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

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

This Law Administration Practice Statement provides guidance on preparing and publishing edited versions.

This Practice Statement is an internal ATO document and is an instruction to ATO staff.

1. What is this Practice Statement about?

This Practice Statement sets out the policy in relation to preparing and publishing edited versions (EVs).

To improve the integrity of our advice processes, we publish EVs of all written binding advice.

The forms of written binding advice for which EVs are published are:

- private rulings issued under Division 359 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)[1]
- administratively binding advice issued to specific taxpayers.

We publish EVs of written binding advice internally on ATOlaw and externally on the Legal database.

2. Can taxpayers rely on edited versions?

No. EVs published to the Legal database provide a public historical record of edited written binding advice we issue.[2]

We are not bound by an EV, in relation to any taxpayer. Importantly, an EV:

- is not intended to provide a taxpayer with advice or guidance
- is not a publication approved in writing by the Commissioner
- does not set out a general administrative practice of the ATO.

Therefore, a taxpayer who relies on information contained in an EV which is incorrect or misleading is not protected from:

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

It is only the written binding advice that is provided to the taxpayer (from which the EV is created) that is binding on the Commissioner, and only in relation to the taxpayer to whom it applies.

3. The roles in the edited version process

Case officers and authorising officers

When preparing an EV, case officers and authorising officers must ensure that:

- the relevant precedential ATO view is correctly applied or created when the written binding advice is prepared and that it is technically correct
- the steps to ensure confidentiality and privacy requirements, outlined in Attachment A to this Practice Statement, are followed in regard to the EV editing process
- the ATO style guide and the ATO standards for citations and references are applied when drafting the EV (internal links only).

The authorising officer has ultimate responsibility for the quality of the EV issued to the taxpayer.

Publishing officers

Staff in the Law Publishing and Policy team (Law Publishing), in the Office of the Chief Tax Counsel business line, publish EVs to ATOlaw and the Legal database. During the publishing process, publishing officers undertake a final review of EV content as issued to the taxpayer to ensure that the requirements of Attachment A have been met.

Law Publishing is also responsible for resolving comments received on an EV following its issue to a taxpayer (see section 6 of this Practice Statement).

4. What needs to be taken into account when creating an edited version?

The overall objective of the editing process is to prepare a version of the written binding advice that

[1] All legislative references in this Practice Statement (including in Attachment A) are to Schedule 1 of the TAA, unless otherwise indicated.

[2] EVs have been published in response to applications received after 31 March 2001 or, in respect of GST-specific private rulings, 30 June 2001. However, EVs over 15 years old are routinely removed from the Legal database.

accurately reflects that advice and is suitable for publication.

Taxation laws, primarily Division 355, impose confidentiality obligations on ATO staff. Further, obligations to protect the privacy of individuals are imposed by the *Privacy Act 1988* (Privacy Act). Case officers must take particular care when preparing an EV to ensure there is no unauthorised disclosure of taxpayer information or interference with the privacy of an individual caused by the disclosure of personal information.

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

Any officer involved in creating or reviewing an EV must follow the 3-step approach editing process outlined in Attachment A of this Practice Statement. Examples illustrating the editing process can be found in Attachment B of this Practice Statement.

5. What is a summary edited version and when is it used?

In exceptional cases, it may not be possible to accurately reflect the facts underlying the advice without identifying the parties or breaching confidentiality. A summary of the advice in general terms (referred to as a 'summary EV') must be prepared in these instances. Summary EVs are comprised only of the advice's questions and answers or, in rare cases, a brief statement (such as 'the Commissioner has ruled on each of the questions'). Privacy and/or commercial-in-confidence issues are the only reasons for the preparation of a summary EV.

6. What is the process for comments and review?

The case officer must send the authorised EV to the taxpayer for comment at the same time the written binding advice is issued.

If the taxpayer does not provide comments about the EV within 28 days from the issue date of the written binding advice, the EV will undergo the publishing process.

If the taxpayer does provide comments relating to privacy or confidentiality matters within 28 days or at any time prior to publication, these comments will be considered by a publishing officer, who may liaise with the case and authorising officers when resolving the issues raised by a taxpayer.

7. Are edited versions updated?

Documents published to ATOlaw and the Legal database are intended to be a public historical record only. They are not updated to reflect changes in:

- the law, or
- our application of the law.

However, an EV should be annotated where:

- the underlying written binding advice is revised
- the original written binding advice is overturned during review processes, or
- the EV is found to be incorrect or misleading and presents a risk in regard to incorrect use.

8. More Information

This Practice Statement should be read in conjunction with Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the ATO.*

For assistance or queries regarding the EV process, email Law Publishing.

See also:

- ATO style guide (internal link only)
- ATO standards for citations and references (internal link only)
- Australian Privacy Principles guidelines
- EVs on ATOlaw (internal link only)
- EVs on the Legal database

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Business line	TCN

ATTACHMENT A – EDITING PROCESS

This Attachment outlines the considerations you should follow when preparing an EV, including the relevant legislation and the 3-step process to follow when editing.

1. Requirements when editing written binding advice

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 publishing. Ensuring it is suitable for publishing means that an EV:

- meets the confidentiality requirements in Division 355 and does not disclose 'protected information', and
- meets the requirements of the Privacy Act in relation to the handling of 'personal information'
- does not disclose any information provided on a commercial-in-confidence basis.

Confidentiality requirements

Division 355 imposes strict prohibitions on ATO employees in regard to the disclosure of protected information.

Protected information[3] is information that:

(a) was disclosed or obtained under or for the purposes of a law that was a taxation law (other than the *Tax Agent Services Act 2009*) when the information was disclosed or obtained; and

(b) relates to the affairs of an entity; and

(c) identifies, or is reasonably capable of being used to identify, the entity.

Much of the information contained within written binding advice will fall within these categories and therefore be considered protected information.

Additionally, some of the information we obtain when providing written binding advice has been shared with us on a 'commercial-in-confidence' basis. Even if it is not protected information, we are obligated not to disclose commercial-in-confidence information without the consent of the person providing that information.

Requirements of the Privacy Act

The Privacy Act protects the privacy of individuals and regulates how personal information is handled.

Section 6(1) of the Privacy Act defines 'personal information' as:

… information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in a material form or not.

Thirteen Australian Privacy Principles (APPs) are set out in the clauses of Schedule 1 to the Privacy Act, of which the following directly apply to the EV process:

- APP 1: open and transparent management of personal information
- APP 11: security of personal information

More information about privacy and how the APPs should be applied can be found on the OAIC website and in the OAIC's *Australian Privacy Principles guidelines*.[4]

2. Approach to the editing process

Case officers must follow a 3-step approach in performing the editing process. These steps will ensure that the requirements referred to in paragraph 1 of this Attachment are met.

[3] Subsection 355-30(1).
[4] Office of the Australian Information Commissioner (2019) *Australian Privacy Principles guidelines*, https://www.oaic.gov.au

Remember that overall, we are generally seeking to protect and keep confidential the information of any taxpayer or third party in this process – not just the primary applicant.

However, there may be instances where the identity of third parties or the nature of transactions has been so widely publicised and advertised that the removal of **all** the information which might identify those third parties serves no useful purpose and may hinder the meaning of the EV.

Examples of the sort of information relating to third parties (not the taxpayer) that may be published include the following (this list is not exhaustive):

- The names or transactions of public companies where the information has been disclosed in
  - a prospectus
  - an annual report
  - a media release/press conference
  - a report to a stock exchange (for example, information concerning mergers/acquisitions, share buybacks, share splits).
- 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
  - statutory authorities, such as councils and public utilities.
- Where the goods or services provided by a third party are advertised to the public and the client base is potentially large. In this case, the transaction or arrangement must be one that is very common and used by, or available to, large numbers of people or organisations.
- Information which has been previously published in a publicly available ATO document, such as public rulings and determinations, product rulings, class rulings, media releases and taxpayer alerts.

Examples of the editing process are contained in Attachment B of this Practice Statement and you can contact the Law Publishing team in the Office of the Chief Tax Counsel for further assistance if needed.

Step 1 – remove information that directly identifies the taxpayer or a third party

This step requires case officers to ensure that an EV does not contain any details which may **directly identify** the taxpayer or other entities involved.

Common examples of such details include:

- name (of individuals, companies and other entities)
- address
- tax file number
- Australian business number
- contact details (for example, telephone numbers, email addresses and websites)
- date of birth
- employee identification numbers (for example, Australian Government Service numbers)
- identification and reference numbers (for example, Administrative Appeals Tribunal reference details)
- account numbers with financial institutions (for example, credit cards and bank account details)
- licence numbers (for example, driver's licence and firearm's licence numbers)
- Medicare number
- signature.

Step 2 – remove or replace information that may allow the taxpayer or a third party to be identified

Where the advice includes details that may otherwise reveal a taxpayer or third party's identity, these details must be replaced with more general terms. The EV must remain comprehensible and must still accurately reflect the written binding advice. You must not replace any details with false statements.

Again, noting the exception for publicly available third-party information, other information which, **when combined with other facts**, may potentially identify taxpayers should also be removed or replaced with sanitised or generalised information. The following are examples:

- gender (for example, consider using 'they' or 'their' in place of 'she' or 'him')
- words denoting relationships (for example, consider using gender-neutral words like 'spouse', 'sibling' and 'relative')
- quotes and extracts (including clause, condition, section and paragraph numbers) of contracts, constitutions and other taxpayer or related entity documents that are not in the public domain
- titles or positions of persons, such as director, public officer or doctor
- precise monetary amounts and foreign currencies
- geographic locations (for example, it may be acceptable to leave a reference to a large city like Sydney or Melbourne in an EV; however, it may be prudent to remove the name of a rural town, like Cocklebiddy WA or Middleton QLD, who have much smaller populations)
- jurisdiction-specific legislation or treaties
- specific descriptions of work or business activity
- relationships and associates
- political associations
- types and descriptions of assets, products and projects
- matters considered by committees
- medical conditions and treatments
- membership of professional and other bodies
- foreign or domestic government agencies
- industry-specific terms or details (for example, stating that the taxpayer purchased an aircraft for commercial use greatly limits the number of entities that could be the taxpayer)
- dates critical to the scheme being ruled upon
- commentary or opinion about a person
- information about income-producing activities which may carry a social stigma.

Case officers should also, as a rule, remove personal information, including details about:

- the adoption of a child
- a divorce
- political associations
- taxpayers engaged in income-producing activities which may carry a social stigma.

Step 3 – remove or replace commercial-in-confidence information

This step requires you to remove or replace any information which has been supplied on a commercial-in-confidence basis (even though it may not identify the taxpayer or any third party).

Confidential information is information which has:

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

Information that is within the public domain cannot be confidential in nature.

Information possessing 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 confidentiality of the information, the value that the person or competitors place on the information and the investment undertaken to develop the information.

We can only publish confidential information with the consent of the taxpayer who provided that information. If we publish confidential information without consent, there may be legal consequences. Further, if commercial-in-confidence information is also protected information under section 355-30, a tax officer will make an unlawful disclosure of protected information in contravention of section 355-25, even if the taxpayer has consented to the publication of the information – see section 355-35. The effect of this is that a taxpayer *cannot* consent to the disclosure of their protected information.

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] HCA 33). Such arrangements can be described in the EV and must still be edited in accordance with the other requirements outlined in Steps 1 and 2 of this Attachment to protect the identity of the taxpayers and third parties.

ATTACHMENT B – EXAMPLES

The examples in this Attachment provide guidance in editing written binding advice to remove or replace information that may enable the identification of a taxpayer.

Example 1 – clauses of a contract

It may be necessary for you to quote specific clauses of an agreement or contract in a private ruling but you should omit or paraphrase such clauses in the EV. Instead of including (for example):

> *Clause 3.4 of ABC's Enterprise Agreement sets out …,*

the following would be more appropriate and in line with our privacy and confidentiality requirements:

> *You have provided relevant clauses of your agreement which detail the obligations of the parties.*

Example 2 – description of work and claim

Where you are issuing advice to a prominent rugby league player seeking to claim a deduction for the value of protective head gear, you could describe this as:

> *You are a professional sportsperson. You wish to claim a deduction for the value of sporting equipment.*

Example 3 – business activity, geographic location

Where you are issuing a private ruling to a company providing engineering services on resource installations in Area A of the Timor Gap Zone of Cooperation, you could describe this as:

> *You are an entity providing services on plant and structures located outside Australia. An international tax agreement does not exist between Australia and the country in which the services are being provided.*

Example 4 – dates

Where dates (and exact dates in particular) pose privacy risks, you can sanitise these by using more general dates or legislated dates. You might use the following instead:

> *The contract was entered into during the relevant financial year.*
>
> *The contract was entered into after 20 September 1985.*
>
> *The scheme commences in the year beginning 1 July 20xx.*

Example 5 – relationships and associates, business activity

Where you are issuing advice to a taxpayer who runs a takeaway food outlet with his wife and their son and daughter and their respective spouses, you could describe this as:

> *You and members of your family operate a small business.*

Example 6 – description of work

A customs officer has 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 Australian Border Force and now works in another government department but the defence of the charge was necessary for his continued prospects of employment. You could describe this as:

> *You have expended legal costs associated with the successful defence of a serious criminal charge (in connection with the performance of your duties in order to preserve your continued prospects of employment). You have since left that place of employment and now work elsewhere.*

Example 7 – monetary amounts

Monetary amounts can be replaced by general terms or mentioned with reference to legislated amounts. If this is not possible, approximations can be used. You might use the following:

> *You incurred net medical expenses in the relevant financial year above the relevant medical expenses threshold.*
>
> *You incurred net medical expenses in the relevant financial year above $2,333 (the legislated amount).*

Example 8 – third party involved

A taxpayer has invested in a public company which has merged with another public company. As a result, there are capital gains tax implications for all shareholders of that company. In this instance, the mention of the 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, you may retain this information in the EV.

Example 9 – third party involved

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. 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, you may retain this information in the EV.

Example 10 – third party involved

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. You must remove the name of both businesses from the EV. You may also need to generalise the nature of the transaction if it is peculiar to those businesses.

Example 11 – industry-specific terms or information

An oil company writes to the ATO requesting advice on a proposal to enter into a transaction involving the purchase and installation of oil refining equipment used in a new refining technique. In this case, you must edit the EV sufficiently to prevent the oil companies, the manufacturers of the oil refining equipment and potential investors (knowledgeable persons) from ascertaining the identity of the taxpayer or third party involved in the transaction. You must also maintain the confidentiality of information relating to the new refining technique.

Example 12 – geographic location

Using the facts described in Example 11 of this Attachment, 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, you must consider whether this broader community would be able to identify the taxpayer or third party involved in the transaction.

Example 13 – industry-specific terms or information

A taxpayer has sought a ruling in relation to certain international financing arrangements for the leasing of a Boeing 747-400 aircraft. You could describe this as:

> *You are seeking advice on the deductibility of interest incurred under a financing arrangement for leasing income-producing equipment.*

If you described the arrangement 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) needs to be generalised using a term such as 'income-producing equipment'. The phrase 'international financing arrangements' further generalises 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. You would need to exercise judgment.

Example 14 – third-party information

A taxpayer is a shareholder in a small private company and asks for advice on transactions they have had with that company. 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. You must remove the name of the third-party company from the EV. You may also need to generalise the nature of the transaction if it is specific to that company.

Amendment history

Date of amendment	Part	Comment
13 July 2022	All	Updated for currency and to meet the requirements of the Privacy Act 1988
	Attachment	Changed to Attachment A and introduced Attachment B; updated Examples in Attachment B from alpha to numerical
26 February 2019	Footnote 1	Updated to indicate that edited versions over 15 years are removed from the Legal database
	Sections 3 and 6	Updated responsible team name
	Section 8	Updated contact details
	More information	Added links to edited versions on ATOlaw and the Legal database
7 May 2018	Throughout	Updated publication placement to ATOlaw and the Legal database, due to the relocation of EVs to those systems; updated responsible branch names and to reflect minor Style Guide changes
	Attachment A, section 1	Removed hyperlink, footnote, header and footer restrictions
	Example G	Updated net medical expense legislated amount
29 May 2015	Throughout	Updated to new LAPS style and format
	Section 6	Removed the Publication Advisory Committee process
	Section 7	Updated to allow for annotation of edited versions where the underlying private ruling decision is overturned and where they are found to be incorrect or misleading
	Attachment B	Deleted
20 February 2014	Throughout	Consolidation of the material from the EV Guidelines
9 August 2013	Throughout	Updated to new business line of Tax Counsel Network
30 August 2012	Throughout	Updated team name and references
	New paragraph 12	Inserted to provide clearer guidance to officers when preparing edited versions
30 July 2012	Throughout	'Tax Office' updated to ATO as per the ATO style guide; Practice Management Unit (PMU) updated to new name L&P Publishing Unit
	Paragraph 7	Deleted reference to section 105-60 of Schedule 1 to the TAA as it was removed by the *Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010*
	Paragraph 5, footnote	Deleted reference to section 284-215 of Schedule 1 to the TAA which was repealed by the *Tax Laws Amendment (2010 Measures No. 1) Act 2010*
	Paragraphs 22 to 24	Wording revised for clarity
	Paragraph 25	Law Infrastructure Branch updated to Law Practice Support Branch

	Paragraph 7 (dot points) of Attachment B	'Description of work' moved to Step 3 and combined with 'business activity'; 'contract number and quotes' expanded to include more detail; 'title and/ positions of persons' moved to Step 3
	Paragraph 18 of Attachment B	Three questions clarified
	Paragraph 19 (dot points) of Attachment B	'Important' inserted before 'matters'; 'Associates (for example spouse etc)' combined with Relationships, Country, states and territories' expanded for clarity; Medical conditions and treatments inserted; Professional bodies updated; 'Titles and/or positions or persons' moved from Step 1; 'Products' added to 'types and description of assets'
11 April 2011	Paragraph 10 and references	Update to secrecy provisions due to the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010*
5 Nov 2009	Subparagraph 3(c) of Attachment A	Emphasis removed from the word 'potentially'

References

Legislative references	TAA 1953 Sch 1 Div 355 TAA 1953 355-25 TAA 1953 355-30 TAA 1953 355-30(1) TAA 1953 355-35 TAA 1953 Sch 1 Div 359 Tax Agent Services Act 2009 Privacy Act 1988 6(1) Privacy Act 1988 Sch 1
Case references	O'Brien v Komesaroff [1982] HCA 33; 150 CLR 310; 41 ALR 255
Other references	ATO style guide ATO standards for citations and references Australian Privacy Principles guidelines *The Macquarie Dictionary* online, www.macquariedictionary.com.au
File reference	1-U4BNPD6
Related practice statements	PS LA 2008/3

ATO references

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