

JOINT SUBMISSION BY

The Tax Institute,
Chartered Accountants Australia and New Zealand,
the Institute of Public Accountants, CPA Australia, Taxpayers Australia and the
Law Council of Australia

Draft Practice Statement Law Administration PSLA 2011/27

Matters the Commissioner considers when determining whether the ATO view of the law should only be applied prospectively

Date: 4 September 2014

The Professional Bodies welcome the opportunity to comment on Draft Practice Statement Law Administration PSLA 2011/27 ("the Draft Practice Statement").

GENERAL COMMENTS

The Professional Bodies broadly support the policy underpinning the Draft Practice Statement and the content of the Draft Practice Statement. Subject to specific comments below, the Professional Bodies are of the view the Draft Practice Statement clarifies the intent and application of the original PSLA 2011/27. In the Professional Bodies' view, application of the Draft Practice Statement will result in positive outcomes for taxpayers that are appropriate in nature.

Clarification has been achieved by insertion of the new paragraphs into the Draft Practice Statement following the decision in the *Macquarie*¹ case that attempt to deal with the outcomes of the *Macquarie* case in a practical way. In particular, the Professional Bodies are supportive of the internal referral process introduced by new paragraph 36.

SPECIFIC COMMENTS

The Professional Bodies have the following specific comments to make in respect of the Draft Practice Statement.

- Paragraph 25 of the Draft Practice Statement suggests that the Draft Practice Statement applies to 'any product, position, opinion or view of the law'. It would be useful if the Commissioner could clarify which particular products (eg public rulings and determinations) the Draft Practice Statement will be applied to by the Commissioner, particularly in light of the comments of the Full Federal Court in *Macquarie*, and state this in the Draft Practice Statement.
- Paragraph 25 also refers to the requirement imposed upon ATO personnel to determine whether there are circumstances (taking into account the factors outlined in paragraph 42) which would make it appropriate for the ATO to 'take action' to apply the ATO view of the law on a prospective basis. In the light of the Full Court's comments in *Macquarie*, it might be better for the Commissioner to amend the paragraph as follows [suggested changes in red]:

"Before applying any product, position, opinion or view of the law, ATO personnel are required to determine whether there are circumstances which would make it inappropriate to take action to review and amend assessments to apply the ATO view of the law in past years or periods".

¹ *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119

- New paragraph 28 should be inserted after paragraph 29 and not before.
- Paragraph 34 states that “the factors outlined in paragraph 42 might be relevant considerations, among other considerations, in deciding whether to settle a dispute with a taxpayer.” The paragraph then states, “The settlement of disputes is beyond the scope of this draft practice statement: see instead Law Administration Practice Statement PS LA 2007/5 *Settlements*”. The statements are inconsistent and it is our preference that the second statement is deleted and replaced with, “See **also** Law Administration Practice Statement PS LA 2007/5 *Settlements*”.

Other comments

In relation to paragraph 34, the Professional Bodies query whether it is intended the Draft Practice Statement apply in the context of a settlement in circumstances where the Commissioner has applied his view of the law in an assessment which is disputed. In such circumstances it would not seem appropriate to take into account the factors in paragraph 42 in considering a settlement of the disputed assessment.

The Professional Bodies understand from discussions with the ATO that the Commissioner intends for the Draft Practice Statement to apply to a settlement which can arise either before or after an assessment is issued. If this is the Commissioner’s intention, the Draft Practice Statement should be amended to make it clear exactly when the Commissioner intends the Draft Practice Statement should apply.