TR 2006/10 - Public rulings

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Taxation Ruling

Public rulings

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This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

(Note: this is a consolidated version of this document. Refer to the ATO Legal database (ato.gov.au/law) to check its currency and to view the details of all changes.)

What this Ruling is about

1. This Ruling outlines the system of public rulings following the enactment of the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*. This Act implemented the government's response to the recommendations made in the *Report on Aspects of Income Tax Self Assessment* (ROSA Report).[A1] In respect of public rulings, that Act inserted new Divisions 357 (common rules) and 358 (public rulings) into Schedule 1 to the *Taxation Administration Act 1953* (TAA), the provisions of which are referred to in this Ruling.

1A. This Ruling also outlines the inclusion of indirect tax and excise rulings into the system of public rulings following the enactment of the *Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010*. This implemented the government's response to the Board of Taxation's *Review of the Legal Framework for the Administration of the Goods and Services Tax*[A2], which recommended harmonising the indirect tax rulings system with the general rulings system.

[A1] Treasury (2004) *Report on Aspects of Income Tax Self Assessment*, https://treasury.gov.au/publication/p2004-aspects-income-tax-self-assessment.

[A2] The Board of Taxation (2008) *Review of the Legal Framework for the Administration of the Goods and Services Tax*, https://taxboard.gov.au/consultation/legal-framework-for-the-administration-of-the-gst.

2. This Ruling considers:

(i) what constitutes a public ruling;

(ii) the types of public rulings the ATO publishes;

(iii) the status and binding effect of public rulings;

(iv) the status and binding effect of formal rulings which are not public rulings;

(v) the status of draft public rulings;

(vi) the relevance of public rulings to whether a taxpayer has a reasonably arguable position in regard to income tax, minimum tax and petroleum resource rent tax matters for the purposes of certain penalty provisions;

(vii) public rulings and the promoter penalty laws;

(viii) the withdrawal of public rulings;

(ix) the status of public rulings following a rewrite of the law;

(x) the effect of inconsistent rulings;

(xi) the effect of misleading rulings; and

(xii) the date of effect of public rulings.

2A. All further legislative references in this Ruling are to Schedule 1 to the TAA, unless otherwise indicated.

Previous Rulings

3. Taxation Rulings TR 92/1 *Income tax and fringe benefits tax: public rulings*, TR 92/20 *Income and other taxes: guidelines on the use of date of effect paragraphs in Taxation Rulings and Taxation Determinations*, TR 97/16 *Income tax: status of taxation rulings following the income tax law rewrite* and Product Grants and Benefits Ruling PGBR 2003/1 *Product grants and benefits: public rulings* were withdrawn on and from 5 April 2006. To the extent that the Commissioner's views in those Rulings apply in respect of the new provisions, they have been incorporated into this Ruling.

3A. Goods and Services Tax Ruling GSTR 1999/1 *Goods and services tax: the GST rulings system* and Wine Equalisation Tax Ruling WETR 2002/1 *Wine equalisation tax: the WET rulings system* have been withdrawn with effect from 30 June 2010. To the extent that the Commissioner's views relating to public rulings in those Rulings continue to apply under Divisions 357 and 358, they have been incorporated into this Ruling.

Ruling

What constitutes a public ruling?

4. A public ruling is written binding advice, published by the Commissioner for the information of entities generally, on the way in which, in the Commissioner's opinion, a relevant provision[1] applies or would apply to entities generally, or a class of entities. A public ruling will state that it is a public ruling.

5. Under subsection 358-5(2), a public ruling may deal with any matter involved in the application of a relevant provision. Such matters may include matters relating to ultimate conclusions of fact. Where appropriate, a public ruling can also cover matters such as the Commissioner's approach to discretions, risk management material, and 'safe harbours', but only where these matters are relevant to the application of the relevant provision. This is further discussed at paragraphs 16A to 16D of this Ruling.

6. In addition to broad statements that anyone may rely on, the Commissioner may tailor public rulings to a particular class of entities or limit the scope of the ruling to a particular transaction entered into by a number of entities (such as class rulings or product rulings[2]). A class of entities may be defined by reference to certain characteristics (for example, being an employee or shareholder of a particular company, or being a member of a professional association). A class of entities can also be defined by reference to a particular behavioural characteristic of the members of that class, such as whether they are acting reasonably and in good faith. The following examples demonstrate how a public ruling may apply only to certain entities or entities who display particular behavioural characteristics.

Example 1

7. *The Commissioner issues an information booklet which is stated to be a public ruling and to apply to entities who are 'non-business individual self-preparers who have acted in good faith and reasonably relied on the ruling'. This public ruling is for an identifiable class of entities even though the booklet itself contains information relevant to a broader class. Kerry and Simon are non-business self-preparers. Kerry, in preparing her own tax return, acts in good faith and reasonably relies on a statement in the public ruling which misstates the law (although she is unaware that it does so). However, Simon unreasonably attempts to exploit a typographical error in the booklet which is obvious to him. Kerry can rely on the ruling but Simon cannot, as Simon does not fall within the identifiable class of entities to which the ruling applies.*[3]

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[1] See paragraph 11 of this Ruling for more information.
[2] See paragraph 22 of this Ruling for more information.
[3] This is based on Example 3.2 in paragraph 3.51 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.

8. *Note that in the example in paragraph 7 of this Ruling, Simon had entered into the scheme*[4] *to which the public ruling applied before the correction of the typographical error was made. Therefore, if the ruling had applied to him, the uncorrected version of the booklet would have continued to apply to him (see paragraph 46 of this Ruling). However, because he acts unreasonably, Simon does not fall within the identifiable class of entities to which the ruling applies, and the fact that he had already entered into the scheme is irrelevant to his ability to rely on the ruling.*

Example 2

8AA. *The Commissioner issues a law companion ruling which is stated to be a public ruling and to apply to entities who rely on it in good faith. A later court decision determines that the view in the law companion ruling is not correct. Michaela has relied on the law companion ruling in good faith for the period it was in force, and thus the law companion ruling binds the Commissioner. By contrast, Veronica has used the law companion ruling inappropriately, choosing to rely on a single sentence in isolation rather than reading the law companion ruling as a whole. The protection of the law companion ruling does not apply in Veronica's case.*

8A. A public ruling deals with how a provision in the law applies to entities generally or to a class of entities.[4A] A public ruling could not therefore provide advice about how a relevant provision applies to a specific entity. If a ruling is to deal only with how the law applies to a specific entity, it should be issued as a private ruling (see Taxation Ruling TR 2006/11 *Private rulings* for an explanation of the private rulings system). Nevertheless, in the context of providing advice to a class of entities on the application of a provision, it is possible for a public ruling to include a matter that is relevant to only one of the entities in the defined class. Furthermore, a public ruling might also touch on issues that are specific to a particular entity in the context of providing advice to a broader class. For example, a class ruling issued to employees of a particular employer, might necessarily deal with matters concerning a scheme established by the employer. However, as the class ruling is provided for the employees, as a class, it would only bind the Commissioner in respect of those employees and not the employer.

9. The Commissioner may also declare that advice provided generally in other documents, such as tax return instructions, is a public ruling for a specific class of taxpayers only, even though the information contained in the relevant publication may be relevant to a broader class.[5]

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[4] See paragraph 46 of this Ruling for an explanation of what a 'scheme' is.
[4A] Subsection 358-5(1).
[5] See paragraph 3.51 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.

10. A single document labelled a public ruling may consist of a number of separate rulings (that is, a number of opinions on how relevant provisions apply). A ruling will identify the relevant provisions. If the relevant provision is not expressly identified, it is sufficient if it can be identified by necessary implication. Furthermore, the Commissioner has the ability to make only part of a document a public ruling. Therefore, for example, a 'TR series' ruling (see paragraph 22 of this Ruling) contains a section labelled as a public ruling, and usually also contains explanatory material which does not form part of the binding public ruling but contains information to help the reader understand how the Commissioner's view has been reached.[6]

What issues can be covered in a public ruling?

11. The Commissioner can issue rulings only on relevant provisions. Relevant provisions are provisions of Acts and regulations administered by the Commissioner that are about any of the matters listed in section 357-55.

12. Only provisions of Acts and regulations administered by the Commissioner are directly covered by section 357-55. Therefore, for example, the Commissioner cannot directly rule on trust law or the common law relating to the creation of a new trust. Such matters are outside the scope of the relevant provisions on which the Commissioner can directly rule.[7] However, the Commissioner may issue a public ruling on, say, the capital gains tax consequences of the formation of a new trust. In making this ruling, the Commissioner might form a view that a new trust has or has not been created at common law for the purpose of coming to a view on the application of the capital gains tax provisions.[8] In such a case, that ruling would be binding in relation to the application of the capital gains tax provisions, even though it is premised on a particular view about whether a new trust has been formed at common law (which might even turn out to be incorrect). However, the view expressed about whether a new trust has been created at common law is not, by itself, a ruling. Therefore, it would not be binding on the Commissioner in a context outside of the application of the capital gains tax provisions to the particular scheme addressed by the public ruling and the class of entities, if any, it is expressed to apply to.[9]

13. The intention of the amendments implementing the ROSA Report is to enable the Commissioner to make rulings on all the matters and circumstances in which rulings have previously been made (for example, the extent of liability to income tax[10], or the way in which a discretion of the Commissioner would be exercised in

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[6] See paragraph 39 of this Ruling and Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the ATO* for more information.
[7] Subsection 358-5(1).
[8] Subsection 358-5(2).
[9] Subsection 357-60(1).
[10] Former section 14ZAAE of the TAA.

determining that liability[11]). In addition, the Commissioner is authorised to make a public ruling to cover any aspect of the tax or entitlement covered by a relevant provision, including the collection and recovery of the tax, and its administration, or the administration or payment of a relevant grant or benefit.[12]

14. The intention to allow rulings to be given in a very wide range of circumstances has been reflected in the use of the word 'about' in section 357-55, which has a very broad meaning. The word 'about' is not defined in the *Income Tax Assessment Act 1936* (ITAA 1936) or the *Income Tax Assessment Act 1997* (ITAA 1997) but takes its ordinary meaning of 'concerning', 'connected with', 'on the subject of' or 'relating to.'[13]

15. Therefore, a provision under which the extent of liability or entitlement to the taxes, duties, levies and entitlements listed in section 357-55 is worked out is a provision 'about' them, as are provisions that are sufficiently relevant, or a necessary pre-requisite, to working out the liability or entitlement.

16. Provisions dealing with penalties for false or misleading statements, late payment of taxes, or late lodgment of returns, are examples of provisions about the administration or collection of taxes. The same applies to provisions dealing with shortfall interest charge and general interest charge. Similarly, provisions dealing with, for example, franking credits and debits are about the administration or collection of franking tax.

16A. Where a relevant provision contains a discretion, a ruling can set out the Commissioner's opinion on the way in which that discretion should be approached, for example, setting out those factors that are relevant to the exercise of the discretion. As a matter of practice, the Commissioner's general approach to a discretion will often be set out in a law administration practice statement, rather than in a public ruling. In the context of a particular scheme, a ruling may set out how the discretion would be exercised in a specific instance. However, the ruling does not amount to the actual exercise of the discretion, nor can the ruling be expressed in a way that would fetter the future exercise of the discretion in a particular case (see paragraph 36 of this Ruling).

16B. A public ruling can deal with any matter related to the application of a provision.[13AAA] Therefore, the Commissioner may increase the practical utility of public rulings by dealing with related administrative matters on the way a provision applies, including issues relating to 'liability, administration, procedure, collection, and

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[11] Former section 14ZAAD of the TAA.
[12] Paragraph 3.22 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 and paragraph 2.12 of the Explanatory Memorandum to the Tax Laws Amendment (2010 GST Administration Measures No.2) Bill 2010.
[13] Delbridge, A (ed) and ors (2001), *The Macquarie Dictionary*, rev. 3rd edn, The Macquarie Library Pty Ltd, North Ryde and Moore, B (ed) (1999) *Australian Oxford Dictionary*, Oxford University Press, Melbourne.
[13AAA] Subsection 358-5(2).

ultimate conclusions of fact'.[13A] As a matter of practice, matters relating to administration, procedures and collection would usually be set out as an appendix in a public ruling or a Practical Compliance Guideline.

16C. [Omitted.]

16D. Where a 'safe harbour' is specifically provided for by a relevant provision, it may be the subject of a public ruling. An example is the provisions concerned with safe harbour debt amounts in Division 820 of the ITAA 1997.

16E. The Commissioner also has the general administration of some Acts which do not contain provisions which are 'about' any of the taxes, levies and duties listed in section 357-55. An example is the *A New Tax System (Australian Business Number) Act 1999* (ABN Act),[13B] which has general application extending beyond the administration and collection of any of the taxes levies and duties listed in section 357-55. So, the Commissioner is not authorised to make binding public rulings about the ABN Act. However, it may be necessary to cover ABN Act issues in the course of providing a ruling on a relevant provision which is covered by the list in section 357-55, such as section 12-190 (no-ABN withholding) which is a provision about the administration and collection of income tax. Consideration of these issues would fall under the scope of 'any matter' for the purpose of ruling on the no-ABN withholding provision, and is only binding in respect of that provision (also see the example in paragraph 12 of this Ruling).

How are public rulings made?

17. A ruling will only be a public ruling for the purposes of the public rulings provisions if it:

- is published;[14] and
- states that it is a public ruling.[15]

18. The Commissioner publishes public rulings by placing them on the ATO Legal database.

19. The Commissioner must also, by notifiable instrument, publish notice of the making of a public ruling.[16] However, if the Commissioner issues a public ruling but fails to publish notice of the

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[13A] Paragraphs 3.22 and 3.49 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.
[13AA] [Omitted.]
[13B] Subsection 28(4) of the ABN Act provides that the Act is taken to be one that the Commissioner has the general administration of.
[14] Paragraph 358-5(3)(a).
[15] Paragraph 358-5(3)(b).
[16] Subsection 358-5(4).

making of that public ruling, an entity to whom it applies may nevertheless rely on the ruling and it will bind the Commissioner.[17]

20. The conclusion in paragraph 19 of this Ruling follows from section 357-90, which deals with formal defects. That section provides that the validity of a ruling is not affected merely by the fact that a provision relating to the form of the ruling or the procedure for making it has not been complied with. It prevents the Commissioner asserting that a document clearly intended to be a public ruling is not in fact a public ruling merely because of a procedural or formal defect.

21. A public ruling in force immediately before 1 January 2006 under former Part IVAAA of the TAA is treated as if it were a public ruling under Division 358, with effect from the day it was originally made.[18] Therefore, the level of protection applicable to a ruling under former Part IVAAA of the TAA will continue to apply to that ruling through Division 358. Where inconsistencies arise between 2 rulings that were originally made before 1 January 2006, the rules set out in former sections 170BC to 170BDC and 170BF of the ITAA 1936 will apply. For more information about inconsistencies, refer to paragraphs 52 to 58 of this Ruling.

21A. An indirect tax ruling in force immediately before 1 July 2010 under section 105-60 that is labelled as a public ruling or was described as a public ruling in its publication notice in the *Gazette* is treated from 1 July 2010 as if it were a public ruling under Division 358.[18A] This means that indirect tax rulings that the Commissioner published before 1 July 2010 in the formal public rulings series are treated as public rulings under Division 358. Certain documents containing advice on the application of indirect tax laws published on the ATO website before 1 July 2010 were also labelled as public rulings from 1 July 2010, with the same effect.

The types of rulings the ATO publishes

Public rulings issued in the formal rulings series

22. The ATO makes known its views about the application of relevant provisions in a number of ways. For example, the ATO issues formal rulings, grouped in different series, on the application of relevant provisions at a general level, in the sense that they do not address particular entity's affairs. These formal rulings include the series which, for the most part, meet the criteria for binding public rulings, namely:

- Taxation Ruling series (TR series);
- Taxation Determination series (TD series);
- Law Companion Ruling series (LCR series);

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[17] See paragraph 3.35 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.
[18] Item 29, Part 3 of Schedule 2 to the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*.
[18A] Section 105-60 formerly applied to indirect tax rulings, but was repealed by the *Tax Laws Amendment (2010 GST Administration Measures No. 2) Act 2010*.

- Class Ruling series (CR series);
- Product Ruling series (PR series);
- Product Grants and Benefits Ruling series (PGBR series);
- Excise Ruling series (ER series);
- Excise Determination series (ED series);
- Fuel Tax Ruling series (FTR series);
- Fuel Tax Determination series (FTD series);
- Goods and Services Tax Ruling series (GSTR series);
- Goods and Services Tax Determination series (GSTD series);
- Miscellaneous Tax Ruling (MT series) that are labelled as 'legally binding';
- Wine Equalisation Tax Ruling series (WETR series);
- Wine Equalisation Tax Determination series (WETD series); and
- Luxury Car Tax Determination series (LCTD series).

23. In addition, there are other formal rulings issued by the ATO which do not meet the criteria for binding public rulings. Principally, these are:

- Income Tax series (IT series) of rulings (that is, formal rulings issued before 1 July 1992);
- most of the Miscellaneous Taxation series (MT series) issued prior to 1 January 2006;
- Superannuation Guarantee Ruling series (SGR series);
- Superannuation Guarantee Determination series (SGR series);
- Self Managed Superannuation Funds Ruling series (SMSFR series);
- Self Managed Superannuation Funds Determination series (SMSFR series); and
- Superannuation Determination series (SD series).

23AA. These formal rulings are not public rulings for the purposes of the public rulings provisions. In relation to the IT series, prior to 1992, the rulings generated were not binding. For the other series listed in paragraph 23 of this Ruling, the Commissioner is unable to rule on the matters covered. However, the Commissioner considers all series to be administratively binding on the ATO.

Law companion rulings

23A. A law companion ruling expresses the Commissioner's view on how recently enacted law applies to a class of taxpayers, or to taxpayers generally. Typically, a law companion ruling will be published as soon as practicable after a Bill receives Royal Assent in order to provide early advice. Law Companion Ruling LCR 2015/1 *Law companion rulings: purpose, nature and role in ATO's public advice and guidance* further explains the purpose and nature of law companion rulings, and their role in the ATO's public advice and guidance framework.

Other types of publications that may be made into public rulings

24. The ATO also expresses its view about relevant provisions through other publications. These include:

- *myTax*;
- return form guides;
- information booklets;
- media releases;
- speeches of senior officers; and
- law administration practice statements.[19]

25. To the extent that these publications express the ATO's view about how a relevant provision applies to entities generally or a group or class of entities, they can be given the status of a public ruling.

26. However, to be a public ruling, the relevant publication must state that it is a public ruling for the purposes of the public rulings provisions (see paragraph 17 of this Ruling for more information). Therefore, an ATO publication will not be a public ruling unless it is stated to be one. As with all public rulings under Division 358, the Commissioner must, by notifiable instrument, publish notice of such a document as a public ruling.[19A]

27. Only those parts of the publication which express the ATO's view about a matter involved in the application of a relevant provision will be given the status of a public ruling. Any other part will not be a public ruling.

28. For example, a publication that sets out the ATO's audit strategy for a particular class of taxpayers could not ordinarily be a public ruling. Material of this type could only form part of a public ruling, where the ruling concerned how a relevant provision applied, and the material about the ATO's audit strategy was in the context of the administration of that provision.

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[19] See Law Administration Practice Statement PS LA 1998/1 *Law administration practice statements* for information about the purpose and content of law administration practice statements.
[19A] See subsection 358-5(4).

29. Where no part of the publication concerns the way in which a 'relevant provision' applies to entities generally or class of entities, no part of it can be a public ruling.

The status and binding effect of public rulings

30. A public ruling binds the Commissioner if the public ruling applies to the entity and the entity relies on it. An entity relies on a public ruling by acting (or omitting to act) in accordance with the public ruling. An example of demonstrating reliance by omitting to act is omitting to lodge a tax return in the circumstances in which a public ruling states that a return need not be lodged.[20] An entity will not be considered to have relied on a public ruling if they undertake actions in accordance with a public ruling, but also undertake other actions that materially change the overall form, effect or outcome from what was set out in the ruling.[20A]

31. An entity does not need to know of the existence of a public ruling in order to rely on it. An entity may rely on a public ruling at any time unless they are prevented by a time limit imposed by a taxation law, such as an entity's period of review of their assessment. Furthermore, an entity need not rely on a public ruling at the first opportunity; rather the opportunity must be taken before being prevented from doing so by a time limit imposed by a taxation law.[21]

32. A public ruling applies to an entity if the entity is a member of the class to whom the public ruling applies and the entity's circumstances come within the circumstances addressed in the public ruling. A public ruling applies for the specified period, so long as the law to which it relates remains in force. As discussed at paragraphs 49 to 51 of this Ruling, where the law is re-enacted or remade, the public ruling continues to apply. If the law is repealed or amended to have a different effect, the public ruling ceases to apply.[22]

33. The reason why a public ruling ceases to apply if the law is amended to have a different effect is because a public ruling on the way the Commissioner considers a relevant provision applies or would apply according to the state of the law as it then exists says nothing about how a materially altered version of that provision applies. This is the case irrespective of whether the amendment is to the provision itself or to another provision which effects a change to the operation of the original provision (see paragraph 35 of this Ruling for an example of this).

34. That is not to say that any amendment to (or affecting) a provision would render a ruling on that provision inoperative. It is only if the amendment produces an effect which is different from the effect of the provision prior to the amendment that the public ruling ceases to apply (and therefore ceases to bind the Commissioner). If the

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[20] See subsection 357-60(1).
[20A] See *Aitken v Commissioner of Taxation* [2025] FCA 372 at [164] and [172].
[21] See subsection 357-60(2).
[22] See note 2 in subsection 357-60(1).

public ruling given under the original provision would have been the same if the amendment had been made before the public ruling is given then the public ruling is still applicable. If the public ruling ceases to apply because of the amendment then the public ruling cannot be relied on.

35. This point can be illustrated by way of the following example. Subsection 8-1(1) of the ITAA 1997 provides a deduction for certain losses or outgoings. However, the operation of subsection 8-1(1) is directly affected by Division 26 of the ITAA 1997, which sets out some amounts which cannot be deducted. If a public ruling is made about how the Commissioner considers subsection 8-1(1) applies to a particular type of outgoing, and an amendment were later made to Division 26 denying a deduction for such outgoings, the public ruling can no longer apply. This is the case even though the wording of subsection 8-1(1) has not itself been changed (rather, the effect of the provision has been changed or amended by the amendment to Division 26). However, if the amendment to Division 26 is irrelevant to the issues addressed by the ruling, the ruling would still apply and would still bind the Commissioner. This is the case even if the ruling were later shown to represent an incorrect interpretation of the words of subsection 8-1(1).

36. As mentioned in paragraph 30 of this Ruling, a public ruling will bind the Commissioner if an entity acts or omits to act in accordance with the public ruling. The effect of a public ruling binding the Commissioner is that the Commissioner will not apply the provision in a way that is inconsistent with the public ruling. Therefore if, for example, a ruling sets out the circumstances which would ordinarily lead to the exercise of the Commissioner's discretion in relation to a relevant provision, the Commissioner will exercise the discretion in a way that is consistent with the ruling (including by giving appropriate weight to the factors listed in the ruling as being relevant or significant). However, the ruling itself would not constitute the exercise of the discretion, because that requires a separate act by the Commissioner having regard to all the facts and circumstances of the particular case. A public ruling which applies in relation to a particular scheme will not bind the Commissioner if the scheme is not implemented in the way set out in the public ruling.

36A. In the context of indirect taxes, in circumstances where there is a GST group, GST joint venture or incapacitated entity, a ruling binds the Commissioner if, and only if, both the 'representative entity' and relevant 'member entity'[22A] rely on the ruling. This rule only applies in relation to rulings which apply to the member entity and relate to:

[22A] The term 'member entity' is used in this context to refer to a member of a GST group, a participant in a GST joint venture or an incapacitated entity within the meaning given to those terms by the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). The term 'representative entity' is used to refer to the representative member of a GST group, the joint venture operator of a GST joint venture or the representative of an incapacitated entity (as the case requires).

- what would (but for the rules in the indirect tax law relating to GST groups, GST joint ventures or incapacitated entities) be a GST, wine tax or LCT-related liability or entitlement that the member entity has; and
- what is instead (because of those rules) a liability or entitlement that the representative entity has (or would have if, after the application of the rules, the liability or entitlement still existed).[22B]

36B. For example, the Commissioner may be asked to rule on whether a particular supply made by a member of a GST group is subject to GST. The ruling that the Commissioner gives would satisfy paragraph 36A of this Ruling, as any GST that is payable on the group member's supply would (because of the grouping rules in the GST law)[22C] be payable by the representative member of the group and not the group member. Accordingly, the Commissioner would only be bound by the ruling if both the group member and the representative member rely on the ruling. In order to rely on the ruling, the group member would need to treat its supply in accordance with the ruling and the representative member would need to act in accordance with the ruling when lodging its GST return for the tax period to which any GST payable would be attributable.

37. Where an entity relies on a public ruling that applies to them, the Commissioner may nevertheless apply a relevant provision of the law as if the entity had not relied on the public ruling, if doing so would produce a more favourable result for the entity. The Commissioner has power to do this provided there is not a relevant time limit in the law which prevents it. However, the Commissioner is not obliged to consider whether a more favourable outcome is available for the entity.[23] Rather, the Commissioner may accept an entity's self-assessment without further investigation.

38. Because the Commissioner may apply an interpretation of the law that is more favourable to the entity, a public ruling binds the Commissioner in the following ways if the entity chooses to rely on it:

- To the extent that a public ruling determines a tax liability, amount or an entitlement (or whether there is a tax liability, amount or an entitlement) under a relevant provision, the liability, amount or entitlement must be determined in accordance with the public ruling. However, if the Commissioner concludes that the public ruling was wrong, the Commissioner may adopt the correct position if it is more favourable than the public ruling.
- To the extent that a public ruling expresses the Commissioner's opinion on an ultimate conclusion of

[22B] Subsections 357-60(5) and (6).
[22C] In particular, subsection 48-40(1) of the GST Act.
[23] Section 357-70.

fact for the purposes of a relevant provision (such as whether the entity is a resident), the Commissioner is bound to follow his or her expressed opinion, or may adopt the correct conclusion if that is more favourable.

- To the extent that a public ruling deals with matters of administration, procedure, collection or any other matter involved in the application of a relevant provision, the Commissioner must not act inconsistently with the public ruling to the entity's detriment. However, the Commissioner may adopt an interpretation that is more favourable where that is the correct position.[24]

The status and binding effect of formal rulings which are not public rulings

39. To the extent that formal rulings or parts thereof are not public rulings,[25] they are not capable of legally binding the Commissioner as described in paragraphs 30 to 38 of this Ruling. However, the policy of the ATO is to stand by what is said in a formal ruling and to depart from a formal ruling only where there are good and substantial reasons to do so.

The status of draft public rulings

39A. A published draft public ruling is not a ruling and is not legally binding on the Commissioner. It is a consultative document which sets out the Commissioner's preliminary view about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities, in relation to a defined scheme or class of schemes.

39B. Unless otherwise stated in the document, reliance on a statement in a current draft ruling[26AA] provides the same level of protection as written guidance which means that although it is not legally binding, the Commissioner will stand by it unless there are good and substantial reasons to depart from it.[26AB]

39C. Where a draft ruling sets out a view on how a relevant provision applies, and that view represents the Commissioner's general administrative practice[26AC], that can affect the commencement date of the final ruling. In such a case, if the final public ruling (other than an indirect tax or excise ruling) takes a

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[24] See paragraph 3.30 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.
[25] See paragraphs 22 to 23A of this Ruling.
[26] [Omitted.]
[26AA] Refer to PS LA 2008/3.
[26AB] See paragraph 39A of this Ruling.
[26AC] See Taxation Determination TD 2011/19 *Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?*

position that is less favourable to the taxpayer than the draft ruling, the view of the law taken in the final ruling can only be applied to schemes begun to be carried out after the final ruling is published.[26AD]

The relevance of public rulings to whether a taxpayer has a reasonably arguable position in regard to income tax, minimum tax and petroleum resource rent tax matters for the purposes of certain penalty provisions

40. Under the penalty provisions in Division 284, a taxpayer may be liable to pay an administrative penalty. In regard to income tax, minimum tax and petroleum resource rent tax (PRRT) matters, the level of penalty depends, in part, on whether the taxpayer[26A] treats a relevant provision as applying to a matter or identical matters in a particular way that was not reasonably arguable.

41. Section 284-15 provides that in determining whether a taxpayer has taken a reasonably arguable position, for the purposes of the penalty provisions, it is necessary to have regard to the 'relevant authorities'. A 'public ruling' is included as one of a number of relevant authorities for this purpose,[27] none of which alone is necessarily conclusive.[27A]

42. The TAA provides no guidance on the status of formal rulings which are not public rulings for the purposes of determining if a taxpayer has taken a reasonably arguable position. However, the Explanatory Memorandum to the Taxation Laws Amendment (Self Assessment) Bill 1992 states that 'Taxation Rulings issued by the Commissioner prior to the new arrangements introduced by this Bill may also be considered'.[28] The ATO has long accepted this approach and continues to do so.

Public rulings and the promoter penalty laws

42A. Under the promoter penalty laws[28A], the Commissioner may apply to the Federal Court for sanctions, remedies (or both) to address conduct concerning the:

[26AD] Subsection 358-10(2). From 1 July 2010, the Commissioner may revise an indirect tax or excise ruling at any time, whether or not the relevant scheme or tax period has commenced: see subsection 357-75(1).

[26A] This provision applies to a statement made by a taxpayer's agent as if it had been made by the taxpayer.

[27] Paragraph 284-15(3)(d).

[27A] For further information on whether a taxpayer has taken a reasonably arguable position refer to Miscellaneous Taxation Ruling MT 2008/2 *Shortfall penalties: administrative penalty for taking a position that is not reasonably arguable*, and, in regards to public rulings, paragraphs 46 to 48 of that Ruling.

[28] This Explanatory Memorandum refers to the old provision of section 222C of the ITAA 1936, which was replaced with an equivalent provision in section 284-15.

[28A] Division 290.

[28B] [Omitted.]

- promotion of schemes on the basis of conformity with a public ruling if the scheme is materially different from that described in the ruling; and
- implementation of schemes, that have been promoted on the basis of conformity with a public ruling, in a way that is materially different from that described in the ruling.

42B. The Commissioner has issued Law Administration Practice Statement PS LA 2021/1 *Application of the promoter penalty laws*, setting out the administrative procedures that are used in applying the promoter penalty laws.

Withdrawal of a public ruling

43. Where a public ruling does not specify the time at which it ceases to apply, the ruling will apply until it is withdrawn.[29]

44. The Commissioner may, by notifiable instrument, withdraw a public ruling, either wholly or to an extent.[30] If the Commissioner fails to publish a notice of withdrawal by notifiable instrument, the public ruling continues to apply until it is effectively withdrawn. In other words, all formalities must be complied with in order for the withdrawal of a public ruling to be effective.

45. The withdrawal takes effect from the time specified in the notifiable instrument. That time must not be before the day after the instrument is registered on the Federal Register of Legislation under the *Legislation Act 2003*.[31]

46. To the extent that a public ruling is withdrawn and it is not an indirect tax or excise ruling it continues to apply to schemes to which it applied that had begun to be carried out before the withdrawal, but does not apply to schemes that begin to be carried out after the withdrawal.[32] A scheme is taken to have begun if a contract requiring the scheme has been entered into.[33] 'Scheme' is widely defined to mean 'any arrangement', or 'any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise'.[34] An 'arrangement' is defined to mean any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings.[35]

47. The Commissioner has the flexibility to defer the withdrawal of a public ruling (including an indirect tax or excise ruling) where it

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[29] Section 358-15. Additionally, even if it is not withdrawn, an indirect tax or excise ruling that is a public ruling will cease to apply in relation to a particular taxpayer if an inconsistent private ruling is given to that taxpayer (paragraph 357-75(1B)(d)).
[30] Subsection 358-20(1).
[31] Subsection 358-20(2).
[32] Subsection 358-20(3).
[33] Section 357-80.
[34] See subsection 995-1(1) of the ITAA 1997.
[35] See Subsection 995-1(1) of the ITAA 1997.

would be inappropriate for the public ruling to be withdrawn on short notice.[36]

48. As such, in appropriate circumstances, the Commissioner may leave a public ruling in force even though there are doubts about the correctness of the public ruling. When withdrawing a public ruling, the Commissioner is entitled to have regard to the consequences for entities of a withdrawal with immediate effect and may therefore delay the date of withdrawal to minimise the consequences. However, a delayed date for withdrawal would not generally be appropriate where rulings address tax avoidance arrangements, or in situations where the former public ruling is being exploited.

The status of public rulings following a rewrite of the law

49. If the Commissioner has made a public ruling about a relevant provision and that provision is re-enacted or remade, the public ruling is taken to be about the re-enacted or remade provision, insofar as the new law expresses the same ideas as the old law.[37] However, if the law is substantively changed, the part of the public ruling dealing with the changed law ceases to apply.

50. Therefore, entities can continue to rely on existing legally binding rulings which deal with the old law if the old law expresses the same ideas as the new law. If the old law has been replaced by a new law which does not express the same ideas, then the part of the public ruling on that old law does not apply in relation to the new law. That is, that part of the public ruling will not apply to schemes entered into on or after, or extending beyond, the date of effect of the new law.

51. In deciding whether the new law expresses the same ideas as the old law, entities can normally assume there has been no change in those ideas unless announced otherwise. Ways in which a change may be announced include:

- the explanatory memorandum, second reading speech or other relevant extrinsic material relating to a Bill which is re-enacting or remaking the particular provisions;
- a tribunal or court decision (not under appeal) which makes it clear that there has been a change in ideas;
- a public announcement by the ATO that there has been a change in ideas – for example, by way of a Taxation Ruling, Taxation Determination, press release or other ATO publication.

[36] Subsection 358-20(2).
[37] Section 357-85.

The effect of inconsistent rulings

52. Where there are inconsistent rulings that both apply to the entity, section 357-75 sets out rules for determining which ruling may be relied upon, to the extent of the inconsistency. Rulings are not inconsistent to the extent to which they apply to different schemes or to different time periods (such as different income years).

52A. To the extent inconsistent rulings deal with indirect tax or excise issues, the indirect tax and excise rules apply (refer to paragraphs 58A to 58C of this Ruling). To the extent inconsistent rulings deal with other issues, the rules for rulings other than indirect tax or excise rulings apply (refer to paragraphs 53 to 58 of this Ruling).[37A]

Public rulings other than indirect tax or excise public rulings

53. As a general principle, an entity may always choose to rely on a public ruling that applies to them and may choose to rely on a private or oral ruling that specifically addresses their circumstances (assuming it still applies to them and has not, for example, been superseded by a later ruling: see paragraph 55 of this Ruling). So, if there is an inconsistency between a later applicable private or oral ruling and an earlier public ruling, the entity may choose which ruling they wish to rely on. Similarly, if there is an inconsistency between 2 public rulings (including this Ruling and, say, one of those rulings mentioned in paragraph 3 of this Ruling), each of which applies to a particular entity, the entity may rely on either ruling.

54. However, there are special rules which limit the ability to rely on a private or oral ruling if it is inconsistent in some respect with a later public ruling.

55. If the private or oral ruling is inconsistent with a later public ruling, the earlier private or oral ruling is taken not to have been made if, when the public ruling is made, the following 2 conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

56. This allows the correction of an erroneous private or oral ruling by the issue of a later public ruling, but only where the entity has not already entered into the scheme and the relevant income year or accounting period has not commenced. If the entity has already entered into the scheme, or the relevant income year or accounting period has commenced, they may rely on either ruling (see paragraph 53 of this Ruling)

[37A] Paragraph 2.32 of the Explanatory Memorandum to the Tax Laws Amendment (2010 GST Administration Measures No. 2) Bill 2010.

57. Where there are 3 or more inconsistent rulings, the rules in paragraphs 55 and 56 of this Ruling should be applied to each combination of 2 rulings in the order in which they are made, to determine whether any of the rulings are taken not to have been made, and then to determine which of the remaining rulings the entity can rely on.

58. These rules to resolve inconsistencies between rulings do not apply where both the inconsistent rulings were originally made before 1 January 2006. The rules set out in former sections 170BC to 170BDC and 170BF of the ITAA 1936 apply in such a situation.[38]

Indirect tax or excise public rulings

58A. If there are 2 inconsistent indirect tax or excise rulings that apply to an entity and both are public rulings then, to the extent of the inconsistency, that entity may rely on either of the rulings.[38A]

58B. If there are 2 inconsistent indirect tax or excise rulings that apply to an entity and at least one of the rulings is not a public ruling, then, to the extent of the inconsistency the later ruling is taken to apply from the later of the time it is made and the time (if any) specified in the ruling as being the time from which it begins to apply. The earlier ruling is taken to cease to apply at that later time.[38B]

58C. Where there are 3 or more inconsistent indirect tax or excise rulings, the rules in paragraphs 58A and 58B of this Ruling should be applied to each combination of 2 rulings in the order in which they are made, to determine which ruling the entity can rely on.

Date of effect of public rulings

59. A public ruling binds the Commissioner from the time the public ruling is published, or from the earlier or later time as specified in the ruling.[39]

General guidelines

60. A public ruling can apply from the time it is published, or such earlier or later time as is specified in the ruling. The ATO includes in public rulings a section explaining the date of effect.

61. Generally, the ATO specifies that public rulings have both a past and future application. This is because they represent the Commissioner's opinion as to what the correct interpretation of the law has always been.

62. However, there are situations where it is appropriate for a public ruling to have a prospective date of application. For example, where

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[38] Item 30, Schedule 2 of the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*.
[38A] Subsection 357-75(1A).
[38B] Subsection 357-75(1B).
[39] Subsection 358-10(1).

the ATO has facilitated or contributed to taxpayers adopting a different view of the law. See Law Administration Practice Statement PS LA 2011/27 *Determining whether the ATO's views of the law should be applied prospectively only* for further details.

63. Public rulings dealing with legislative amendments will usually apply from the application date of the amending legislation. As the ATO cannot provide interpretative advice on legislation prior to the legislation receiving Royal Assent, or on regulations prior to their registration, these public rulings will be issued after Royal Assent and apply from when the relevant legislation comes into effect.

64. [Omitted.]

65. [Omitted.]

66. [Omitted.]

67. [Omitted.]

68. A public ruling dealing with the criteria in respect of which, or the method by which, the Commissioner will exercise a discretionary power can only apply to an exercise of the particular discretion after the ruling is issued, but may relate to an earlier period.

69. Where a court or tribunal decision which is not subject to an appeal is more favourable to entities than a previous ATO practice, any new public ruling adopting that decision ordinarily will have both a past and future application.

Where prior general administrative practice exists and the ruling is not an indirect tax or excise public ruling

70. A public ruling that is not an indirect tax or excise ruling that relates to a scheme and that changes the Commissioner's general administrative practice (or conflicts with a previous private ruling) cannot apply to a particular entity if:

- the change is less favourable to the entity than the practice or ruling; and
- the entity has started to carry out the scheme.[40]

The Commissioner has issued Taxation Determination TD 2011/19 *Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?* on the meaning of the term general administrative practice.

71. [Omitted.]

72. [Omitted.]

73. [Omitted.]

74. [Omitted.]

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[40] Subsection 358-10(2).
[41] [Omitted.]

Inter-relationship between rulings, settlements and audits

75. A public ruling that covers an issue which was part of a settlement between an entity and the ATO will not apply to the entity in relation to that issue for the periods which were the subject of the settlement. If the ruling is intended to apply to the issue covered by a settlement (in the period the subject of the settlement), the ruling will state the extent to which it will apply.

76. If after a settlement with an entity a basis of assessment is followed for future periods, and a new public ruling is issued which is:

- less favourable to the entity than the settlement terms: the public ruling will apply to the entity for all transactions, arrangements, agreements, acts or events entered into, commenced or occurring after the date the public ruling is issued or any later date specified in the public ruling; or
- more favourable to the entity than the settlement terms: the public ruling will generally have both a past application (other than in respect of periods that are the subject of the settlement) and a future application.

77. The date of effect of a public ruling will not be any different for those entities who are subject to a taxation audit at the time the public ruling is issued.

Date of effect

78. This Ruling applies from 1 January 2006. However, this Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Ruling.

Commissioner of Taxation
4 October 2006

[42] [Omitted.]

Appendix 1 – Detailed contents list

79. The following is a detailed contents list for this Ruling:

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TR 2006/D6

Related rulings and determinations:

TR 2006/11; MT 2008/2; TD 2011/19; LCR 2015/1; PCG 2016/1

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