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Australian Government
Australian Taxation Office



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The Treasury

Review of process for supporting new tax laws with extrinsic materials and ATO guidance

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Executive summary

New law extrinsic materials and ATO public advice and guidance (PAG) products have an important function in assisting taxpayers to understand the policy intent, operation, and administration of new legislation. When functioning well they build trust and confidence in the tax system by providing certainty and transparency to taxpayers on unfamiliar new legislation.

Explanatory memorandums (EMs) are prepared by the Treasury as companion documents to a bill. Their primary purpose is to assist members of the Parliament, officials and the public to understand the policy intent, objectives and detailed operation of the proposed legislation. EMs can also play an important role in the interpretation of legislation by the courts.

ATO guidance products communicate the ATO view of how the taxation and superannuation systems work and how legislation is to be administered. ATO guidance provides clarity about the ATO position and can communicate behaviours that the ATO considers to be high risk or unlawful. Correspondingly, PAG aims to give clients the tools to adopt best practice approaches to meet their obligations.

The primary product for providing the ATO's guidance on a new piece of legislation is the Law Companion Ruling (LCR). The ATO may also use Practical Compliance Guidelines, Law Administration Practice Statements, Taxpayer Alerts and web guidance to support new law. The key differences between the ATO guidance products relate to their primary purpose and the delivery channel.

Treasury and the ATO have reviewed the new law guidance products and the processes for their development, in light of feedback from internal and external stakeholders that the products are not always meeting their objectives. This review was informed by discussions with representatives from the National Tax Liaison Group (NTLG) and the Board of Taxation (BoT).

The review sought to clarify what was working well and what could be improved. The review also aimed to establish a common understanding of the purpose of the guidance products, how they are intended to be used and what is best practice in their preparation.

Attachment A 'New law guidance products' sets out, for each product, the review's understanding of its purpose, the various constraints around its development, and approaches that define when the product is fit for purpose. In developing a common understanding about each product, two issues of particular interest were opportunities and constraints around the use of LCRs, and the interaction between LCRs and EMs.

Attachment B 'New law guidance processes' maps the high-level steps that the Treasury, the ATO and external stakeholders perform in the development of new legislation, the accompanying EM and the corresponding ATO guidance products. In the review workshops and discussions, the current procedures for two particular areas were identified as benefitting from clarification: the interaction and cooperation between the Treasury and the ATO in developing new guidance products; and the procedures and opportunities for external stakeholder consultation.

A number of possible options for improvements in relation to new law guidance processes were identified through the review workshops. Following consideration of these ideas for improvements, the review has identified **seven Best-Practice Principles**, these being:

1. Better integration of PAG consideration/development concurrently with the law design process so that there is coordinated development of legislation, EMs, LCRs and other ATO guidance products.

2. External feedback on key issues should be captured during the policy and law development process. Where an issue that is consistent with the Government's policy intent is not resolved through the law or the EM, the process should communicate issues to the ATO early to consider incorporating into any necessary PAG planning.
3. Ensuring EMs explain, in a clear and readable way, the policy intent of the legislation and how it operates to achieve that intent.
4. Any issues that may be under consideration for PAG should be prioritised based on a number of relevant factors including the objective and necessary scope of any PAG and the importance to the tax system of dealing with that issue in PAG, and when. In addition to helping determine whether PAG is desirable, where relevant this should also assist in determining the scheduling of new law guidance (along with other general guidance priorities) to ensure it best meets the ATO and community needs in the timeliest manner.
5. External visibility of issues under development for PAG on new law measures.
6. A considered choice on the best channel and the nature of the product to be employed should be made at the outset of the new law guidance process.
7. Staff guidance and instructions should outline the guidance product development process, consultation processes, and the roles, responsibilities and processes for staff for escalation and approval.

Importantly, during the review workshops and discussions, it was acknowledged that as part of any 'best practice' principles there will be some issues beyond the control of Treasury and/or the ATO that can impact on the delivery of such principles.

The review then identified five key recommendations for change (refer to table below):

Recommendations	Link to Best-Practice Principle
• Better integration of the Treasury law design and ATO guidance development processes	1, 2 and 7
• Prioritisation of issues to consider for, and include in, guidance products	2, 4, 5 and 7
• Categorisation of guidance demands and appropriate delivery channel selection	5, 6 and 7
• Improved external visibility of new law issues	1, 5 and 7
• A suite of measures around the development and presentation of EMs	2, 3 and 7

These recommendations seek to ensure the aspects of new law guidance processes that have been working well are applied consistently, as well as to identify areas for improvement. They will be adopted in ATO and Treasury processes in the development of upcoming legislation and law guidance.

Origins and objective of the review

Within Treasury and the ATO there has been growing recognition that new legislation, EMs and LCRs, were not always integrating as a package to set out what the new measure will mean in practice for affected taxpayers.

Partly the issue was one of timing. The products were intended to be developed and released concurrently but the difficulty of achieving this in practice meant that, at the time of the passage of legislation, taxpayers may not have the full set of intended guidance material. Partly too, the understanding of what EMs and the relatively new LCRs were intended to achieve was still open to question. In particular there were diverse views on the purpose and function of EMs and LCRs between the Treasury, ATO and external stakeholders. The distinction between EM explanatory material and ATO interpretive material has not been universally understood.

In addition, since late 2018, external members of the NTLG have raised concerns that legislative support products and guidance do not always match their policy intent, do not contain sufficient examples and detail, and could benefit from greater public consultation.

In a related but separate process, in October 2019, the Treasury's Law Division began to review the quality of EMs and the workflows that produce them, with a view to improving the utility and consistency of EMs and streamlining their preparation.

In response the Treasury and ATO Forum established a working group in early 2021 to consider these issues. The Terms of Reference, which were developed in consultation with stakeholders, set out the review's broad aims as to:

- clarify the respective roles of guidance products for new tax law to promote a common understanding amongst Treasury, the ATO and tax community; and
- measure the effectiveness of the various current products for supporting implementation of new tax laws and identify and promote best practice in developing guidance products for new tax law.

The review has been led by a working group comprised of ATO and Treasury staff, engaging with representatives of the NTLG and the BoT, and reporting to a steering group of senior Treasury and ATO officials.

Conduct of the review

The review has been progressed through internal analysis by the Policy and Law Divisions of Treasury and the PAG and Policy, Analysis & Legislation areas of the ATO, and engagement with external representatives from the NTLG and the BoT. In keeping with the aims of the review, internal and external consultations had the aims of:

- Coming to a common understanding among Treasury, the ATO and external stakeholders of:
 - the purpose and appropriate content of the various new law guidance products; and
 - the best practice legislation guidance development processes (identifying what is working well and opportunities for improvements).
- Exploring whether new law guidance products could be improved and where this is the case, developing recommendations to improve product content and product development process.

The review has also incorporated, and informed, the outcomes of a separate review of EMs, which identified ways to support the development of more consistent, effective and fit-for-purpose EMs. As part of this EM review, Treasury engaged Deloitte digital content experts to undertake a desktop review of Treasury EMs and to seek feedback from a range of stakeholders, including Treasury portfolio entities, the Law Council of Australia and the secretariats for the Senate Standing Committee for the Scrutiny of Bills and Parliamentary Joint Committee on Human Rights. Treasury has implemented several improvements to EM template design, production processes and guidance for EM writing in response to the review.

The first step of the new law guidance review was the preparation by ATO and Treasury of the *New law guidance: background paper* (**Attachment D**). The paper summarises ATO and Treasury perspectives on Treasury EMs and ATO guidance products. The paper was used to inform discussion, initially internally and then with externals, on the purpose of the guidance products, the constraints around their development, and whether, given the constraints, they were fit for their intended purpose. The background paper was the basis of workshops with representatives from the NTLG on 7 October and the BoT on 22 November 2021.

The next step in the review was an internal analysis within the ATO and Treasury of three recent new law measures (stapled arrangements, diverted profits tax, and combating illegal phoenixing) to explore the processes involved in developing guidance products. These internal reviews were then translated into a questionnaire, sent to NTLG representatives, which formed the basis of workshops on 7 October, 21 October and 16 December 2021.

A summary paper of the NTLG workshop discussion was released to the NTLG. Also prepared and released was a paper (the *New law guidance: working paper* **Attachment E**) which categorised issues raised into various 'principles' that would need to be considered to ensure guidance products are fit-for-purpose and the process for their development is best practice.

This report summarises the common understandings that were reached in the review and the areas identified for improvement.

Key areas of common understanding

The role of new law guidance products

Law companion rulings

The *New law guidance: background paper* (**Attachment D**) describes the purpose and function of LCRs and the constraints around their development. Stakeholders identified LCRs as a key product in relation to new law guidance and emphasised that the longer the delay in developing and issuing an LCR, the less is their practical benefit. A delay could result in the market establishing its own understanding and this comes with a risk that taxpayers may adopt different positions to that ultimately adopted by the ATO.

Common understanding was reached that:

- LCRs are not intended to be produced for every piece of legislation but only in cases where clarification of how the ATO will interpret and administer the legislation is desirable at the time the legislation is passed.
- The LCRs are a key product for stakeholders and the timeliness of their delivery can be important. Timely delivery of a concise document is often preferable to the delayed delivery of a document more inclusive of all guidance issues.

The interaction between explanatory memorandums and law companion rulings

A goal of the review was to clarify the fundamental distinction between EMs and ATO guidance products, and their different roles in supporting new tax law. Through the internal and external consultations of this review and that of the EM review it was clarified that:

- The primary role of the EM is to explain the policy intent behind the law and how it operates to achieve that intent. It is prepared at a point in time and circulated by the approving Minister to support the passage of the legislation through Parliament. It cannot be amended or updated other than to make a correction or reflect amendments agreed by the Parliament, and cannot be amended after the legislation is passed.
- ATO guidance products communicate the ATO view of how the Commissioner will interpret and administer the law (including where relevant, new law). ATO products are prepared when a need for guidance is identified on an issue of sufficient priority, and they are amended or updated over time as necessary.
- Although there may be material of interpretive value in EMs, interpretive material neither can, nor should, be added into EMs *in place of* guidance products. This approach would take the EM outside of its primary role of explaining the policy and operation of the law and increases the risk of the EM including errors about how the law should be interpreted.

Attachment A provides a summary of the various law guidance materials, explaining their different functions and setting out the key principles that determine whether they are fit for purpose as determined by internal and external consultation during the review.

The new law guidance process

ATO–Treasury cooperation on the development of new law guidance products

Although there is a protocol (*the Treasury and the Australian Taxation Office – Tax and Superannuation Protocol – [ATO Treasury Protocol](#)*) in place to guide ATO and Treasury cooperation in new law development, external stakeholders generally had a limited understanding of the interaction between Treasury and the ATO in development of new legislation.

The review discussion clarified the current processes for Treasury/ATO cooperation on law development (see **Attachment B – New law guidance processes**) but also found there can be an insufficient focus on guidance needs during law development, leading to guidance product timing and content issues. There was a common understanding that joint consideration of the design of new law, its associated EM and potential guidance products is beneficial to the quality of these products. In particular, such joint consideration can promote consistency between the policy intent and administration of new law, expose practical and administrative issues with the law before it is finalised, and help the ATO to develop timely advice on the most critical issues.

Managing resources and risks associated with very early development of PAG

It was acknowledged that there are constraints of operating in an environment where resources must be allocated to the highest priority work including the development of PAG (on existing and new law). With the development of PAG early in the process there is a risk of wasted effort as a result of the law not progressing or other delays outside the ATO and Treasury's control.

Stakeholders appreciated that the ATO must balance the benefits of developing PAG early in the law development process (for example, necessary PAG is better able to be published in a timely manner) with the cost of investing time and effort in the development of PAG that is ultimately not needed. The timing of the development of new law guidance should carefully balance these trade-offs.

In deciding how to balance the allocation of limited resources, the ATO must also consider the priority of the need for new law PAG relative to the ongoing need for public advice in respect of already enacted law.

External stakeholder consultation

External stakeholder feedback is received by both the Treasury and ATO during the policy and law development processes and by the ATO during the development of guidance products. The earlier potential guidance needs can be raised in the law development process the more adequate will be the time for consideration. However, stakeholders expressed views that guidance needs they raise during law design consultation do not always appear to contribute to ATO/Treasury consideration of what guidance is required. From these discussions a better understanding was developed that:

- A key indication of issues that may be considered by stakeholders as a priority for incorporating into guidance will be the issues raised in the law design process. However, current ATO and Treasury consultation processes may not always focus on ensuring the necessary key guidance issues are captured. Nor do current processes always provide adequate feedback to stakeholders about how concerns they raise are being considered.
- There are Governmental, procedural and timing constraints on the level and scope of external consultation on new legislation and EMs. With those constraints, stakeholders indicated that their engagement early in new law guidance processes would increase their confidence that their interpretation of issues is in line with that anticipated to be the ATO's. It would also help identify priority issues to assist in finalising LCRs in shorter timeframes.

Key outcomes of the review

Summary of changes

Table 1: Summary of changes to be made as result of the review

The proposed actions seek to address and where appropriate incorporate the relevant Best Practice Principles identified as part of this review (as outlined in the Executive Summary).

Process	Current	Recommendations	How this will happen
1. Consideration of PAG issues when designing new law	<p>While the current quality assurance protocol sets out the issues to be worked through during law and policy development, the process does not explicitly include consideration of future guidance needs.</p> <p>This can lead to guidance products being considered late in the process, feedback provided during consultation on law not being considered as part of guidance development and potential inconsistency between the law and guidance products.</p>	<p>Where appropriate the ATO and Treasury should:</p> <ul style="list-style-type: none"> • seek stakeholder feedback on issues which may require ATO guidance at the same time as gathering feedback on draft law • share feedback (between and within agencies) on issues potentially meriting guidance, or relating to law design, collected at time of law development • in consultation with stakeholders, give early consideration to guidance issues raised, potentially leading to: <ul style="list-style-type: none"> – improvements in the law or EM, where appropriate – better prioritisation and scheduling of ATO guidance products – earlier consideration of the best channels for addressing guidance issues 	<p>Where appropriate Treasury will:</p> <ul style="list-style-type: none"> • include a specific question in relation to potential ATO guidance required when consulting on draft law and EM • share with the ATO any potential PAG-related and non-confidential information <p>Treasury and ATO will:</p> <ul style="list-style-type: none"> • consider if potential guidance issues identified early have implications for the law or EM <p>ATO will:</p> <ul style="list-style-type: none"> • consider internal processes to ensure PAG issues raised during law development are fed into the correct business areas for consideration

Process	Current	Recommendations	How this will happen
2. Prioritisation of new law guidance issues	<p>There is some lack of clarity around the process for seeking internal or external input into prioritisation of issues on which new law guidance may be prepared.</p> <p>There is no clear framework for prioritising guidance and making judgements around timing and time-critical PAG.</p>	Where appropriate, ATO decisions about priority and timing of new law guidance should be informed by formal external and internal consultation processes	Where appropriate, the ATO will ensure that the processes allow for external input on the priority of new law issues which may require guidance
3. Determining the appropriate PAG channel and product	There is some lack of clarity around the framework for determining the appropriate PAG channel or product	Where the ATO has decided on the need for new law guidance, it should give early consideration to the most appropriate product and channel to provide guidance	Where required, the ATO will amend internal processes to ensure external input on new law issues which may require guidance, including issues identified through law development processes, are fed into the correct business areas for consideration, to inform channel and product decisions
4. External visibility of new law guidance issues	Reported lack of visibility of PAG being considered for new law	<p>There should be improved visibility of ATO decisions to develop new law guidance including through:</p> <ul style="list-style-type: none"> • matters progressing to formal PAG being advised on the ATO advice under development program on ato.gov.au • more transparent / efficient use of existing consultation processes on specific pieces of PAG 	<p>Where appropriate, the ATO will:</p> <ul style="list-style-type: none"> • add those new law guidance issues which are progressing to formal PAG on the advice under development program • ensure the consultation conducted in respect of the development of New Law Guidance will adopt and apply effective, best practices.
5. Explanatory Memoranda development	A number of issues impact on the overall effectiveness of Treasury EMs, including:	Treasury should continue to refine its processes, templates and drafting guidance for EMs, to support stakeholders' understanding of new	<ul style="list-style-type: none"> • Treasury will seek to ensure comprehensive policy context is incorporated in EMs – this will help

Process	Current	Recommendations	How this will happen
	<ul style="list-style-type: none"> • inconsistent and sometimes insufficient policy justification and explanation included in EMs of how the policy intent is achieved; • a tendency towards paraphrasing legislation, rather than providing useful explanatory commentary; • inconsistent editorial standards; and • lack of overall clarity and readability due to unnecessary complexity of language and inconsistent styles and structures in the documents. 	law, and better inform consultations on the law, EM and guidance products	<p>to ensure a consistent understanding across ATO, Treasury and stakeholders of the policy intent of the law, which will inform consultations and preparation of guidance. The policy context necessary to be included in an EM will depend on the complexity and scale of the reforms – Treasury’s focus will be on ensuring the policy context provided gives a complete picture, suitable to explain the effect of the proposed new law and how it operates to achieve that intent.</p> <ul style="list-style-type: none"> • Treasury will further its practice of releasing draft consultation EMs when consulting on Exposure Draft legislation, and explicitly invite feedback on EM coverage and quality. Additional stakeholder feedback will improve the quality of EMs and better inform the preparation of guidance material. <p>Improved EM templates and drafting capabilities will lead to clearer drafting and more useful commentary and hence better understanding of the law by all stakeholders.</p>

Detail of key outcomes and changes

1. Consideration of PAG issues when designing new law

The current quality assurance (QA) protocol between the Treasury and ATO provides a framework for the functioning of the law design process between the Treasury and the ATO. A conclusion of this review is that an earlier consideration of ATO administration and guidance issues in a more integrated fashion with the law development process will:

- facilitate earlier awareness of the need for, and, depending on the level of certainty involved with the development of the law, an earlier start in the development of ATO guidance
- improve the drafting of the law and EM, to the extent that consideration of ATO guidance identifies issues that should be addressed in the law or EM
- reduce the likelihood of the policy intent and administration of the law being inconsistent.

Consultation on new law guidance issues

Treasury and the ATO will consider new law guidance needs when developing new legislation, and external feedback on PAG requirements will be sought, if appropriate, when consulting on draft law and EMs. For example, questions relating to what interpretive and administration issues may merit ATO guidance and the appropriate timing or channel for such guidance could be explored at the time of the exposure draft legislation and EM.

Treasury will also share any potential PAG related, and non-confidential, information with the ATO when it is received. Likewise, the ATO will share feedback it receives that may be relevant to the drafting of the law or the EM.

The earlier evaluation of these guidance issues will not only identify guidance needs but may expose practical and administrative issues with the draft law. If analysis of the issue shows the problem to be the design of the legislation or how the policy is explained in the EM, these issues can be considered and ideally dealt with before the legislation is finalised for introduction and passage. This would ensure that PAG products were not called upon to address gaps in the law and that there is sufficient policy clarity in the EM to allow the law to be correctly interpreted consistently with policy intent.

Where guidance issues are identified relating to how the law will be administered or interpreted in the course of administration by the ATO, better embedded issue prioritisation and channel selection procedures (see below) incorporated into the law design process will be put in place so that guidance advice can be better provided at the time it is needed.

Not all issues identified during the policy and law development phase will, or should, translate into extrinsic materials or guidance. However, early identification and sharing of the issues for consideration as potential guidance topics will assist in shaping the final design of the new law and EM to ensure issues are addressed in the most efficient and effective manner, whether this is through the new law, the EM or PAG as relevant.

Internal linkages and processes amended

Internally, the ATO will address processes and linkages between our Law and Policy Design area, and the new law project teams, to ensure PAG issues raised during law development are fed into the correct PAG areas. This will ensure that those with the most appropriate skills are aware and able to consider the prioritisation, channel and product consideration decisions which flow.

2. Prioritisation of new law guidance issues

Focus on time-critical issues first

At the time draft law and explanatory materials are issued for consultation, that consultation will include a request for input on priority of new law issues which may require guidance – particularly those which may have time pressures because of impending application dates, or because commercial decisions may need to be made by a certain date to comply with the new law.

Having this input will allow the ATO to better focus resources on key priority issues and where the ATO decides to deliver PAG, to focus on a staged delivery of the less critical PAG in a phased approach.

In addition, it has been established through this review that a key best practice principle for issues that may be under consideration for PAG is that it focuses on key priority issues only, to improve timeliness, rather than try to cover all issues at once.

3. Product and channel selection

External input on new law guidance

Not all new law will necessitate guidance, and there will be different layers of guidance required for different pieces of law, depending on complexity.

Where it has been identified through consultation on draft law, or through the law development process, that there may be multiple areas on which guidance is required, the ATO will undertake to seek external input on the priority of those new law guidance issues.

Right product at the right time

Again, noting that not all new law will necessitate guidance, there will be a more systemised process regarding the consideration of the most appropriate product to provide ATO guidance, which has regard to the best practice principles for use of particular products developed during this review. While the LCR remains the flagship new law guidance product, there will be a formalised consideration of the right product to provide new law guidance, taking into account all factors and input and feedback received. This decision will be made by the ATO at the outset of the new law guidance process and reviewed as necessary as more clarity on issues becomes available.

Attachment A outlines all the new law guidance products, including their role, limitations, and best practice principles in relation to their use.

4. External visibility of new law guidance issues

Better visibility of what is planned

The ATO will employ the ATO Advice under Development Program as the primary platform for advising that it is preparing PAG on a given new law topic, and planned completion dates.

However, there will also be greater use of consultation processes and external engagement on specific pieces of PAG, in line with best practice consultation approaches. Given the variety of issues which may arise, there is no single process advocated.

5. Explanatory Memoranda

Incorporating sufficient policy context in EMs

Treasury will ensure comprehensive policy context is incorporated in EMs, to contextualise the operation of the new law within existing legal frameworks and policy settings. This has been an area of focus following the completion of the Treasury Review of Explanatory Memoranda in late 2021 and will continue to be an ongoing priority.

Ensuring sufficient policy context is provided in EMs will promote a more consistent understanding across the ATO, Treasury and stakeholders of the intent of the proposed law and how it operates to achieve that intent, which will inform consultations and the preparation of other guidance. The policy context necessary to be included in an EM will depend on the complexity and scale of the reforms – Treasury's focus will be on ensuring the policy context provided gives a complete picture, suitable to explain the effect of the proposed new law and how it operates to achieve that intent.

Improved EM consultation practices

Treasury will further its practice of releasing draft consultation EMs (or parts of EMs) when consulting on Exposure Draft legislation, and will specifically seek feedback on the coverage and quality of draft EMs.

Releasing a consultation EM enables stakeholders to offer early feedback on the explanation of the proposed law, including the explanation of the law's purpose, intended operation and broader policy context, as well as the use of any illustrative examples. The EM is refined in light of consultation feedback and formalised with additional components for introduction to Parliament (such as inclusion of the statement of capability with human rights).

Specifically seeking comments from stakeholders on the consultation EM will help to elicit feedback and improve the drafting of the EM. It may also raise issues relevant to the development of the law itself or ATO new law guidance materials, which will be shared with the ATO to inform new law guidance planning and development.

Ongoing refinement of templates and building EM drafting capability

Treasury adopted a new template and layout for EMs in late 2021, informed by the outcomes of the Treasury Review of Explanatory Memoranda and related feedback provided through this review. This new structure will make it easier for readers to engage with Treasury EMs and provide greater insight for stakeholders about the rationale and operation of the proposed new law.

The design of the EM template will allow improved navigation and consistency of structure, which will make the documents more navigable and accessible for readers. The new template was developed in response to stakeholder feedback and all new Treasury EMs are now using this new EM design. The design changes mainly relate to the arrangement of headings, page margins and the insertion of a table of contents at the start of each chapter.

Treasury EMs continue to adopt a structure and layout which provides a range of detail about the proposed new law and its policy context, including:

- a high-level outline of the proposed new law
- an explanation of the context of the amendments
- a comparison of key features of new law and current law, and
- a chapter-based approach to the layout of EMs, to assist overall readability.

Treasury will look at further design improvements which can be made during the remainder of 2022, subject to the views of portfolio ministers.

Treasury has also invested in a number of improvements to the internal processes and guidance for developing EMs to ensure greater editorial consistency both within and across EM products. This includes launching a revised style guide, clearer editorial standards for drafters of Treasury EMs (supported by plain-English training), and the establishment of an internal Explanatory Memoranda Steering Group, which periodically reviews EM products for quality and consistency.

Implementation feedback

Treasury and the ATO will welcome feedback from BoT and NTLG members and others on new law guidance products and their development as these review recommendations get bedded down.

Any feedback received will help to further develop the outcomes reported here.

Attachment A – New law guidance products

Introduction

New law is supported by an Explanatory memorandum (prepared by Treasury). This is in many, but not all cases, supplemented in some form by public advice and guidance (prepared by the ATO).

Through public advice and guidance, the ATO:

- helps people understand their rights and obligations under the new law
- makes it easier to comply with the new law
- explains any administrative aspects it is putting in place in relation to the law.

Explanatory memorandum

Role and purpose

The purpose of an EM is outlined in the *Legislation Handbook*, maintained by the Department of the Prime Minister and Cabinet. The *Legislation Handbook* explains that:

‘An explanatory memorandum is a companion document to a bill, to assist members of the Parliament, officials and the public to understand the objectives and detailed operation of the clauses of the bill. It helps a reader to understand the intent and effect of the legislation and may play an important role in a statute’s interpretation. The *Acts Interpretation Act 1901* (section 15AB) allows an explanatory memorandum (and also a second reading speech—see paragraphs 7.45 to 7.46) to be used by a court to interpret legislation...’ (paragraphs 7.1 – 7.2).

Scope and limitations

EMs are point-in-time documents that are specifically designed to accompany bills during consideration in Parliament. EMs explain the proposed legislation and how it implements the underlying policy change being presented to the Parliament. EMs should clearly explain the policy intent of the law (the ‘why’), the means by which the law as drafted would achieve the intent (the ‘what’), and how the law operates to achieve that intent (the ‘how’).

The point-in-time nature of EMs is a key point of difference with PAG products, which are able to be updated and revised to account for changes to the interpretation and administration of a law following its commencement.

Best practice approach

Consistent with the findings of both the New Law Guidance review and Explanatory Memoranda Review Project, EMs should explain, in a clear and readable way, the policy intent and the objectives of the law. When developing content, drafters should focus on the role of the EM in explaining the law’s purpose and effect, and how it will operate to achieve that effect.

An EM should clearly explain the operation of the proposed law, including by:

- explaining how the law is intended to operate, without expanding or limiting the scope of the law beyond its intended operation;
- explaining key issues rather than merely paraphrasing the legislation. EMs should avoid providing excessive commentary on provisions that have a clear and straightforward meaning;

- not seeking to limit or expand how the Commonwealth will administer or enforce the law beyond what is intended by the policy;
- being expressed in plain English and avoiding legal jargon and unnecessary abbreviations
- including relevant examples to the extent necessary to inform a general understanding of the law; and
- using diagrams, flowcharts and tables where possible to explain complex concepts in a simpler way.

An EM should clearly explain the policy intent behind the proposed law, including by:

- providing policy context and an explanation of why the measure is needed; and
- clearly articulating the rationale for the reform and how it is achieved through the bill.

An EM should clearly address issues relating to the proposed law that are likely to be of interest to scrutiny committees of the Parliament, including by:

- appropriately anticipating and addressing issues of concern to scrutiny committees, and
- clearly foreshadowing to the Parliament the Government's justification for the approach adopted in the bill and how it addresses matters of relevance to scrutiny committees.

An EM should be prepared in a consistent and efficient manner, including:

- delivering a product that meets the above principles using a consistent voice;
- using streamlined, consistent headings and referencing to make navigation more efficient;
- using consistent and standardised formatting;
- be informed by consultation:
 - within Treasury
 - with agencies that will administer the law (including the ATO)
 - across the Commonwealth on cross-portfolio)
 - with stakeholders at the Exposure Draft stage
- be checked for quality assurance (including style check and proof reading) against mandated editorial standards.

Law companion ruling

Role and purpose

The role of a law companion ruling (LCR) is to provide early binding advice on the ATO's interpretation of new law, in particular

- to allow users to understand how the ATO will administer the law
- support principles-based law design,
- support and assist with the realisation of Government policy and administrative outcomes that are ideally expressed in (and supported by) the words of the law (and as explained in the Explanatory Memorandum).

Scope and limitations

As a public ruling, an LCR requires a significant investment of ATO resources to produce. LCRs will therefore only be produced on the highest priority new law issues which require binding certainty for taxpayers. Care should be taken to limit their scope to these issues only, so as not to delay their finalisation.

To avoid rework, where the need for an LCR has been identified and sufficiently prioritised by the ATO, an LCR should be commenced as soon as possible in the law development phase, but only once there is reasonable certainty that the law is progressing in a certain form. This may mean that it does not start until towards the end of the law development process, and a significant amount done post Royal Assent.

Best practice approach

The following outlines the best practice in relation to an LCR, as established by this review:

1. When required, an LCR should be prepared on the highest priority new law issues on which taxpayers require binding certainty to allow them to understand how the ATO will administer the law.
2. LCRs should avoid trying to be 'omnibus' rulings but instead focus on key priority matters to improve timeliness of issue.
3. Authors of LCRs should consider input on timing concerns when planning completion dates.
4. An LCR is limited by the law itself and cannot cover gaps in the law.
5. Subject to 4, an LCR must follow and not be inconsistent with the policy intent as outlined in the law (and assisted by the EM). It should not duplicate the EM.

Practical compliance guideline

Role and purpose

The role of a practical compliance guideline (PCG) is to provide broad or practical compliance guidance where there may be significant law administration issues. A practical compliance guideline may, for example, communicate how the ATO will assess risk or apply audit resources in relation to tax law compliance issues.

Scope and limitations

In a new law situation, PCGs will be used primarily to provide comfort to taxpayers in relation to particular types of transactions, and to provide guidance on how to operate in a low-risk tax environment.

Best practice approach

1. PCGs can support new law to provide comfort to taxpayers in relation to particular types of transactions, or to provide guidance on how to operate in a low-risk tax environment.
2. Forming a view on what may be considered 'low risk' behaviour will often require or benefit from practical experience of the system in operation, so PCGs should be carefully considered before being developed on new law, and if they are so developed, should be reviewed after a reasonable period of time.

Law administration practice statements

Role and purpose

A law administration practice statement (LAPS) is an internal policy document that instructs ATO staff. LAPS do not provide interpretative advice, but they do discuss technical issues to the extent required to assist staff understand the directions provided.

They are published externally to provide insight into the ATO's administration of the system.

Scope and limitations

A LAPS is the highest form of corporate policy in the ATO, so would usually be prepared only where there is a significant change to ATO administration.

Best practice approach

1. Where there is complexity in the administration of a significant new law, LAPS should be considered being prepared to provide overarching policy direction to ATO staff and ensure internal consistency in the administration of the new measure.
2. LAPS should also be considered for significant new law where there is understood to be a need to provide visibility to the community of the checks and balances in place on ATO decision-making processes.

Web guidance

Role and purpose

Web guidance on ato.gov.au is the primary ATO channel to provide assistance and plain guidance to the Australian community, including on new law.

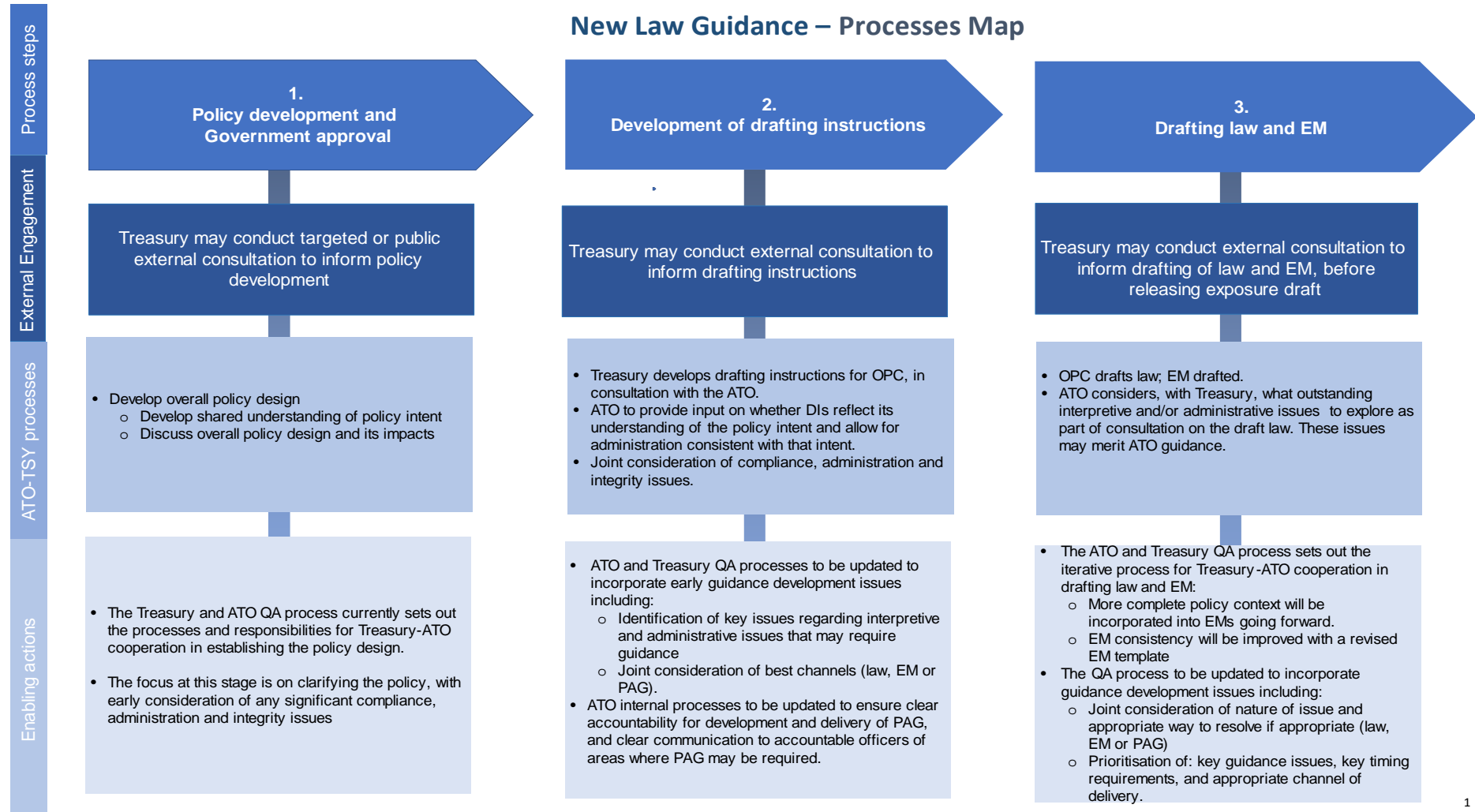
Scope and limitations

Web guidance has a strong emphasis on providing clear communication to individuals, small business and advisors about how to comply with their tax obligations. It is not designed to deliver the detailed guidance that is contained in an LCR or PCG, nor is the ato.gov.au platform able to provide the more sophisticated database and historical functionality required for these types of documents (which are stored on the Legal database).

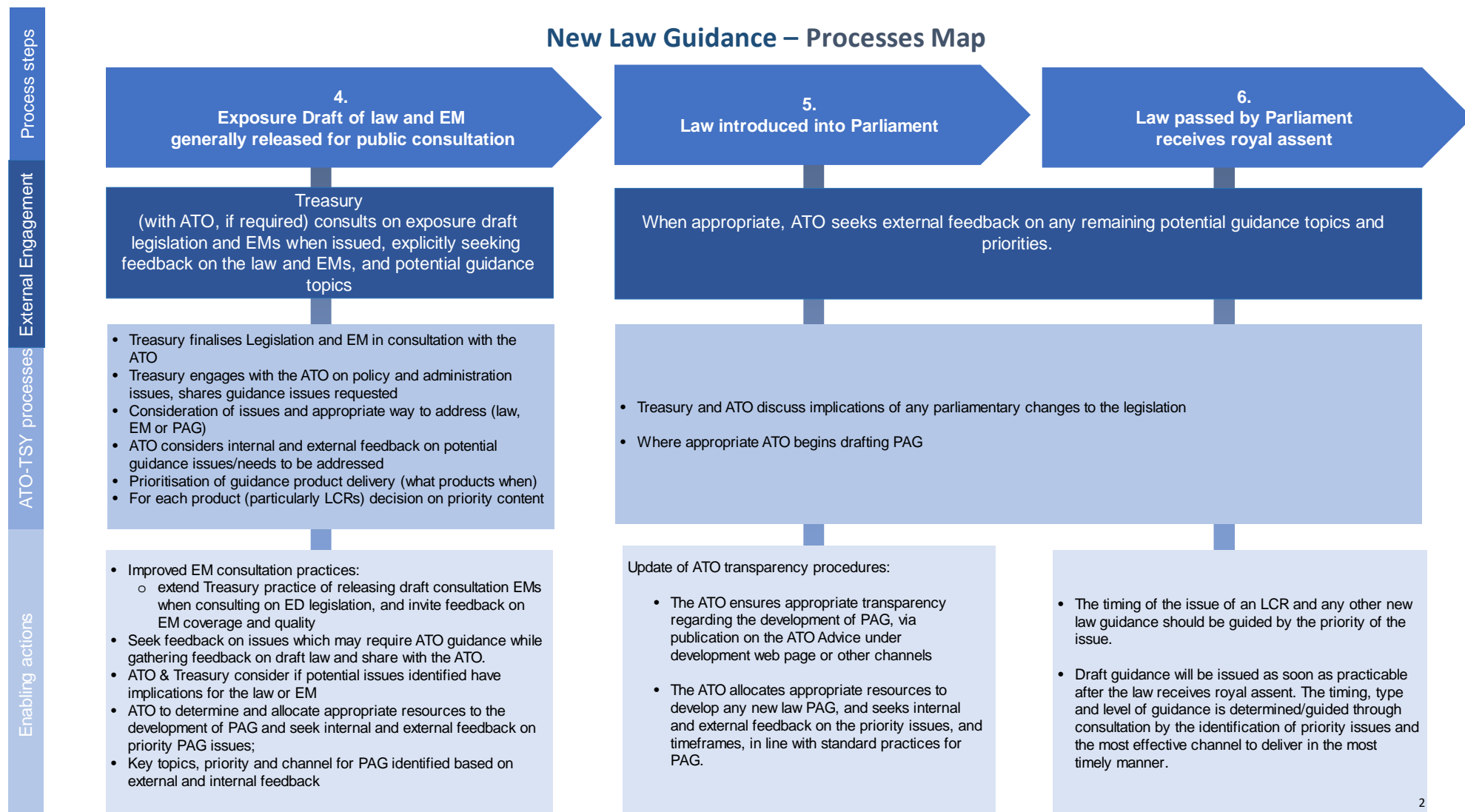
Best practice approach

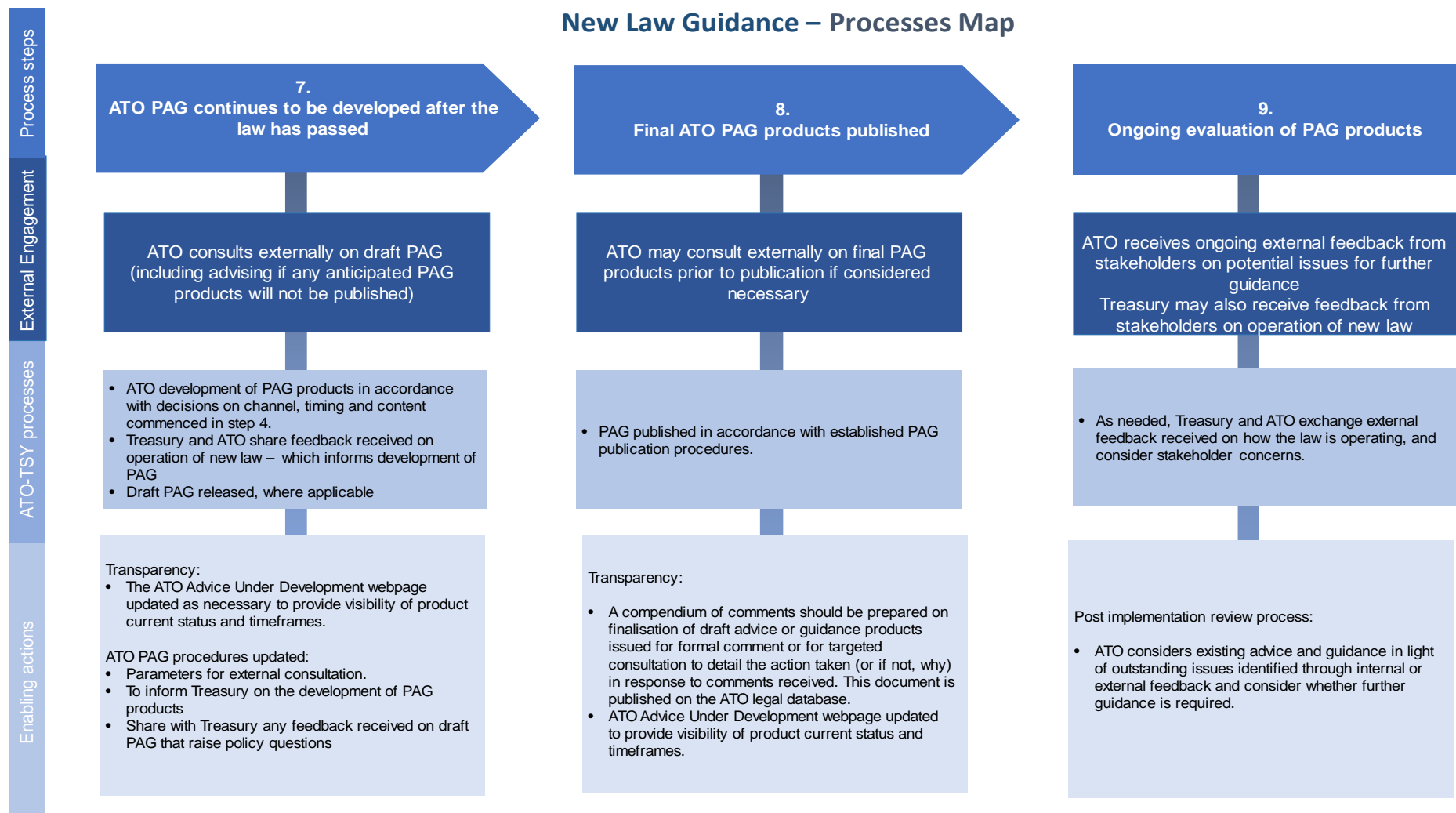
1. Website guidance should provide less complex time-sensitive guidance to the community while the best channels to clarify other issues are being explored.
2. Website guidance should be updated, using a layered approach which complements any formal products as they are developed.

Attachment B – New law guidance processes



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Attachment C – External engagement

Table 1: External participants

New Law Guidance Review: National Tax Liaison Group (NTLG) representatives and Board of Taxation		
Michael Bersten	Law Council of Australia & New Zealand	NTLG workshop
Lynda Brumm	Chartered Accountants Australia and New Zealand	NTLG workshop
Michelle Calder	BoT Secretariat Manager	BoT workshop
Michelle De Niese	Corporate Tax Association of Australia	NTLG workshop
Rosheen Garnon	BoT Chair	BoT workshop
Tony Greco	Institute of Public Accountants	NTLG workshop
Clint Harding	Law Council of Australia	NTLG workshop
Julianne Jaques	BoT Member	BoT workshop
Ian Kellock	BoT Member	BoT workshop
Alexis Kokkinos	CPA Australia	NTLG workshop
Andrew Mills	The Tax Institute	NTLG workshop
Christina Sahyoun	BoT CEO	BoT workshop
Jerome Tse	The Tax Institute	NTLG workshop
Scott Treatt	The Tax Institute	NTLG workshop
Chris Vanderkley	BoT Member	BoT workshop
David Watkins	Chartered Accountants Australia and New Zealand	NTLG workshop
Sue Williamson	CPA Australia	NTLG workshop

Explanatory Memorandum Review

Law Council of Australia

Secretariat for the Senate Standing Committee for the Scrutiny of Bills

Secretariat for the Parliamentary Joint Committee on Human Rights

Attachment D – New law guidance: background paper (August 2021)

Introduction

The purpose of this paper is:

1. to provide a brief overview of the intended purpose of new law guidance products in supporting new law and how they fit in the overall system, and
2. to provide an ATO and Treasury perspective on how these products are working in practice and the challenges in meeting their intended purpose.

The role of ATO public advice and guidance

Public advice and guidance is the primary means by which the ATO communicates its view of how the taxation and superannuation systems work and how they are administered. It is a key component for fostering willing participation in the tax and super systems.

Through public advice and guidance, the ATO:

- gives clients tools to help them meet their obligations
- builds trust and confidence in the system by providing certainty and transparency about the ATO position
- influences clients and intermediaries to adopt best practice approaches
- communicates those behaviours that the ATO considers to be high risk or unlawful
- engages with the community in responding to existing or emerging risks, and
- supports efficient and consistent ATO decision making.

The ATO employs a number of public advice and guidance products to set out the Commissioner's view on how recently enacted law applies and how it will be administered. The primary product for providing new law guidance is the Law Companion Ruling (LCR). The ATO also uses Practical Compliance Guidelines, Law Administration Practice Statements, Taxpayer Alerts and web guidance to support new law. Selection of the appropriate product is determined based on the key purpose of the guidance and market needs. Often the ATO adopts a layered approach where a suite of products is employed.

Law companion rulings

The purpose of an LCR as originally designed is to provide clarity and certainty around our interpretation of the new legislation. Not every new law measure is accompanied with an LCR.

The original intent of LCRs was to provide an insight into the practical implications or detail of 'recently enacted' law in ways that may go beyond mere questions of interpretation, as well as to:

- assist users to understand how the ATO will administer new law
- support principles-based law design

- support and assist with the realisation of Government policy and administrative outcomes that are expressed in (and supported by) the words of the law (and as explained in the Explanatory Memorandum)
- provide insight into the application of the new law at the earliest time practicable.

An LCR could contain any number of the following to assist the community with the application of 'new law', such as¹:

- set out the Commissioner's view on the meaning of an expression or concept in the new law
- set out practical examples of how the new law will or will not apply
- identify factors the ATO may use to assess the risk of certain activities or transactions not being compliant with the new law, and examples of high and low risk scenarios
- contain general information about the new law and our approach to it, such as what the ATO are planning to do to implement the new law and foster willing compliance
- assist taxpayers in meeting their lodgment obligations
- address practical considerations, such as documentation requirements and how they can be met, and
- note issues that might emerge in the future.

Initial product intent

The LCR was initially designed as a guideline with the aim of providing both interpretive guidance as well as guidance on practical matters. It was expected to develop in concert with the new law with the initial identification of a potential LCR expected to occur soon after the finalisation of the policy. As ATO staff contributed to the drafting instructions they would use the intelligence developed to identify the key issues to be covered in the LCR. In a similar timeframe to OPC drafting the law, the ATO would draft the LCR with the aim of publishing soon after the law receives Royal Assent.

What is happening in practice?

As set out in this paper, while LCRs serve a valuable guidance function in the community, assisting to provide clarity on how the ATO will administer certain new measures, their current function differs from what was originally envisaged. LCRs are being primarily employed to provide interpretive guidance with other products setting out guidance on how to comply, and/or our administrative approaches.

There are a number of practical difficulties with the current process to develop LCRs. The one size fits all approach set out in [LCR 2015/1](#) *Law companion rulings: purpose, nature and role in ATO's public advice and guidance* has led to less than optimal outcomes in regards to timeliness, the scope of products and their practical benefit to the community. These factors need to be considered when determining the best approach for supporting new law. It is important to note that while there are many new measures enacted every year, this does not mean that for every new measure enacted there is an LCR published. LCRs are published

¹ Refer paragraph 10 of [LCR 2015/1](#).

by the Commissioner when it is determined that the community requires clarity on how a particular measure will be administered.

Accordingly, in the course of this review one of the issues that will need to be considered is whether LCRs are delivering sufficient meaningful guidance at the right time. This will require consideration of the purpose and function of LCRs, what the ATO is seeking to achieve, and whether LCRs continue to be the best way for the ATO to deliver advice on new law.

Timeliness of law companion rulings

It has proven difficult in practice to progress the LCR in parallel to the new law. As can be seen in Table 2 a majority of draft LCRs are issued more than 6 months after the date of introduction of the legislation (noting that the ATO cannot actually publish the LCR until the legislation has been introduced into Parliament). When considering the time between legislation receiving Royal Assent and a corresponding draft LCR being published, the majority take more than 3 months for the draft to issue, however, there are still draft LCRs that take more than 6 months to be published. When considering timing of final versions of LCRs, most are not finalised for more than 6 months from the date of Royal Assent.

This data does not reflect the fact that the ATO is often required to issue some form of clarification or update to LCRs after new law has been observed in practice through live cases. This leads to the query as to whether LCRs are performing the function for which they are intended in a timely manner.

There are a number of reasons for this difficulty in timeliness of an LCR including:

- Access to staff with the working knowledge of the measure is difficult. These staff are committed to supporting the law development process which remains the priority product. This leaves limited capacity for LCR production.
- It is not always easy to identify a topic for which an LCR should be developed. A decision early in the process that an LCR is not required may be subsequently reversed, and conversely whether an LCR should be prepared is often only identified and/or added to the process late in the law development phase.
- Development of the LCR is occurring in an environment where staff are afforded a limited timeframe to synthesise the proposed law and hypothesise its practical application. At the same time the 'need to know' principle does create difficulties in
 - identifying issues for a potential LCR (including commencing drafting of the LCR), and
 - testing positions with a range of different viewpoints.

It has proven less difficult in practice to progress an LCR post passage of the new law. There is an underlying question as to what timeliness means from the perspective of the user of the guidance material, whether guidance is required as soon as the law comes into effect for decision making or system implementation, or whether it is really required for reporting or lodgment – in which case a more relevant benchmark may be how soon the LCR publishes after the law comes into substantive effect.

Some statistics²

Table 1: Number of LCRs and/or other guidance products issued in draft form to new law measures enacted:

	2018/19	2019/20	2020/21
Number of LCRs	6	5	3
Number of PCGs	2	3	1
Number of LAPS	1		1
Website guidance*	16	19	8
New measures enacted	23	16	4

*Website guidance refers to significant website guidance developed to support new law measures. It is not published in draft form however is updated following feedback as required.

**No taxpayer alerts issued in support of new law measures during the identified periods.

Table 2: Time taken to issue draft LCR and final LCR from date new measure introduced to Parliament and date new measure received Royal Assent (from 1 July 2018 to present):

	< 30 days	30 days - 90 days	90 days - 180 days	> 180 days
DRAFT LCR				
Time taken from introduction to Parliament	1	4	2	6
Time taken from date of Royal Assent*	2	3	3	2
FINAL LCR				
Time taken from introduction to Parliament	1	0	1	12
Time taken from date of Royal Assent	2	1	2	9

*Three draft LCRs issued prior to a new measure receiving Royal Assent, but when bills were introduced to Parliament (marked with * in Appendix A).

² Refer to Appendix A for a detailed summary.

Practical benefit of what is covered in an LCR

There are a number of examples where LCRs have provided very useful and timely guidance following the passage of new law. However, when considering the purpose of an LCR, anecdotal evidence suggests that in some circumstances the limited timeframes results in authors being unable to broadly explore the topic. This has on occasion resulted in LCRs that effectively paraphrase the law and explanatory memorandum and provide little insight into interpretive issues, the breadth of the impact or the practical application.

There is also the risk of a sub-standard product as the authors are not able to properly test the ATO view prior to publication. While LCRs are issued in draft form with an intent to allow for broad community consultation, allowing the ATO the mechanism to alter positions in the final published version, in practice it is difficult to move away from the initial published positions. This is despite the fact that an LCR was intended to be a stable ruling that illustrates the principles expressed in the new law as understood *at the time that the new law was being developed*³, which could be *supplemented* by advice or guidance following actual experiences of taxpayers applying the law.⁴

What can be difficult to cover in an LCR

There are a number of areas of difficulty with the development of LCRs. Many of these are outside the control of the ATO. Examples include:

- An LCR is not suitable to fill potential gaps left by the law and the EM. For example, recent experience includes users requesting more and more guidance and examples be included within the EM. In many cases this cannot practicably be accommodated which results in a shift in focus to the ATO covering off these issues in the LCR.
- Users may be looking for an expression of policy intent which is outside of the scope of ATO advice and guidance.
- Practical examples of the operation of the law continue to develop after a Bill is enacted.
- An LCR needs to follow the rules of statutory interpretation. It must follow the policy intent as outlined in the law (and assisted by the EM).
 - There may be pressure to give effect to a view of the policy which can undermine the credibility of our approach to statutory interpretation
 - Equally, there may be tension as between the ATO's genuine interpretation of the law and policy contradicting government views.
- There can be changes in the policy very late in the process which makes inclusion in the LCR very difficult.

Competing objectives of timeliness versus coverage of issues

Practical experience shows that there is effectively a trade-off between *timeliness* of delivery of an LCR and the *extent of coverage of issues* in the product itself. To achieve a fulsome coverage of all potential issues that could arise in relation to the new law, experience has shown this results in a delay in delivery of the final (and in some cases even the draft) LCR. However, if this were flipped and the main aim was simply the timely delivery of guidance, in many instances the most effective form of delivery would be less formal products, such as

³ Refer paragraph 38 of [LCR 2015/1](#).

⁴ Refer paragraph 39 of [LCR 2015/1](#).

website guidance. There is then a question of how this could be complemented later by more formal guidance products. This is discussed further below.

Other advice and guidance products

In addition to LCRs, the ATO has other types of advice and guidance products that are used in appropriate cases for new law.⁵ The choice of product, or suite of products, is made having regard to the purpose of the advice and guidance being developed.

What is happening in practice?

The key differences between the ATO guidance products relate to their primary intent and the delivery channel. As discussed below these products are effective in supporting new law in with their specific intent. The ability of these products to be issued in a timely manner is dependent on the complexity of the topic and whether the product seeks to provide coverage of all key issues. Website guidance is generally less complex and can be produced quickly. However, as the ATO moves beyond the focus of staff instructions in LAPS and taxpayer alerts to PCGs similar difficulties arise in being able to identify all issues and develop the Commissioner's view in a timely manner.

Other product types that the ATO may issue to support new law include the following.

Practical compliance guidelines

Practical compliance guidelines (PCGs) were introduced in 2016⁶ with the aim of providing a principal source of broad law administration guidance for the community.

The aim of a PCG is to provide useful insights into the practical implications of tax laws and ATO administrative approaches and generally will not express a view on the way the law applies. They are intended to:

- guide the behaviour of taxpayers who wish to operate in a low tax risk environment
- signal when the ATO considers certain behaviour to be of a higher risk of non-compliance
- signal how the ATO will apply its compliance resources
- provide practical compliance solutions to deal with any uncertainty in the application of tax laws.

PCGs are published to the ATO Legal database and provide a primary location for relevant compliance guidance. While similar guidance may also be provided through web guidance or as part of other products, the aim is to develop a PCG where there are significant law administration issues, the content is of a detailed or technical nature, or only affects a relatively small number of taxpayers. Community consultation on the scope and content is a key aspect of the product development. For significant issues the ATO will also generally publish the PCG in draft form.

New law context

PCGs are an effective tool to support new law through establishing risk frameworks and providing comfort to taxpayers on particular transactions or impacts on their business. For

⁵ Refer to Appendix C for a broad summary.

⁶ [PCG 2016/1](#) *Practical Compliance Guidelines: purpose, nature and role in ATO's public advice and guidance*.

example, to support the JobKeeper measure PCG 2020/4⁷ was issued setting out feedback on schemes to gain access to or receive an increased amount of the JobKeeper payment. PCG 2020/4 highlighted key factors which will be considered when deciding whether to apply compliance resources including mitigating factors.

A further example is PCG 2018/7⁸ which sets out the ATO's compliance approach to certain restructures entered into in response to the hybrid mismatch rules. It provides examples of low risk restructuring to assist taxpayers where their intention is to eliminate double non-taxation outcomes consistent with the policy intent of the new legislation.

PCG 2020/2⁹ is an example of where a PCG may not have been the appropriate product. Many of the key aspects of this product relate to the ATO's administration and may be better suited to a Law Administration Practice Statement.

What is happening in practice?

The development of a PCG requires the ATO to have formed views on:

- what a lower risk of non-compliance may look like
- behaviours which are considered higher risk of non-compliance
- decisions to be made regarding the application of compliance resources

These processes may require additional time and require practical experience of the system in operation. However recent experience highlights these products can be issued closely following Royal Assent.¹⁰

Law administration practice statements

Law administration practice statements (LAPS) are policy documents on the performance of technical work.¹¹ They provide direction to ATO staff on the way they should perform technical work in relation to the laws the Commissioner administers. They are not intended to provide interpretative advice. However, they may discuss technical issues to the extent required to assist staff understand the directions provided.

While directed at staff, they are published to provide insight into the administration of the system.

New law guidance context

LAPS can be helpful in the new law guidance context where there is complexity in the administration of the measure or to provide visibility to the community of checks and balances on significant decision-making processes. A recent example provides directions to staff when making diverted profits tax assessments.¹² It sets out a decision making framework for staff that provides assurance to the community that the measure will be applied with an appropriate level of oversight and review. In the context of recent government initiatives PSLA 2020/1 was developed to provide staff direction on the exercise

⁷ [PCG 2020/4](#) Schemes in relation to the JobKeeper payment.

⁸ [PCG 2018/7](#) Part IVA of the Income Tax Assessment Act 1936 and restructures of hybrid mismatch arrangements.

⁹ [PCG 2020/2](#) Expansion of estimates regime to GST, LCT and WET.

¹⁰ [PCG 2020/2](#) and [PCG 2020/4](#) both issued in the same month as the relevant legislation receiving Royal Assent. See Appendix A.

¹¹ [PS LA 1998/1](#) Law Administration Practice Statements.

¹² [PS LA 2017/2](#) Diverted profits tax assessments.

of the Commissioner's discretion which is relevant for determining eligibility for the Boosting cash flow for employers and Jobkeeper measures.¹³

What is happening in practice?

The development of LAPS necessitates engaging staff with knowledge and skill sets on ATO policy and procedures. These people will need time to synthesise the new law. It has generally taken more than 6 months post Royal Assent for the product to be published. An exception is PS LA 2020/1 that issued after two months to meet an urgent need for staff guidance in regard to COVID-19 Stimulus measures. While it issued quickly there was a need to undertake a number of amendments over the subsequent 12 months as a greater range of circumstances were identified and to adapt for decisions of the AAT and Federal court.

Taxpayer alerts

Taxpayer alerts provide early warning of concerns that the ATO has with particular arrangements. This will include where arrangements go beyond the policy intent of the law or involve deliberate approaches to avoid obligations. They are issued to enable taxpayers to make informed decisions about their tax affairs, prevent widespread adoption or promotion of higher risk arrangements and demonstrate our ability to detect risk.

New law context

Alerts are useful to support new law as they can issue quickly where new or emerging schemes or arrangements are identified. They can also issue before the Commissioner's view on how the law applies in regard to the arrangement has been finalised or the extent of the risk is fully known. With the introduction of the Multinational Anti-avoidance Law¹⁴ (MAAL) in December 2015 the ATO had a series of Alerts issued over the following 12 months.

What is happening in practice?

Similar to LCRs, there is a requirement for the Commissioner to have identified issues or arrangements of concern. TA 2016/2¹⁵ which identified areas of concern with interim arrangements entered into to avoid the application of the MAAL, issued on 26 April 2016, 4 months after Royal Assent. It highlights that these products can be issued quickly. However, this product was developed based on insights from a significant taxpayer engagement program (part of the Tax Avoidance Taskforce), where the ATO worked closely with taxpayers reviewing and reorganising their businesses to ensure compliance. This was possible within such short timeframes because of an immediate engagement strategy. It is not always possible to commence such strategies and generate this intelligence on the impact of new laws until sometime after the law is enacted – most commonly not until income tax returns are received for the year following commencement of the measure.

¹³ [PS LA 2020/1](#) Commissioner's discretion to allow further time for an entity to hold an ABN or provide notice to the Commissioner of assessable income or supplies.

¹⁴ Tax Laws Amendment (Combating Multinational Tax Avoidance) Bill 2015.

¹⁵ [TA 2016/2](#) Interim arrangements in response to the Multinational Anti Avoidance Law (MAAL).

Website guidance

Web content is an important product in the ATO's delivery of advice and guidance on new law.¹⁶ ATO.gov is often used to complement other ATO guidance products but also as a primary delivery channel. It is focused on providing clear communication to individuals, small business and advisors about how to comply with their tax obligations. There is a strong emphasis on ensuring material is comprehensible to a broad community. Notably, key users of the website are individuals who lack sophisticated tax knowledge. This is in contrast to the users of ATO public rulings, such as LCRs, who are typically tax professionals or at least highly tax literate.

New law context

One of the key benefits of website guidance is the ability to issue content quickly. This content is generally less complex and as a result is more easily developed. However, it is generally not suitable to attempt to deal with complex interpretive issues or content which is more suited to other guidance products. As a result, web content may need to be complemented with more formal guidance where complex technical issues can be dealt with.

The ATO has recently adopted a layered approach to the provision of advice and guidance to support new law. This has included general guidance and instruction through ATO.gov with other products providing more detailed guidance. Examples are the Temporary full expensing measure where the primary channel of web content was supported by an LCR.¹⁷

Website guidance can deliver general or time-sensitive guidance to the community while other issues are being explored. As part of a multi-channel approach, it allows for staged approaches to deliver guidance to provide clarity on new law.

Explanatory memoranda

An explanatory memorandum is a companion document to a bill. Its purpose is to inform effective consideration of legislation in Parliament. It also explains to a range of audiences the policy rationale and justifications underpinning the law and what it is designed to achieve.

Preparation of an explanatory memorandum must comply with the Legislation Handbook published by the Office of Parliamentary Counsel. Timeframes for preparation depend on the delivery expectations for the associated legislative measure and can change as Government priorities shift.

Difficulties faced in practice

Apart from inflexible production timeframes, Treasury frequently experiences considerable pressure to add material into EMs in place of, or ahead of, regulator guidance. There can be pressure to include examples or extensive commentary of how the law will apply to groups of people in particular circumstances. This approach takes the explanatory memorandum outside of its primary role, which is to explain the policy behind the law, and contributes to them being unwieldy to read and inefficient to produce. In a time-critical environment, it also increases the risk of the explanatory memorandum including errors in how the law should be interpreted.

¹⁶ Refer to Appendix B for detail on web content prepared to support new law from 1 January 2018 to present.

¹⁷ [LCR 2021/D1](#) Temporary full expensing.

Issues experienced by users

Over time different issues have undermined the effectiveness of EMs, including:

- inconsistent and sometimes insufficient policy justification and explanation
- paraphrasing of legislation, rather than providing useful explanatory commentary on provisions
- lack of consistent editorial standards
- lack of overall clarity and readability due to inconsistent styles and structures in the document.

A new template will form the basis for consultation on these issues with a range of stakeholders later in the year.

Attachment E – New law guidance: working paper (April 2022)

Background

New law guidance review

The ATO and Treasury are undertaking a review of guidance material supporting new legislation (the review). The objectives of the review are to:

1. Measure the effectiveness of the various current products for supporting implementation of new tax laws.
2. Identify and promote best practice in developing guidance products for new tax law.
3. Clarify the respective roles of guidance products for new tax law to promote a common understanding amongst Treasury, the ATO and the tax community.

As part of this review, the project team has engaged with external representatives from the NTLG and Board of Tax, as well as internal stakeholders, to seek their perspectives on the current system of new law guidance. Views have been sought on aspects of the system which are functioning well along with current issues or concerns with processes and products. This feedback has been provided both on the background paper¹⁸ prepared to provide an ATO and Treasury perspective on how the new products are working in practice and three case study topics.¹⁹ A draft working paper was shared with external representatives and discussed at a workshop on 16 December 2021. The next steps are for the ATO and Treasury to consider the feedback to date and to develop final recommendations on system improvement opportunities which will be taken forward.

Explanatory memorandum review

Separately, in response to stakeholder feedback, Treasury has been undertaking a review and broader consultation on the explanatory memorandum (EM) product. The aims of this EM review are to:

- ensure Treasury EMs are fit for purpose, including by clearly explaining the policy intent, the means of achieving that intent and how the law operates to achieve that intent, and by addressing parliamentary scrutiny issues
- improve overall quality, consistency and readability of the EMs
- streamline internal production of EMs.

¹⁸ ATO–Treasury New Law Review – New law guidance products paper final 20210823

¹⁹ The case studies considered the 'Diverted profits tax', 'Stapled arrangements' and 'Combating illegal phoenixing' measures.

Themes identified and potential findings

The **Attachment** to this paper summarises the themes drawn from this review to date, ‘what’ those themes are trying to achieve and possible options for ‘how’ to achieve the desired objectives. Where relevant, information has also been included on current progress towards achieving the desired objectives.

Theme 1. Integration of guidance consideration/development in the law design process

There is a benefit in more formally considering public advice and guidance (PAG) as part of the legislation development (LD) process. Stakeholders are concerned that, if the processes are not well integrated, there may be inconsistency in the expression of the policy intent of the law and the administration of the law consistent with that policy intent. At a practical level, better integration of LD and PAG processes would allow for an issue to be fully scoped to confirm whether it is best dealt with through the law/ EM or PAG, and if the latter, facilitate earlier development of the guidance. The notion of contemporaneous development of PAG is consistent with the purpose of law companion rulings (LCRs).²⁰

There is some concern among stakeholders that a focus on the drafting of the law is not always accompanied by a corresponding focus on interpretive issues and how these might be best resolved. This may lead to issues for PAG being identified late, leading to delays in the issuing of interpretive guidance.

Potential best-practice principle

Better integration of PAG consideration/development concurrently with the development of the law so that there is a more seamless joint development of legislation, EMs, LCRs and other ATO guidance products.

Problems identified/potential findings

External feedback expressed a number of benefits of PAG being developed in concert with the law. The consideration of how an issue might be dealt with from a PAG perspective helps to expose practical and administrative issues with the law. If analysis of the issue shows the problem to be the design of the legislation or how the policy is explained in the EM, these issues can be considered and ideally dealt with through those means. This would ensure that PAG products were not called upon to address gaps in the law and that there is sufficient policy clarity in the EM to allow the law to be correctly interpreted. If the issue is about how the ATO intends to interpret and administer the law, this early clarification in the law design stage will assist with the timely development of the ATO guidance products.

There are some risks with developing the PAG as the law is developed. In particular, care is needed to avoid wasted effort and uncertainty in progressing PAG while the law and EM are not settled. The availability of resourcing to perform the PAG development has also been highlighted as a concern. There has also been acknowledgement that interpretation is not a homogenous exercise – different issues require varied resourcing, time and consultation, some of which cannot be meaningfully started until the law is settled. Regardless of these concerns there is a focus on identifying issues and undertaking a preliminary exploration of them as the legislation is developed. This helps to highlight issues that need to be addressed in the law itself.

²⁰ Paragraph 12, LCR 2015/1 *Law companion rulings: Purpose, nature and role in ATO's public advice and guidance*.

Industry stakeholders expressed the opinion that there will be material of interpretive value in EMs that cannot simply be categorised as ‘explaining the policy’, for example explanations of key concepts and definitions. They believe the distinction between interpretive material and explanatory material that is not interpretive is hard to draw.’ Regardless, interpretive material neither can, nor should, be added into EMs *in place of* PAG. This approach takes the EM outside of its primary role, which is to explain the policy intent behind the law and how it operates to achieve that intent and increases the risk of the EM including errors about how the law should be interpreted.

Ideas that could deliver the principle

- **Embed focus on potential PAG issues within the legislation development process** – Ensuring a collaborative process by Treasury’s policy and law design areas, and the ATO’s business line and PAG areas, to ensure early identification of issues and allow a proper analysis of how to best deal with them either through the EM or PAG.
- **Updated staff instructions to ensure an early focus on PAG** – Ensuring ATO teams involved in the legislative design process have an early focus of considering potential PAG needs, including practical implications of the PAG and its interaction with existing law and ATO guidance. While there is not an expectation teams are drafting the guidance, there is the opportunity for them to consider what guidance issues/topics exist and how those issues could be most efficiently and effectively dealt with. This would require reallocation of resources to do this work during policy and law development.
- **Use existing processes to identify key PAG topics** – Existing processes could be used to seek external feedback to identify key areas in which PAG material should be prepared.

Theme 2. Ensuring new law guidance issues are captured from ATO and Treasury consultation during the policy/law development phase

As part of the policy and law development process, feedback relevant to the interpretation of the draft legislation should be captured from external stakeholders and closely considered and analysed by the ATO and Treasury. Issues which are not appropriate to deal with (or cannot be addressed) in the final version of the law or EM but have a significant impact across a taxpayer market/s, may be an indicator of potential ATO PAG topics. Potential issues to be covered by PAG should be identified and tracked as they arise in the policy and law development process, rather than only once the new measure is enacted.

Currently external feedback on issues is summarised by Treasury and decisions taken on what action will be taken in response. Consultation summaries are prepared for public release summarising key stakeholder feedback and the changes made by the Government in response to feedback.

Potential best-practice principle:

It is important that external feedback on key issues is captured during the policy and law development process and that processes address issues consistent with the Government’s policy intent. Where an issue that is consistent with the Government’s policy intent is not resolved through the law or the EM, the process needs to communicate issues to the ATO early to incorporate into PAG planning.

Problems identified/potential findings

External feedback is collected by both ATO and Treasury during the policy and law development processes. A key source of priority PAG issues will be the issues raised through this process. However, external stakeholders expressed views that these issues do not appear to always contribute to the consideration by ATO/Treasury as to what guidance (e.g., explanatory material, PAG etc.) is required for a measure.

Stakeholders provided feedback that they were not aware of any joint ATO and Treasury process to ensure the key issues are captured. The current processes do not harness the opportunity to confirm external stakeholder needs are being appropriately met during development of extrinsic materials and ATO guidance.

Not all issues identified during the policy and law development phase will, or should, then translate into extrinsic materials or guidance. However, stakeholders considered that early identification and sharing of the issues for consideration as potential PAG topics will assist in shaping the final design of the new law and EM to ensure issues are addressed in the most efficient and effective manner, whether this is through the new law, the EM or PAG as relevant.

Ideas that could deliver the principle

- **ATO and Treasury processes** – Updated to ensure joint consideration of potential issues for PAG development or inclusion in the EM is integrated throughout the law development process and not as a final wrap up step. Existing processes and procedures should include consideration of community input regarding potential PAG topics and their relative priority.
- **Issue capture processes** – The consultation summary that is prepared to communicate key feedback and changes made in response to consultation should be reviewed to ensure it achieves the purpose of allowing Treasury Ministers to provide community visibility of how feedback has been considered. This is particularly where issues within the scope of the policy intent are the subject of ongoing community submissions and remain unresolved from a community perspective.
- **Update existing ATO processes to ensure information regarding the new measure is shared broadly** with relevant staff responsible for advice and guidance to ensure a common understanding of key aspects of the new measure and potential PAG topics that have been identified. This would be subject to any specific rules around limiting wide distribution of material depending on the security classification of information.

Theme 3. Ensuring EMs explain, in a clear and readable way, the policy intent of the legislation and how it operates to achieve that intent

Stakeholder feedback suggests that a number of issues have hampered the overall effectiveness of Treasury EMs, including:

- inconsistent and sometimes insufficient policy justification and explanation included in EMs of how the policy intent is achieved;
- insufficient attention to Parliamentary Committee scrutiny concerns;
- extensive paraphrasing of legislation, rather than providing useful explanatory commentary on the operation provisions and their interaction with existing and related legislative and regulatory frameworks;

- inconsistent editorial standards, and
- lack of overall clarity and readability due to unnecessary complexity of language and inconsistent styles and structures in the documents.

The New Law Guidance review further confirmed the importance of the EM product clearly explaining the law's purpose and effect and the role this played in the PAG environment.

Potential best-practice principle

Consistent with the findings of the New Law Guidance review, EMs must explain, in a clear and readable way, the policy intent and the objectives of the law. When developing content, drafters must focus on the role of the EM in explaining the law's purpose and effect, and how it will operate to achieve that effect.

Problems identified/potential findings

A lack of comprehensive guidance to support EM drafting which, when combined with often short production timeframes, contributed to the issues raised by stakeholders.

Stakeholders also expressed the need for a requirement for EMs to provide sufficient clarity to allow taxpayers to easily understand the intended operation of the new law and noted the significant role extrinsic materials can play in the interpretation of legislation.

Stakeholders suggested the EMs could better explain the policy intent and the objectives of the law including the broader context of what the policy intent is and reasons behind that policy." (i.e. the 'what' and the 'why').

Ideas that could deliver the principle

- **EM drafting guidance improved** to provide drafters with detailed guidance and support that:
 - provides clear guidelines on the requirements of content detail in EMs
 - assists drafters with techniques which aid in clearly and plainly explaining the policy intent behind the law and how it will operate rather than simply describing the law
 - allows consistency across the body of Treasury EMs, and
 - has a secondary benefit of allowing EMs to be produced more efficiently.
- **EM template design uplift** to allow improved navigation and consistency of structure, to make the documents more user focused. The design changes are intended to provide a clearer framework for EM drafting to encourage consistency and clarity and to improve the user experience through clearer presentation and navigability (including the arrangements of headings, page margins and the insertion of a table of contents at the start of each chapter).

Treasury has implemented a first stage of improvements involving a redesign of the Treasury EM template and more guidance on content requirements for drafters to improve the readability, consistency and effectiveness of Treasury EMs. Treasury engaged digital content experts at Deloitte to assist with the design and implementation of these improvements. The first EM with the new design features was introduced into Parliament in late 2021 and all Treasury EMs for legislation introduced from the Autumn 2022 sittings onwards will conform to the new template.

Treasury will shortly undertake staff training on plain English principles and writing techniques to support improvements in the readability of Treasury EMs. Treasury is also planning to introduce further design improvements to its EMs over the coming year and will engage the ATO and external stakeholders on proposed changes prior to implementing them.

Theme 4. Prioritise issues to be covered by PAG

The process to develop PAG for new law needs to include a prioritisation process for potential PAG topics based on their importance to the system and time sensitivity. This will determine what issues need to be dealt with under the initial guidance for a new measure, with remaining issues considered for subsequent PAG products.

Potential best-practice principle

PAG issues must be prioritised based on importance to the tax system, time sensitivity and any other factors to determine timing of delivery. This priority system should then be used to determine the scheduling of new law guidance to ensure it best meets the ATO and community needs.

Problem identified/potential findings

External feedback suggests the new law guidance process should not be attempting to address all issues up front. Its intent should be to provide certainty on the key issues. Any attempt to address all known issues as part of initial advice and guidance products can lead to delays in issuing the product/s and the risk that products will be lengthy and difficult for the community to understand.

Feedback has been received from both internal and external stakeholders that the ATO needs to ensure it clearly understands time-critical PAG needs. This will allow resources to focus on delivering the most important PAG at the earliest time. Other issues can be dealt with through separate and subsequent products.

Input to determine priority of issues needs to be sought from both **internal** and **external** stakeholders.

Ideas that could deliver the principle

- **PAG confirmation step as part of existing consultation approaches** – As part of engaging with external stakeholders on new law measures, input is to be sought to confirm key issues, time pressures and best options to deal with the outstanding issues through advice and guidance. This will occur towards the end of the new law process.

Theme 5. External visibility of issues being considered for new law PAG

Stakeholders have suggested that improved visibility should be provided on what issues are under development in relation to new law. This will include priority and non-priority issues, and should be available as soon as possible, ideally soon after the law and EM are settled.

Potential best-practice principle

There should be external visibility of issues identified for potential PAG on new law measures.

Problems identified/potential findings

Views have been expressed that there is a potential gap that the ATO does not have a standard process to provide external confirmation of PAG focus areas for new law measures. This includes issues captured from external feedback as well as those identified by the ATO. External representatives have indicated they are often uncertain on the topics under consideration for PAG, including those issues which may require greater effort to settle the interpretive position. While the ATO does employ the 'Advice under development' on the ATO website to flag products under development, the information is generally high level and will only indicate a few key items.

In instances such as Temporary Full Expensing and JobKeeper, the ATO has been able to use community consultation/feedback processes to clearly define key issues and understand the practical implications for the taxpayer community.

Ideas that could deliver the principle

- **ATO Advice under development page** – Better signposting to identify PAG under consideration for new law measures.
- **Greater use of consultation processes on specific new law PAG** – Engage with external stakeholders where appropriate to highlight issues and seek their input. For example, publishing a paper listing the issues identified and suggested timing/priority for delivery, flagging concerns where possible. This would provide early visibility, allow external input and ideally could be developed reasonably quickly (but monitored for the potential to delay PAG where the issues are known and scoped), improving transparency in developing new law PAG.

Note: These options are not a one-size-fits-all approach. They are a statement of intent regarding what approaches we could be considering for community consultation/feedback on PAG.

Theme 6. Categorisation of issues and determining appropriate PAG channel and product

A key aspect of the development of public advice and guidance is the decision-making process on the form and the most appropriate channel to communicate the guidance. This decision is influenced by the impacted taxpayer market/s, the complexity of the measure and the nature of advice and guidance being provided.

Potential best-practice principle

A considered choice on the best channel and the nature of the product to be employed needs to be made at the outset of the new law guidance process and reviewed as necessary as more clarity on issues becomes available.

Problems identified/potential findings

The ATO needs to ensure the PAG it produces is the best fit for the issues and the taxpayer market. Interpretive guidance is not necessarily the priority at the commencement of a measure. While the LCR remains as the primary ruling product for new measures, the ATO needs to ensure the guidance employed suits the taxpayer market and the priority issues.

External feedback during workshops has highlighted a key preference to maintain the LCR product for new law measures. This is driven by the perceived benefits of having the practical administration of the system considered during the law development and the release of key guidance soon after the measure receives royal assent. Early taxpayer certainty was also an important priority for stakeholders, with the certainty of a legally binding LCR a significant component in the overall process.

However, internal feedback confirms an LCR is not always considered the best product and recent experience supports this. Examples are the recent diverted profits tax measure where the key aspect was to highlight how the measure will be applied by ATO staff through a practice statement.²¹ Recent stimulus measures have also highlighted the need to consider the audience needs and issue broad web guidance to support the community with more detailed guidance provided through LCRs and other formal products.

Ideas that could deliver the principle

- **Review current processes** - Ensure current procedures include not just key topics, but also confirmation as to the impacted taxpayer markets and consideration of the best product to deliver the guidance, including consideration of when and how taxpayer certainty should be provided on those key topics (e.g., whether a ruling is needed, whether guidance is needed urgently, etc.). These procedures should include the potential for additional early targeted consultation.

Theme 7. Instructions and processes for staff regarding the development of new law guidance materials

Potential best-practice principle

Staff guidance and instructions clearly outline the guidance product development and consultation processes, and the roles and responsibilities and processes for staff for escalation and approval.

Ideas that could deliver the principle

- **New law guidance process map** – Develop a high-level process map of the legislation development and guidance processes to clarify how the processes interact, including timing of steps, consultation and responsibilities. The aim would be to set out the framework that is in place to improve understanding within Treasury and the ATO about how their respective roles and functions contribute to the broader process of legislation development and implementation. This would also be a potential avenue to provide external awareness of how the ATO and Treasury work together to develop new law and the associated guidance.

Key aspects that could be covered include:

- the interaction of the ATO and Treasury in the new law development process

²¹ The diverted profits tax case study found that the development of the staff guidance material around application of the measure helped to address concerns raised with the breadth of the measure and how it will impact taxpayers. During development of PS LA 2017/2 flow charts detailing the process were prepared and shared externally for consultation during the law development phase. This assisted to settle some issues of concern during the finalisation of the law and the EM.

- external engagement guidelines
- how the new law guidance process operates as a subset of the broader new law development process, and
- the role of staff across both the law development and PAG processes.
- **Updated staff instructions/materials** – Update staff instructions to highlight key aspects of the process. The focus would be on ensuring the instructions clearly indicate the key considerations regarding developing new law guidance and the roles and responsibilities.

This could include:

- Identifying key PAG staff at the commencement of the new law process with clear assignment of roles, responsibilities and accountabilities.
- Incorporating a project management approach to the PAG approval process in instances where there are time imperatives around delivery of PAG. This will involve establishing a process to brief key stakeholders, discuss issues and develop products.

Table 1: Summary of key themes

- **Theme 1:** Better integration of PAG consideration/development concurrently with the law design process so that there is a more seamless development of legislation, EMs, LCRs and other ATO guidance products.
- **Theme 2:** It is important that external feedback on key issues is captured during the policy and law development process and that processes address issues consistent with the Government's policy intent. Where an issue that is consistent with the Government's policy intent is not resolved through the law or the EM, the process needs to communicate issues to the ATO early to incorporate into PAG planning.
- **Theme 3:** Ensuring EMs explain, in a clear and readable way, the policy intent of the legislation and how it operates to achieve that intent.
- **Theme 4:** PAG issues must be prioritised based on importance to the tax system, time sensitivity and any other factors to determine timing of delivery. This priority system is then used to determine the scheduling of new law guidance to ensure it best meets the ATO and community needs.
- **Theme 5:** External visibility of issues under consideration and/or development for public advice and guidance on new law measures.
- **Theme 6:** A considered choice on the best channel and the nature of the product to be employed needs to be made at the outset of the new law guidance process.
- **Theme 7:** Staff guidance and instructions must clearly outline the guidance product and consultation development process, and the roles and responsibilities and processes for staff for escalation and approval.
 - a. Development of a high-level process map of the law design and guidance processes.
 - b. Updated staff instructions to highlight key aspects of the process.

Note: As part of any 'best practice' process there will be some issues beyond the control of Treasury and/or ATO that can impact on the effective delivery of the above principles

Table 2: Summary of what we are wanting to achieve

	WHAT do we want to achieve?	HOW might we achieve that?
1	Integration of PAG consideration/development in the law design process	<ul style="list-style-type: none"> • Better integrate focus on potential PAG issues with the law design process • Updated staff instructions to ensure an early focus on PAG
2	Ensuring new law guidance issues are captured from ATO and Treasury consultation during the policy/law development phase.	<ul style="list-style-type: none"> • ATO and Treasury processes updated to ensure joint consideration of potential issues for PAG development and consultation • Issue capture processes updated • Update existing ATO processes to ensure information regarding the new measure is shared broadly with relevant staff where possible
3	Ensure EMs explain, in a clear and readable way , the policy intent and how it operates to achieve that intent	<ul style="list-style-type: none"> • EM drafting guidance improved to provide drafters with detailed guidance and support • EM template design uplift to allow improved navigation and consistency of structure • Staff training and support on Plain English principles and writing techniques
4	Prioritise issues to be covered by PAG	<ul style="list-style-type: none"> • PAG Confirmation step as part of existing consultation approaches
5	External visibility of issues being considered and developed for new law PAG	<ul style="list-style-type: none"> • ATO Advice under development page improvements • Greater use of consultation processes on specific new law PAG and engaging with external stakeholders when identifying issues for PAG
6	Categorisation of issues and determining appropriate PAG channel and product	<ul style="list-style-type: none"> • Updated process documentation regarding the development of PAG and consideration of best product
7	Clear processes for guidance product and consultation development process	<ul style="list-style-type: none"> • Law design and guidance process map setting out key information regarding process, timeframes, consultation and responsibilities • Identifying clear roles and responsibilities and processes for staff including escalation and approval processes