



Law Council  
OF AUSTRALIA

*Business Law Section*

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8 April 2016

Dear Andrew,

### **LCG 2015/D1 – Law Companion Guidelines**

I write on behalf of the Taxation Committee of the Business Law Section of the Law Council of Australia<sup>1</sup> in relation to LCG 2015/D1.

We make the following comments:

1. There are many references in the Guideline to parties only being able to rely on it if they have applied it in good faith. The concept is applied in two examples but neither is particularly helpful: one being where there was no reliance on the Guideline, the other where the taxpayer relied on an incorrect statement in a Guideline knowing it to be incorrect. There is otherwise no explanation provided. As this is a concept that has different meaning in different contexts, an explanation of what it means should be included. Additionally an example where a taxpayer relied on the guideline which turns out to be incorrect without knowledge of it being incorrect would be helpful.
2. There are aspects of the Guideline which appear to be inconsistent with existing PSLAs, in particular PSLA 2004/6 and PSLA 2013/4 which relate to how the ATO consults with Treasury on proposed law and how advice is provided to taxpayers on proposed laws. It is unclear whether this is intended or not. For example, comments at paragraph 12 about how the ATO and Treasury consult seem to differ to those in PSLA 2013/4. Most significantly, the comment in the Guideline that the guidelines reflect a 'common understanding' of the intended policy seems to suggest that the ATO has a role in the development of policy which would be inconsistent with comments in PSLA 2013/4 and the legal position that the policy is set by Government not Treasury or the ATO. The comments at paragraphs 13, 14 and 17 that the Guideline will form part of a package that sets out what the new measure will mean seem to suggest that they form part of the making of the law, when it should be clear that they are simply the ATO's view of the law (which we note is mentioned in paragraph 14). At paragraph 16 there is a stronger suggestion in the second and third bullet points that publication of guidelines support the drafting of new law, which is potentially inconsistent with the concept

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that it is the Government, with OPC, that drafts the law. For these reasons, it is suggested the views expressed in PSLA 2013/4 should be brought in to LCG 2015/D1.

3. The content at paragraphs 38 to 40 of the Guideline is confusing as to the status that guidelines are to have. We understand the guideline is merely an outline of the Commissioner's view of the law. In which case, guidelines should be updated and amended as per any other public ruling. If however, the Commissioner chooses to treat guidelines as part of a package explaining policy reasons for a new provision, then there should be no subsequent amendment to the guideline.
4. At paragraph 23 there is a comment that the Commissioner will stand by what is said in a draft guideline. We suggest that this language be softened. While we acknowledge that the intention is to provide certainty, as stated in PSLA 2004/6 the Commissioner should not be bound by provisions which are not yet law, and it is those provisions which draft guidelines will relate to. Changes are often made to Bills prior to implementation, and where this is the case the Commissioner should not be bound by advice provided on an earlier version of draft laws.
5. We recommend that paragraphs 5 to 7 (inclusive) be removed. They repeat content which is included elsewhere in the guideline and are in some respects inconsistent with that content. For example, at paragraph 5 it is stated a draft guideline will be published at the time a Bill is introduced into Parliament, or soon after and that consultation will follow that, whereas at paragraph 20 the indication is that consultation will occur prior to the introduction of the Bill where possible.

If you have any questions in relation to these comments, in the first instance please contact the Committee Chair, Adrian Varrasso, on 03-8608 1263 or via email: [adrian.varrasso@minterellison.com](mailto:adrian.varrasso@minterellison.com).

Yours sincerely,



**Teresa Dyson, Chair**  
Business Law Section