taxpayer

6. This requires editing officers to ensure that the edited version does not contain any primary identifying details of a taxpayer.

7. Editing officers must remove or replace primary identifying details such as the following:

   - account numbers with financial institutions (for example, credit cards, bank account details)
   - addresses
   - Australian business numbers
   - contact details (for example, telephone numbers, fax numbers, email addresses)
   - dates of birth
   - description of work
   - employee identification numbers (for example, Australian Government Service numbers)
   - identification and reference numbers (for example, Administrative Appeals Tribunal reference details)
   - licence numbers (for example, driver's licence and firearm's licence numbers)
   - Medicare numbers
   - names of individuals, companies and other entities
   - quotes from specific contracts, deeds or agreements
   - signatures
   - tax file numbers, and
   - titles and/or position of persons (for example, Director, Public Officer, Dr., The Hon.).

8. Editing officers must remove or replace certain personal information which is protected from release under the Privacy Act. Personal information is defined in subsection 6(1) of the Privacy Act to mean 'information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.'

   Examples of personal information which may fall under this category include:

   - adoption of a child
   - details of a divorce
   - medical treatment
   - political associations, and
   - taxpayers engaged in income producing activities which may carry a social stigma.

9. The following example provides some guidance in editing written binding advice.

10. **Example A:** Mr Jones of 45 Ramsey Street, Fitzroy, Victoria, claims a deduction for home to work travel expenses.

    This may become: The taxpayer claims a deduction for home to work travel expenses.

    The taxpayer's name and address is replaced with a general identifier such as 'The taxpayer'. The edited version still accurately reflects the facts.

Step 2: Removing information relating to third parties

11. The primary identifying information of third parties named in the document must also be removed in the same manner as for the taxpayer unless:

    - the information pertaining to the third party is in the public domain (refer Attachment A), and
    - the taxpayer's identity could not be ascertained by identifying the third party.

12. The examples in the following paragraphs illustrate the application of these exceptions.

13. **Example B:** A taxpayer has invested in a public company which has merged with another public company and as a result there are capital gains tax implications for all shareholders of that company.

    Approach: The mention of the actual name of the company and the facts of the merger will not identify the taxpayer. Nor will it reveal information about the third party company which is not already in the public domain. Therefore, this information may be retained in the edited version.

14. **Example C:** A taxpayer is a shareholder in a small private company and asks a question about transactions they have had with that company.

    Approach: In this case, identifying the company could allow a knowledgeable person to identify the taxpayer, and will also reveal information about the third party company that is not in the public domain. The name of the third party must be removed from the edited version. The nature of the transaction may also need to be generalised if it is specific to that company.

15. **Example D:** A taxpayer invests in a financial product which has not been the subject of a product ruling, and asks about the tax effectiveness of the product. The product has been marketed publicly, is widely available to a large population, and is supported by the issue of a prospectus and advertising.

Approach: The naming of the product, the product promoter, or the features of the product will not identify the taxpayer, or reveal information about the product that is not in the public domain. Therefore, this information may be retained in the edited version.

16. **Example E:** A taxpayer is a small business taxpayer and wishes to know the tax effect of transactions it has entered into with another small business taxpayer.

Approach: Identifying either business may identify the taxpayer, and may also reveal information about either business which is not available publicly. The name of the business and the third party must be removed from the edited version. The nature of the transaction may also need to be generalised if it is peculiar to those businesses.

Step 3: Removing other information which may enable identification

17. Once editing officers have removed or replaced all of the primary identifying details, they then have to remove or replace other information which may enable someone reading the edited version to ascertain the identity of the taxpayer or any third parties who are not excepted third parties (refer to paragraph 12 of the Statement). For instance, a set of facts surrounding a transaction may, when taken together, lead to the identity of the taxpayer or entity.

18. Therefore, editing officers must exercise reasonable care when editing so that an informed person in the industry, occupation or community could not ascertain the identity of the taxpayer, or identify third parties that are not excepted. Editing officers must therefore consider three questions:

    (i) would a person reading the edited version be able to identify the taxpayer, or any third party who is not excepted?

    (ii) would a knowledgeable person reading the edited version be able to identify the taxpayer or any third party who is not excepted?

    (iii) would a person within a community reading the edited version be able to identify the taxpayer or any third party who is not excepted?

19. Matters to keep in mind when considering these questions include references to:

    - associates (for example, spouse, ex-spouse, siblings)
    - business activity
    - countries, States and Territories
    - dates
    - details of financial transactions or related activities and arrangements (including property transactions and their identifiers)
    - foreign and domestic government agencies
    - gender
    - industry specific terms or details

- matters brought before judicial bodies such as Courts, Tribunals, Commissions
- matters considered by committees
- membership of professional bodies
- monetary amounts
- quotes from or references to submissions provided by the taxpayer
- records such as taxation assessments, and
- types and descriptions of assets and projects.

General public test

20. The following examples may assist to identify information in an edited version that may enable a person in the general public to identify the taxpayer or a third party who is not excepted.

21. **Example F:** A plumber from Yass in New South Wales claims a deduction for car expenses.

    This may become: A plumber claims a deduction for car expenses.

    The removal of the reference to a specific town or city minimises the potential for the taxpayer's identity to be ascertained and the description accurately reflects the written binding advice.

22. **Example G:** A professional female golfer claims a deduction for decline in value of a set of golf clubs.

    This may become: A professional sportsperson claims a deduction for decline in value of sporting equipment.

    The removal of the reference to a professional female golfer and its replacement with the general term 'professional sportsperson' minimises the potential for the taxpayer's identity to be ascertained. The description of the deduction as 'decline in value of sporting equipment' rather than 'decline in value of golf clubs', further maintains the taxpayer's anonymity whilst accurately describing the question at issue.

23. **Example H:** A customs officer sought a ruling about the deductibility of his legal costs associated with the successful defence of a criminal charge of receiving a bribe (in connection with the performance of his duties). The customs officer has left the Customs Service and now works in another government department, but the defence of the charge was necessary for his continued prospects of employment.

    This may become: A taxpayer sought a ruling on the deductibility of legal costs associated with the successful defence of a serious criminal charge (in connection with the performance of the taxpayer's duties). The taxpayer has left their previous employment and now works in other employment, but argues that the defence of the charge was necessary to preserve continued prospects of employment.

    By removing and/or generalising the facts relating to the taxpayer's current and former occupation and the charge that the taxpayer defended in court, the taxpayer's identity will be protected in the edited version that is published in the register. At the same time the facts and legal question in the written binding advice are accurately reflected.

24. Editing officers must, to the best of their judgment, consider whether a ***knowledgeable person*** or a ***significant section of the community*** may be able to identify the taxpayer or any third party who is not excepted.

Knowledgeable person test

25. Editing officers must consider whether someone with specialised knowledge of a particular industry or occupation would be able to ascertain the identity of a taxpayer or a third party who is not excepted, from the content of the edited version. Knowledgeable persons may include:

- the major participants (including competitors, customers and suppliers) in an industry
- those who provide services to or have knowledge of the industry and would have an in-depth knowledge of the operations within that industry (including legal and financial advisers, lawyers, engineers, media commentators, analysts), and
- those who have a thorough understanding of a particular occupation, including members of professional bodies, unions, industry associations, chambers of commerce, other business associations and consumer bodies.

26. The knowledgeable person test is dependent on the facts of each case and the making of a judgement by editing officers as to whether the facts may possibly allow a knowledgeable person to identify the taxpayer, or a third party who is not excepted.

27. The possibility of a knowledgeable person being able to ascertain the identity of a third party is more likely in complex arrangements or transactions, or where the particular industry is highly specialised.

28. **Example I:** Assume that an oil company writes to the Tax Office outlining a proposal to enter into a transaction involving the purchase and installation of oil refining equipment used in a new refining technique. The relevant knowledgeable persons may include all the oil companies, the manufacturers of the oil refining equipment and potential business and stock market investors. In this case, the editing must be sufficient to prevent the oil companies, the manufacturers of the oil refining equipment and potential investors from ascertaining the identity of the taxpayer or any other entity involved in the transaction, due to the confidential nature of the transaction.

29. However, if the request for written binding advice describes the new refining technique, the knowledgeable person test may be extended to the broader oil industry and oil-reliant industries. In this case, further editing may be required so that it would not enable the broader oil industry and oil-reliant industries to identify the taxpayer or a third party who is not excepted, who was involved in the transaction.

30. **Example J:** A taxpayer sought a ruling in relation to certain international financing arrangements for the leasing of a Boeing 747-400 aircraft.

    This may become: A taxpayer sought a ruling on a financing arrangement for leasing income-producing equipment.

If the arrangement was described in the former terms, others in the aviation industry would probably be able to identify the taxpayer. So the industry specific term – Boeing 747-400 – is generalised as income-producing equipment. Furthermore, the phrase 'international financing arrangements' was described as a financing arrangement to further generalise the transaction. Note, however, that if the international nature of the financing was an important aspect of the arrangement, the reference may need to be maintained. Judgment will need to be exercised.

Significant community test

31. The edited version must be worded in such a way that someone within a significant section of the community would not be able to associate a taxpayer or third party (where the third party is not excepted) with the facts described in the advice.

32. The significant community test does not require specialised knowledge, as in the knowledgeable person test, and may relate to general knowledge that is commonly known within a community. The appropriate community in this test will be determined on the facts of each case.

33. **Example K:** Using the facts described in example I, if the oil company proposes to enter a transaction involving the purchase of land on which to construct the new refinery, the significant community would include those residing or doing business in the vicinity of the land to be purchased. In this example, editing officers must consider whether this broader community would be able to identify the taxpayer or other entities involved in the transaction.

Step 4: Removing confidential information

34. The final step in editing is to remove or replace information which is confidential in nature to the taxpayer or third parties. Information can be confidential even where the information will not identify the taxpayer or another entity. For example, a document may describe a product or a process which, even though the taxpayer is not identified, is of commercial value. The breach of confidence may result in either a competitive or financial disadvantage to the taxpayer or another entity. Information that is within the public domain cannot be confidential in nature. However, this information must be removed or replaced if it could identity the taxpayer or a third party who is not excepted.

35. Confidential information is information which has:

- the necessary quality of confidence, and
- been given in circumstances where the Tax Office knew or should have known that it was confidential.

36. Information having a commercial value may include a trade secret (for example, a formula used in a business operation or other information concerning aspects of a business) which may provide an advantage over competitors. The presence of information having a commercial value may be indicated by the extent to which a person guards the secrecy of the information, the value that the person or competitors place on the information and the investment undertaken to develop the information.

37. Confidential information can only be published by the Tax Office with the consent of the taxpayer that provided that information. If the Tax Office publishes confidential information without consent there may be legal consequences.

38. Case officers must seek advice from the PMU where:

- a taxpayer states that information it provides to the Tax Office is 'in-confidence'
- a taxpayer does not consent to information being published on the basis that it is confidential or of commercial value, or
- information supplied to the Tax Office appears to be confidential and inclusion of the information is necessary to make the edited version a comprehensible and accurate reflection of the written binding advice.

39. The tax effectiveness of arrangements will not, of itself, be accepted as providing a basis for a claim of confidentiality (see, for example, *O'Brien v. Komesaroff* (1982) 150 CLR 310). Such arrangements can be described in the edited version and must still be edited in accordance with the other requirements of Steps 1, 2 and 3 to protect the identity of the taxpayer(s).

Attachment C: Edited version review and publication process