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

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Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2008/4

This practice statement was originally published on 28 February 2008. Versions published from 1 September 2009 are available electronically – refer to the online version of the practice statement. Versions published prior to this date are not available electronically. If needed, these can be obtained from the Advice and Guidance Unit in the Tax Counsel Network.

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 officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs, tax officers 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**
- **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 the following documents:
   - Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the Australian Taxation Office*
   - Law Administration Practice Statement PS LA 2002/13 *Authorisation of written binding advice*.
2. To improve the integrity of its advice processes, the ATO publishes edited versions of all written binding advice. The forms of written binding advice for which edited versions are published are:
   - private rulings issued under Division 359 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)
   - administratively binding advice (refer to PS LA 2008/3) issued to specific taxpayers.
3. Edited versions are published in the Register of Private Binding Rulings (the Register) on the ATO website.
4. The Register provides a public historical record of all edited written binding advice issued by the ATO. [1] Because of this, documents published in the register will not be updated to reflect:
   - changes in the law
   - changes in the ATO's application of the law, or
   - changes to decisions resulting from review processes after entities have disputed the ATO's decision.
5. An edited version is not a precedential ATO view[2] and cannot be used in determining how the ATO will apply the law in other cases.
6. 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
   - is not a publication approved in writing by the Commissioner
   - does not set out the ATO's general administrative practice.
7. Accordingly, a taxpayer that relies on information contained in an edited version which is incorrect or misleading is not protected from:
   - tax that would otherwise be payable or repaying an otherwise overpaid entitlement
   - interest, or
   - penalty.

[1] Edited versions have been published in response to applications received after 31 March 2001, or 30 June 2001 in respect of GST specific private rulings.
[2] Refer to PS LA 2003/3 *Precedential ATO view*.

8. 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.

Publishing an 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)
   - third parties (whose tax affairs are not the primary subject of the advice).

Roles in the edited version process

Case officers and authorising officers

10. Case officers and authorising officers must ensure that:
    - the relevant precedential ATO view is correctly applied or created when the advice is prepared, and that it is technically correct
    - the steps outlined in this practice statement are followed in regard to the editing process
    - the *ATO Style Guide* and the *ATO Standards for citations and references* are applied when drafting the edited version.
11. It is the authorising officer who has the ultimate responsibility for the decision and quality of the edited version issued.

Legal Database team

12. The Legal Database team in the Tax Counsel Network organise for publishing of the edited version on the Register. During the publication process, the Legal Database team will verify that the editing process has been properly followed.
13. The Legal Database team are also responsible for managing comments received on the edited version following its issue to the taxpayer (see paragraphs 22 to 25 of this practice statement)

Preparing the edited version

14. Taxation laws, primarily Division 355 of Schedule 1 to the TAA, impose a number of confidentiality obligations on ATO personnel. Further obligations to protect the privacy of individual taxpayers are imposed by the *Privacy Act 1988* (Privacy Act). Editing officers must thus take particular care when preparing an edited version to ensure there is no interference with the privacy of an individual and that protected information is not disclosed.
15. Editing officers must follow a four step approach in performing the editing process (refer to Attachment A). 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) may enable a reader to identify third parties except where:

- the information pertaining to the third party is in the public domain, and
- the taxpayer's identity cannot be ascertained by identifying the third party

(4) is confidential to the taxpayer or third parties.

16. Facts that may identify parties must be removed if they are not necessary in accurately reflecting the written binding advice given. If they cannot be removed, they must be replaced with generalised terms and must not be replaced with false statements.

17. The case officer must consider all submissions on 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.

18. Attachment A sets out requirements for editing written binding advice.

Summary edited versions

19. In exceptional cases, it may not be possible to accurately reflect the facts without identifying the parties. A summary of the case in general terms must be prepared and this is referred to as a summary edited version. Summary edited versions 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 edited version.

Process for comments and review

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

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 published to the register.

22. If the taxpayer does provide comments relating to privacy or confidentiality matters within 28 days of the issue date of the written binding advice, these comments will be considered by the Legal Database team. The Legal Database team will apply the requirements set out in Attachment A and advise the taxpayer of its decision. The Legal Database team may liaise with the case officer and authorising officer when considering substantive issues raised by a taxpayer.

23. If a revised edited version is prepared, the Legal Database team 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 published to the Register.

24. If, after engaging in consultation with the Legal Database team, a taxpayer is unable to reach agreement in regard to revising the edited version, they may make a written request, within 28 days of the issue of the revised edited version, for a further review of the decision by the ATO, on the grounds of privacy or confidentiality. The ATO will refer the request to a Publications Advisory Committee (PAC) to consider the taxpayer's submissions and make recommendations.

25. The TCN Practice Management Branch 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 reasoning, 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 Legal Database team of the decision and the Legal Database team will then notify the case officer and authorising officer.

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

Amendment History

Date	Part	Comment
20 February 2014	Throughout	Consolidation of material from the EV Guidelines Reordering of material
9 August 2013	Various	L&P updated to new business line of Tax Counsel Network
30 August 2012	Various New Paragraph 12	Updated team names and references. Inserted to provide clearer guidance to officers when preparing edited versions.
30 July 2012	Various	'Tax Office' updated to ATO as per ATO Style guide.
	Various	Practice Management Unit (PMU) updated to new name L&P Publishing Unit.
	Paragraph 7	Deleted reference to s105-60 of Sch1 to the TAA as it was removed by *Tax Laws Amendment (2010 GST Administration Measures No 2) Act 2010.*
	Paragraph 5, footnote	Deleted reference to s284-215 of Sch1 to the TAA which was repealed by *Tax Laws Amendment (2010 Measures No 1) Act 2010.*
	Paragraphs 22, 23 and 24	Wording revised for clarity.

	Paragraph 25	Law Infrastructure Branch updated to Law Practice Support Branch.
	Attachment B	
	Paragraph 7 (dot points)	'Description of work' moved to Step 3 and combined with 'business activity' 'Contract numbers and quotes' expanded to include more detail. 'Title and/ positions of persons' moved to step 3.
	Paragraph 18	Three questions clarified.
	Paragraph 19 (points)	'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. Religion details inserted. 'Titles and/or positions of persons' moved from Step 1. 'Products' added to 'types and descriptions of assets'.
	Paragraph 38	'must' changed to 'can'.
	Contact details	Updated.
11 April 2011	Paragraph 10 and references	Update to secrecy provisions due to the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Act 2010.*
5 November 2009	Paragraph 11 Subparagraph 3(c) of Attachment A Contact officer details	'Can not' updated to 'cannot'. Emphasis removed from the word 'potentially' Phone number updated
1 September 2009		Contact officer details updated
11 August 2008		Contact officer details updated

Subject references	provision of advice publication of written binding advice written binding advice
Legislative references	TAA 1953 Sch 1 Div 355 TAA 1953 Sch 1 Div 359 Privacy Act 1988 Privacy Act 1988 6(1)
Related Practice Statements	PS LA 2003/3 PS LA 2008/3 PS LA 2002/13
Case references	*O'Brien v. Komesaroff* (1982) 150 CLR 310
Other references	ATO Style guide ATO Standards for citations and references
File reference	01/005535 1-5A8J4CY
Date issued:	**28 February 2008**
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Authorised by:	Mike Bond Assistant Commissioner Law Practice Improvement Branch Law and Practice

Attachment A

Requirements 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. 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'.

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

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

4. Editing officers 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 (and must not be replaced with false statements) which ensure that the edited version is comprehensible and accurately reflects the written binding advice.

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

6. In doing so, editing officers must 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[3]? (general public test)

   (ii) would a knowledgeable person[4] reading the edited version be able to identify the taxpayer or any third party who is not excepted? (knowledgeable person)

   (iii) would a person within a community[5] reading the edited version be able to identify the taxpayer or any third party who is not excepted? (significant community test).

7. These tests are dependent on the facts of each case and the making of a judgment by editing officers. The ability to identify a taxpayer or third party who is not excepted is more likely in complex arrangements or transactions, or where the particular industry is highly specialised.

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[3] It is permissible to identify third parties in certain instances where the information pertaining to the third party is in the public domain. See paragraphs 27 to 29 of this Attachment.

[4] Knowledgeable persons may include competitors, customers, suppliers, members of industry associations, or those who supply services to the industry such as financial advisers, lawyers, analysts, media analysts.

[5] The appropriate community will be determined on the facts of each case. This test does not require specialised knowledge, and may relate to general knowledge that is commonly known within a community.

8. The editing officer must also remove hyperlinks, footnotes, headers and footers. When publishing to the Register:

- hyperlinks become redundant
- references in footnotes are placed in the body of an edited version to avoid corruption due to the removal of pagination
- headers and footers are removed as a safety precaution to ensure correct publishing.

9. Where possible, edited versions should be written as gender neutral as possible, using pronouns such as 'they' or 'their' in place of 'she' or 'him'. Words such as 'spouse', 'child', 'sibling' or 'relative' should be used rather than 'husband' or 'brother'.

10. The examples given in the four step approach below are not intended to be exhaustive. The Legal Database team in the Tax Counsel Network can provide assistance in regard to the editing process.

Step 1: Remove information that specifically identifies the taxpayer

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

12. Editing officers must remove primary identifying details such as those in the following list:

- 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
- 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
- signatures
- tax file numbers.

Step 2: Remove or replace information that may enable the identity of the taxpayer to be ascertained

13. Other information which when combined with other facts in the advice may potentially identify taxpayers will also need to be removed or replaced with sanitised or generalised information. The following are examples:

- quotes and extracts, including clause, condition, section and paragraph numbers, of contracts, constitutions and other taxpayer/related entity documents that are not in the public domain
- titles and/or positions of persons, such as director, public officer or doctor
- monetary amounts and currency
- geographic locations
- jurisdiction-specific legislation or treaties
- specific descriptions of work or business activity
- relationships and associates
- 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.

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

15. **Example A (clauses of a contract):** It may be necessary to quote specific clauses of an agreement or contract in a private ruling, but such clauses must be omitted from the edited version (or clauses paraphrased). The following might be used:

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

16. **Example B (description of work):** Where advice issues to a prominent indigenous rugby league player seeking to claim a deduction for the value of protective head gear, this may become:

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

17. **Example C (business activity, geographic location):** A private ruling issues to a company providing engineering services on resource installations in Area A of the Timor Gap Zone of Co-operation. This may become:

> 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 you are providing the services.

18. **Example D (dates):** Where dates, and exact dates in particular, pose privacy risks, they can be sanitised, using more general dates, or legislated dates. The following might be used instead:

> The contract was entered into during the relevant income year.
>
> The contract was entered into pre-CGT (or post-CGT).
>
> The contract was entered into after 20 September 1985.
>
> The scheme commences in the year beginning 1 July 2013.

19. **Example E (relationships and associates, business activity):** Where advice issues to a taxpayer who runs a takeaway food outlet with his wife, their son and daughter and respective spouses, this may become:

> You and members of your family are joint owners of a small business.

20. **Example F (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 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:

> 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 in another place of employment.

21. **Example G (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. The following might be used:

> You incur net medical expenses in the relevant income year above the relevant medical expenses threshold.
>
> You incur net medical expenses in the relevant income year above $1500 (the legislated amount).

Step 3: Remove or replace information that may enable the identity of a third party to be ascertained

22. 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
- the taxpayer's identity could not be ascertained by identifying the third party.

23. 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.

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

- The names/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.

25. The following examples provide some guidance in editing written binding advice where third parties are involved.

26. **Example H:** 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. 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, this information may be retained in the edited version.

27. **Example I:** 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, this information may be retained in the edited version.

28. **Example J:** 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. The name of both businesses 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 4: Remove or replace confidential information

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

30. 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.

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

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

33. 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) and third parties.

Further examples

34. The following paragraphs provide further guidance on editing written binding advice.

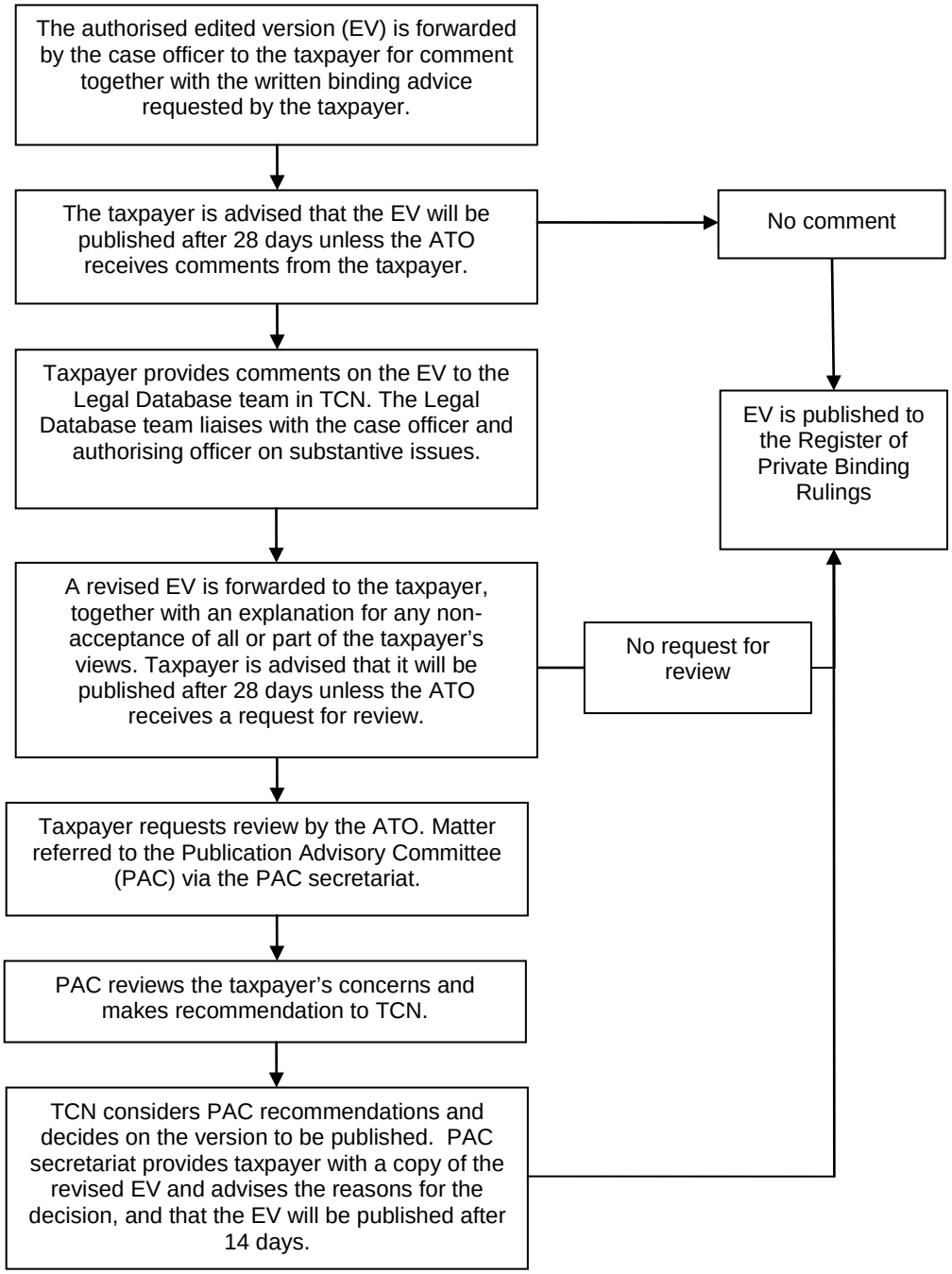
35. **Example K:** An oil company writes to the ATO requesting advice on a proposal to enter into a transaction involving the purchase and installation of oil refining equipment used in a new refining technique. In this case, the editing must be sufficient to prevent the oil companies, the manufacturers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

36. **Example L:** A taxpayer has sought a ruling in relation to certain international financing arrangements for the leasing of a Boeing 747-400 aircraft. This may become:

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

37. 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 would need to be exercised.

38. **Example M:** Using the facts described in Example K, 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 third party involved in the transaction.

39. **Example N:** 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. The name of the third party company 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.

Attachment B: Edited version review and publication process