



PS LA 2013/4 - The ATO's role in tax law design and expressing ATO views as part of the law design process

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Practice Statement Law Administration

PS LA 2013/4

This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement [PS LA 1998/1](#). ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

SUBJECT: The ATO's role in tax law design and expressing ATO views as part of the law design process

PURPOSE: To explain:

- the ATO's role in tax law design
 - the participation of ATO personnel¹ in tax law design, in particular as it relates to how draft law might operate once it is enacted.
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STATEMENT

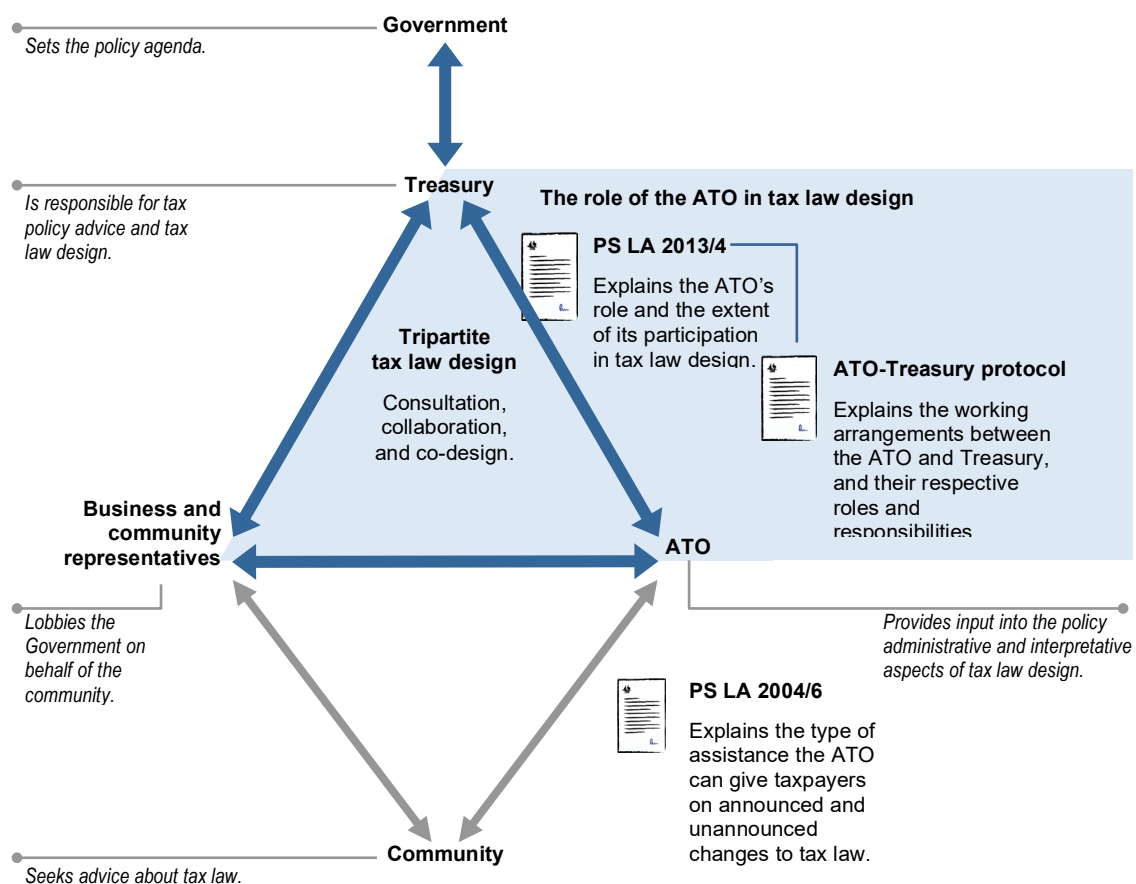
Development of the modern approach to tax law design

1. Since 2002, Treasury has had responsibility for advising relevant government ministers on both tax policy and the design of tax laws, while the Office of Parliamentary Counsel (OPC) has responsibility for drafting legislation. The ATO has continuing responsibility for administering the tax law, and brings its experience with that administration to bear to assist Treasury with the development of tax policy and the design of law.

¹ ATO personnel includes staff, employees, and officers. ATO personnel also includes contractors where their agreement or contract states that they will comply with ATO policies.

2. Tax policy, law and administration are integrally related and interdependent. Strengthening the links between policy development, tax law design and implementation through integrated tax design ensures better alignment between government policy and the operation of the tax system. Given the respective roles of Treasury and the ATO, and the importance of effective consultation with taxpayers as the ultimate users of the tax system, an optimal tax law design process involves joint co-operation and collaboration between Treasury, the ATO and the community.
3. This has been recognised through developments in the tax law design process, including:
 - the Review of Business Taxation's examination of the process of tax law development in 1999, which found that improvements should be made in both the integration between the different government agencies that were involved in the development of tax policy and law, and public consultation during the tax policy and law development processes; and
 - the 2008 report titled *Better Tax Design and Implementation*², recommended that:
 - substantive tax changes should be developed by a tri-partite team led by the Treasury, which includes tax officers and private sector experts. The team should have carriage of the measure throughout the design phase and should also monitor its implementation.
4. No one model of community involvement in tax law design is suitable for all measures. The engagement of private sector consultants is one approach that might be used to engage external expertise (sometimes referred to as 'tripartite tax law design'). Another, more common way to involve the wider community is through public or stakeholder consultation.

Tax law design in context



² Tax Design Review Panel 2008, *Better Tax Design and Implementation*, Treasury, Canberra, 30 April 2008.

5. This practice statement provides guidance for ATO personnel participating in tax law design. Following the completion of the tax law design process, once draft law has been enacted, consultation and collaboration with Treasury and the private sector continues, usually through different forums and representatives (such as the ATO's National Tax Liaison Group (NTLG)).

The Treasury/ATO Protocol

6. The Treasury/ATO Protocol (the Protocol) describes each agency's roles and responsibilities in relation to the various aspects of the tax law design process, consistent with what is set out in paragraph 1 of this practice statement. The Protocol provides an agreed framework for working arrangements between Treasury and the ATO for delivering advice to government on tax policy, and on the design and development of tax law. The Protocol was revised and updated in September 2012.
7. Recognising that tax policy, law and administration are integrally related and interdependent, the Protocol seeks to ensure that the administrative, compliance and interpretative experience of the ATO fully contributes to the tax policy and law design processes, and that there is a high level of integration across the policy, law and administrative aspects of changes to tax laws.
8. ATO personnel working in tax law design teams must adhere to the Protocol.
9. The full text of the Protocol is available at [Treasury/ATO Protocol](#).

The ATO's role in tax law design

10. Within the framework set out in the Protocol, the ATO's role in tax law design is to provide high quality input into the development of tax policy and law. It does this by contributing its views and experience, particularly in relation to the administrative impacts of proposed changes to the law. This recognises the principle that tax policy and law should take administrative issues fully into account. Included within these administrative impacts and issues is that part of tax administration which relates to the interpretation of the laws which the ATO administers.
11. More specifically, the ATO's input within the tax law design process will involve providing advice to Treasury on the administrative and interpretative aspects of proposed tax laws.
12. In relation to providing the ATO's input on interpretative aspects of tax law, Treasury will provide the ATO with the intended policy objective of a particular measure, and the ATO will provide its views as to whether it considers that the draft law achieves that objective. This still recognises that it is OPC which must be satisfied that draft law is legally effective to implement government policy.
13. The nature of the ATO's input into the process may include commenting on drafting instructions, draft law and explanatory memoranda, and may involve direct discussions with OPC where appropriate. The ATO's input into tax law design extends to the passage of the law through the Parliament.
14. Under the parameters of the quality assurance process set out in the Protocol, the ATO will also provide assurance at the time that draft law is to be introduced into Parliament that the Bill as drafted can be administered and interpreted in accordance with the underlying policy intent.

ATO personnel participation in tax law design

15. The ATO is fully supportive of, and committed to, tax law design whenever it occurs, as well as public and stakeholder consultation processes that are led by Treasury on new policy and law proposals. Effective involvement of Treasury, the ATO and the private sector is necessary in order to successfully implement government policy.
16. ATO members of a tax law design team are to be open in discussing issues throughout the tax law design process and the implementation of the new law, to best ensure that the change to the law will operate as intended.³
17. There are established processes in place to provide Treasury with the ATO's views on the administrative, compliance cost and revenue consequences of new tax policy and law at all stages of the tax law design process⁴. ATO input into tax law design is principally provided through discussions and workshops, and by providing comments on the products of tax law design, such as drafting instructions, draft law and explanatory memoranda. For other ATO personnel the aim is to work with the ATO members of a tax law design team to provide high quality input into the law design process, so all relevant issues are considered when making tax law changes.
18. More specifically, in the course of designing and developing draft law, tax law design teams will usually organise consultative discussions or meetings. A tax law design team will engage with other interested parties as part of these discussions or meetings. ATO members of tax law design teams can, and should, provide preliminary views about how the ATO would interpret the draft law to ensure that these discussions and meetings best achieve their purpose. This is an essential part of the process required to develop law that will give effect to policy intent. An identified ATO member of a tax law design team will settle these preliminary views.
19. All members of tax law design teams and parties that are involved in any consultative process should be aware that these preliminary views provide an ATO perspective on the potential application of the proposed law as it stands at that time. A benefit of open discussions about interpretative issues during the law design process is that it allows all stakeholders to put forward their perspectives, which can in turn influence the ATO's views about how the law is likely to operate. There will be some circumstances where the ATO's view about how the law as enacted operates will be different to the views about how the law is likely to operate on introduction to Parliament. For example, this may arise where:
 - amendments to the law are made during the passage of the Bill through Parliament, or
 - court decisions are handed down following the introduction of the Bill that has a material impact on the interpretation of the enacted law, or
 - there is a material difference in the facts of a case being considered under the enacted law relative to the circumstances that were contemplated by the ATO when offering preliminary views as part of the tax law design process.
20. It is only after the law is enacted that the ATO can provide binding advice on its interpretation of the law.
21. When providing input on interpretative issues it is important that ATO personnel consider the issue from the point of view of the impacts of the measure on the community, or sectors within it, and how the law can best be designed in a way that achieves the policy intent as naturally as possible for taxpayers.
22. ATO personnel participating in the tax law design process should:

³ See paragraphs 1.12, 3.25 and 3.36 of *Better Tax Design and Implementation*.

⁴ Corporate Management Practice Statement PS CM 2003/14 *Provision of formal ATO advice to Treasury and Chief Executive Instruction CEI 2014/02/03 Project and program management*.

- seek to ensure that the law and explanatory materials clearly state the policy intent or purpose of the law change
 - consider how the proposed change will interact with other parts of the tax law
 - consider the application date of the law change and the need for any transitional provisions
23. If preliminary views are expressed between the ATO and private sector representatives, the ATO representative/s must ensure that the Treasury representative/s are aware of the preliminary views, given that Treasury has responsibility for instructing OPC on the design of tax law changes.
24. Tax law design team discussions on any issues associated with tax laws that have been introduced into Parliament should take place at the earliest possible time.
25. Consistent with the expectation that ATO personnel be open and transparent in their dealings within the tax law design process, there is an expectation that all other parties taking part in that process will be equally open and transparent, to ensure the quality of the changes to the tax law.

Dealings with taxpayers and their representatives outside of the tax law design process

26. ATO personnel dealings with private sector representatives in a tax law design process (whether or not within a tripartite tax law design process) are to be contrasted with ATO personnel dealings with taxpayers or taxpayer representatives outside such a team in relation to unenacted tax laws. ATO personnel providing assistance to taxpayers or taxpayer representatives in relation to announced or unannounced changes to the tax law are required to follow PS LA 2004/6.⁵
27. In particular, PS LA 2004/6 prohibits ATO personnel from providing indicative interpretative advice on tax law prior to it receiving Royal Assent, or on regulations prior to their gazettal. This is because any such advice may be misleading in the event that the law or regulations change prior to Royal Assent or gazettal.⁶
28. However, PS LA 2004/6 states that ATO personnel should gain a clear understanding of any issues or concerns raised by taxpayers or taxpayer representatives in relation to unenacted tax law.⁷ While recognising the importance of not providing indicative interpretative advice to taxpayers or taxpayer representatives in this process, an open discussion about these issues or concerns, as well as possible responses to them, should helpfully inform the tax law design process.

Clarifying ATO roles in the process

29. If you are unsure about your role in the process or the process you should follow to provide input, you should seek guidance from your manager or follow your business line's escalation process.

⁵ Law Administration Practice Statement PS LA 2004/6 *The ATO role in providing information or advice on the potential application of announced changes to the tax law, or where legislative change is contemplated but not announced.*

⁶ Paragraph 1 of PS LA 2004/6.

⁷ Paragraph 3 of PS LA 2004/6.

Amendment history

| Date of amendment | Part | Comment |
|-------------------|-------------------------------|---|
| 10 April 2014 | Footnote 4 Contact details | Updated 'PS CM 2003/05' to CEI 2014/02/03'. Updated. |

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| Subject references | Law Design & Development |
| Related practice statements | PS LA 2004/6 The ATO role in providing information or advice on the potential application of announced changes to the tax law, or where legislative change is contemplated but not announced |
| Other references | ATO - Treasury protocol Better Tax Design and Implementation , A Report to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs dated 30 April 2008 |
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