PS LA 2010/5 - Technical discussion papers

This cover sheet is provided for information only. It does not form part of *PS LA 2010/5 - Technical discussion papers*

This practice statement is being amended as a result of the publication of PS LA 2012/1 and withdrawal of PS LA 2003/10. Guidance can be obtained from the contact officer until this amendment is finalised.

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Practice Statement Law Administration

PS LA 2010/5

This practice statement is being amended as a result of the publication of PS LA 2012/1 and withdrawal of PS LA 2003/10. Guidance can be obtained from the contact officer until this amendment is finalised.

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

SUBJECT: **Technical discussion papers**

PURPOSE: **To explain:**

- **when technical discussion papers should be published**
- **the status of technical discussion papers, and**
- **the processes for development and finalisation of technical discussion papers**

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STATEMENT

What is a technical discussion paper?

1. A technical discussion paper is the name given to a formal paper on technical issues which seeks to facilitate consultation between the Australian Taxation Office (ATO) and the community as part of the process of developing a precedential ATO view on an aspect of the taxation or other laws administered by the Commissioner.

Scope of this practice statement

2. The processes outlined in this practice statement apply only to those discussion papers which have a core focus of the formation of a precedential ATO view of the law. So for instance, papers which discuss matters of practice, or which discuss discretionary or administrative issues, are not covered by this practice statement. Also not covered are position papers dealing with the application of the law to particular taxpayers.

When should a technical discussion paper be published?

3. As a general proposition, consultation with the community before the formation of a precedential ATO view should be conducted through means less formal than a technical discussion paper. Nothing in this practice statement should be read as seeking to inhibit less formal means of community engagement, or expressing a preference for the publication of a technical discussion paper where there is a more appropriate method by which to consult with taxpayer representatives such as through face to face discussions or phone conversations.

4. A technical discussion paper might be issued in the following situations:

   - where there is significant uncertainty as to the view or approach that the ATO should take on an issue
   - where there is a need to seek formal input on the nature of commercial arrangements relevant to the application of the law, or
   - where private sector input is appropriate for the implementation of new law.

   This list is not exhaustive. All technical discussion papers will now be published.

5. A technical discussion paper should not be published to consult on a potential precedential ATO view where in the minds of appropriate senior officers there is little uncertainty about the approach the ATO will take on the issue. In such cases, it would be more appropriate to consult through the publication of a draft public ruling.

Reasons for publishing a technical discussion paper

6. The need for publishing a technical discussion paper may arise for a number of reasons. However, there are two main drivers which may result in the need to publish a technical discussion paper:

   - to canvass issues prior to the possible publication of a public ruling. As stated in paragraph 5 of this practice statement, where there is little uncertainty about the approach the ATO will take, a draft public ruling will normally be a more appropriate consultation mechanism. However, in certain situations such as those listed in paragraph 4 of this practice statement, it may be appropriate to publish a technical discussion paper to canvass these issues before publishing the draft public ruling.
   - in response to issues raised in meetings of the National Tax Liaison Group (NTLG) committee, sub-committees or other external consultative forums.

Status of a technical discussion paper

7. The status of a technical discussion paper will be clearly outlined in a preamble to the paper, which will indicate that:

   - any views outlined in the paper are preliminary in nature and should not be taken as representing either a precedential ATO view or that the ATO will take a particular view
   - the paper does not set out the ATO's general administrative practice
   - it is not a publication approved in writing by the Commissioner for the purposes of sections 284-215. 284-224 and 361-5 of Schedule 1 to the *Taxation Administration Act 1953*
   - there is no protection from primary tax, statement penalty, or interest provided to taxpayers should they rely on the paper for any purpose.

8. Accordingly, although a technical discussion paper will be published on the external ATO website, taxpayers will not be able to rely on it.[1]

9. Tax officers should also be aware that a technical discussion paper will not express a precedential ATO view. Law Administration Practice Statement PS LA 2003/3 and the Schedule of documents containing precedential ATO views list all documents considered to be precedential ATO views.

Process for development of a technical discussion paper

Management within the framework of PS LA 2003/10

10. Preparation of a technical discussion paper can only proceed after the underlying risk has been assessed and the issue appropriately approved as a Priority Technical Issue (PTI). See PS LA 2003/10 Management of Priority Technical Issues for further information on the escalation, approval and management of PTIs.

11. The development and publication of a technical discussion paper must be managed within the framework outlined in PS LA 2003/10 for managing and resolving the overall PTI.

[1] See also PS LA 2008/3 Provision of advice and guidance by the Tax Office, paragraph 255.

12. In particular, this requires consultation with and agreement by relevant parties to the PTI in regard to the publication of the technical discussion paper and its content, and adherence to approved timeframes for resolution of the PTI.

Record keeping

13. All aspects of the development, publication and subsequent withdrawal of a technical discussion paper, including all approvals, must be clearly documented in accordance with PS CM 2005/27 Record keeping. In accordance with PS LA 2003/10, Siebel is the corporate information technology system for managing the resolution of PTIs, and thus the development and publication of the technical discussion paper should also be managed on this system.

Obtaining approval for the decision to prepare a technical discussion paper

14. In addition to the requirements under paragraph 12 of this practice statement, the decision to prepare a technical discussion paper must be formally approved by an appropriate senior officer, as follows.

- Where the technical discussion paper is to be published prior to the possible issue of a public ruling, approval to prepare the paper must be obtained from:
  - the relevant business line SES risk owner, and
  - the relevant Deputy Chief Tax Counsel, or from the Chief Tax Counsel.
- Where the technical discussion paper is to be published in response to an issue raised at an NTLG committee, sub-committee or other external consultative forum, approval to prepare the paper must be obtained from:
  - the Chair of the relevant forum.
- Where the technical discussion paper is to be published for another reason, approval to prepare the paper must be obtained from:
  - the relevant business line SES risk owner, and
  - the PTI SES in the Tax Counsel Network or a Centre of Expertise.

15. A submission must be made to the relevant approvers, outlining:

- the reason for issuing the intended technical discussion paper
- the scope of the intended technical discussion paper, including:
  - an explanation of the technical issue/s, and
  - the questions intended to be asked
- any specific audience to whose attention the technical discussion paper will be drawn, and
- the timeframe in which it is intended to publish the technical discussion paper.

Use of standard template

16. Authors must prepare a technical discussion paper using the standard template. A link to this template is provided in the Other References section at the end of this practice statement.

Content of a technical discussion paper

17. The following points must be taken into consideration when developing the content of a technical discussion paper.

- Technical discussion papers must be published for the purpose of undertaking genuine community consultation and to seek open dialogue on the issue under consideration. Their content and tone should reflect these purposes. A technical discussion paper therefore should not promote a particular precedential ATO view. Where it is appropriate to outline a 'preferred' view, this should be done in an impartial manner, to make it clear that genuine community comment is sought, and to ensure discussion of alternative views.
- The particular issues on which comments are sought should be clearly expressed, and questions to the community clearly articulated.
- The date of effect of the application of the potential precedential ATO view that may flow from the issues raised in the paper must be clearly articulated and canvassed. This might be done by proposing a date of effect and seeking comment on that date, or by simply seeking comment on what the date of effect of the potential precedential ATO view should be.
- Where it is appropriate, the particular audience from whom comments are sought can be indicated.

Clearance of the technical content of a technical discussion paper

18. Before the technical discussion paper is approved for publishing, the technical content of a technical discussion paper must be given clearance by either:

- the Tax Counsel Network (where the issue which is the subject of the paper has been allocated to the Tax Counsel Network), or
- the relevant Centre/s of Expertise.

Approval to publish a technical discussion paper

19. In addition to the technical clearance requirements set out in paragraph 18 of this practice statement, a technical discussion paper must be approved by an appropriate senior officer before publication, as follows.

- Where the need for the technical discussion paper arises prior to the possible issue of a public ruling, approval to publish the paper must be obtained from the relevant business line SES risk owner.
- Where the need for the technical discussion paper arises in response to an issue raised at an NTLG committee, sub-committee, or other external consultative forum, approval to publish the paper must be obtained from the Chair of the relevant forum.
- Where the need for the technical discussion paper arises for another reason, approval to publish the paper must be obtained from the relevant business line SES risk owner.

Publication of a technical discussion paper

20. The approved version of a technical discussion paper should ordinarily be sent to the PTI and Public Rulings Unit via an appropriate Siebel activity two weeks prior to the proposed publication date. However, on particularly urgent matters, authors of technical discussion papers should work closely with the PTI and Public Rulings Unit throughout the development of the paper to minimise this timeframe and ensure there is no delay in publishing the paper.

21. The PTI and Public Rulings Unit will ensure correct formatting of the technical discussion paper, perform a pre-issue quality check and arrange for publication of the paper.

22. After publication, technical discussion papers will be available both internally on ATOlaw and externally on the Legal Database.

23. The author of a technical discussion paper will be advised that publication has occurred. It is the responsibility of the author to ensure other related parties, including relevant NTLG Chairs, and/or appropriate external stakeholders are informed that the technical discussion paper has been published and is available for comment.

24. The due date for comments will be clearly noted on a technical discussion paper when it is published.

25. The author of a technical discussion paper must ensure appropriate courtesy is shown to individuals or associations who put forward responses to the discussion paper. This will include acknowledging receipt of the submission and where appropriate, replying to the submission.

26. Submissions received on a discussion paper will be published on ATOlaw and the Legal Database, unless it is requested in the submission that the response be kept confidential.

27. Authors should provide copies of the unconfidential submissions received to the PTI and Public Rulings Unit within two weeks of the closure of the period for comments, to enable publication of the submissions to occur.

Finalisation and withdrawal of a technical discussion paper

28. It is in the best interest of both taxpayers and the ATO to finalise the expression of technical views as quickly as possible. Technical discussion papers must therefore not be left in abeyance.

29. Withdrawal of technical discussion papers will be managed by the PTI and Public Rulings Unit.

30. A technical discussion paper must be withdrawn when:

    - a decision has been made to proceed with the provision of ATO advice or guidance (such as a draft public ruling) dealing with the issues canvassed in the paper
    - in the case of NTLG (or other external forum) discussion papers, the issues canvassed in the paper are discussed and finalised in the relevant forum and the outcome of the discussion is noted in the minutes of the meeting, or
    - it is otherwise appropriate to do so in the circumstances, for example a court judgment has determined the issue, or another decision has been made on how to resolve the issue.

31. A withdrawn technical discussion paper will be annotated as withdrawn. The withdrawal notice will provide details of the outcome of the technical issues raised in the paper, including details of the relevant ATO advice or guidance (proposed or final) where appropriate.

32. It is the responsibility of the TCN area or Centre of Expertise which owns the relevant PTI to advise the PTI and Public Rulings Unit when a technical discussion paper should be withdrawn, and to provide:

- evidence of appropriate agreement to withdraw the technical discussion paper (refer to paragraph 33 of this practice statement), and
- the withdrawal notice.

33. Agreement to withdraw a technical discussion paper must be obtained from:

- where the technical discussion paper resulted, or will result, in the issue of ATO advice or guidance, the relevant approver or approvers for that advice or guidance
- where the technical discussion paper was published in response to an issue raised at an NTLG committee, sub-committee, or other external forum, the Chair of the relevant NTLG committee or other forum
- where the technical discussion paper is to be withdrawn for another reason, the business line SES risk owner.

34. If a technical discussion paper has not been withdrawn within six months of its publication, the responsible PTI Owner and/or external forum Chair, in conjunction with any business line SES risk owner and other relevant PTI stakeholders for the issue, will be asked to decide whether to leave the paper open or withdraw it.

35. If the paper is left open, then that decision must be reviewed on a quarterly basis by the responsible PTI Owner or external forum Chair.

Subject references	
Legislative references	TAA 1953 Sch 1 284-215 TAA 1953 Sch 1 284-224 TAA 1953 Sch 1 361-5
Related public rulings	
Related practice statements	PS LA 2003/3 PS LA 2003/10 PS LA 2008/3 PS CM 2005/27
Case references	
Other references	Technical discussion paper template (internal link only)
File references	1-20VGI8W
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Other Business Lines consulted	**All**