

Ms Leah Trebilcock
Australian Taxation Office
Via email: leah.trebilcock@ato.gov.au

25 September 2015

Dear Ms Trebilcock

Re: Draft PSLA 2005/24

1. The Taxation Committee of the Business Law Section of the Law Council of Australia provides the following brief comments which may assist in settling amendments to the above draft practice statement.
2. We note that the draft practice statement deals with, among things, amendments to Part IVA introduced in 2013. We refer generally to the Committee's submissions on those amendments, in particular to:
 - (a) the submission to the House of Representatives' Standing Committee on Economics dated 22 February 2013; and
 - (b) the submission to the Senate Economics Legislative Committee dated 12 April 2013.
3. For reference, unless otherwise noted, we use the new paragraph number to refer to a section of the draft practice statement.

Paragraph 12 – reference back to paragraph 8

4. Paragraph 8 acknowledges that the application of a GAAR is a serious matter. We appreciate that paragraph 12 has been amended to avoid repetition. However the rationale for establishment of the GAAR Panel, as explained at paragraph 12, might nevertheless reference that idea. We suggest adding, (at the end of paragraph 12) “, having regard to what is said at paragraph 8 above”.

Paragraph 31 – notice of a Panel meeting and timing for making written submissions

5. At paragraph 31, we observe that the time by which a taxpayer can make written submissions to the Panel has been amended so as to require such submissions to be made no later than 14 days prior to the meeting of the Panel rather than previously provided 7 days. We question whether that provides a taxpayer with adequate time to prepare written submissions in circumstances where a taxpayer can expect to only be given ‘around 28 days notice of a Panel meeting’? Perhaps more than 28 days notice of a Panel meeting should be provided to a taxpayer if it is important for the Panel to receive a taxpayer’s written submissions 14 days in advance of a Panel meeting.

Paragraph 32 – oral submissions by a taxpayer to Panel

6. We welcome the addition of material to paragraph 32, indicating that there will be occasions on which the taxpayer may prefer to make submissions in the absence of tax officers who are neither members of the Panel nor the decision-maker. We do not see that as necessarily being a usual position, but it is useful to incorporate that possibility.

Omitted paragraph 41 – written and oral submissions, on a without prejudice basis?

7. We are not sure why former paragraph 41 is omitted. It dealt with whether submissions would be on a without prejudice basis. The omitted paragraph said that such submissions would not be on a without prejudice basis, subject to an ability to request the Chair of the Panel, and the exercise of the direction of the Chair, to allow a particular response to be on a without prejudice basis.
8. Is it now intended that submissions be on a without prejudice basis, as the default? If so, this should be expressly indicated. We also confirm our view that it would be useful for the Panel to be able to receive submissions on a without prejudice basis, for example, where the taxpayer asks for that privilege to apply.

Paragraphs 50–56 - Scheme

9. It should be noted that the definition of ‘scheme’ matters more now following the 2013 amendments. This is because subsection 177CB(2) (also known as the annihilation limb) requires the postulate to comprise:
“only the events or circumstances that actually happened or existed (other than those that form part of the scheme).”
10. Accordingly, it would be helpful for the Practice Statement to identify the ATO’s approach to the definition of ‘scheme’ in this context.

Paragraphs 59, 63 and 68 – typographical errors

11. The second sentence of paragraph 59 should refer to ‘Full Federal Court’ rather than the ‘full Federal Court’.
12. At paragraph 63, the word ‘The’ at the commencement of the second sentence should instead read ‘This’.
13. At paragraph 68, the word ‘case’ perhaps was mistakenly deleted in the subheading ‘Relevant case law’.

Paragraphs 61-66 – Exclusions from tax benefit – subsections 177C(2) and 177C(2A)

14. The operation of these exclusions depends to some extent on the definition of scheme which is adopted, for example in relation to Subdiv 124-G relief or Sub 126-B rollover. Again, it would be helpful for the Practice Statement to identify the ATO’s approach to the definition of ‘scheme’ in this context.

Paragraph 71 – additional words

15. At the end of the second sentence of paragraph 71 the words ‘as it applied prior to the 2013 amendments’ should be added.

Paragraph 73 – principles of statutory interpretation

16. Paragraph 73 should be substantially revised to reflect modern principles of statutory construction. A suggested revised draft of this paragraph is set out below.
17. We note however the extent to which a Court will have regard to the Explanatory Memoranda and other material, is unclear.
18. However, given the ATO’s view about the role of the Explanatory Memoranda and other material, the suggested paragraph is as follows:

“The present approach to statutory interpretation requires consideration be given to the words of the statute, and in particular the text of the particular provision(s) concerned: see *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [47]. Section 15AA(1) of the *Acts Interpretation Act 1901* (Cth) requires a purposive approach to be taken to statutory interpretation over a literal approach. Section 15AA(1) provides:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

The High Court in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1990) 169 CLR 214 at 234, said:

"[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy." (footnote omitted)

It is plain that referring to "context" in its widest sense, as a rational aid to understanding meaning, covers not only history but also a wide range of material.

Regard should also be had to s 15AB(1) of the *Acts Interpretation Act* 1901 (Cth), enacted in 1984 which provides that extrinsic material may be referred to:

- "(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
- (b) to determine the meaning of the provision when:
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable."

Subsection 2 lists various extrinsic materials which may be taken into account, including any Explanatory Memorandum relating to the Bill introducing the provision.

The following discussion assumes knowledge of what is said about the amendments in the Explanatory Memorandum to the Bill that became the amending Act."

Paragraphs 74ff: section 177CB – tax benefit

19. We appreciate that the position set out in these paragraphs represents the ATO's view on the operation of the 2013 amendments. However, we also reference the counter position to many of these views, as set out for example in some of the papers at footnote 4.

Paragraphs 83-87: section 177CB – tax benefit

20. Paragraphs 83-87 deal with a common question, as to whether following the 2013 amendments “require taxpayers to pay the highest possible amount of tax they could have incurred, had a scheme not been entered into or carried out”.
21. The answer given is that this will not necessarily be the case. However no detailed example is provided. The suggestion is made that the Commissioner's case may be more attractive to the Court if the lower of the two tax benefits is adopted. We doubt that this assumption is necessarily correct, see *Vincent v Commissioner of Taxation* [2002] FCAFC 291 at [92] per Hill, Tamberlin and Hely JJ.
22. We consider it would be useful both for decision-makers and the profession to know what factors might be taken into account in coming to a view that the lower (or higher) of two potential tax liabilities ought to be preferred. Our view is that, generally, where there are 2 or more reasonable alternatives, the most economically or commercially feasible alternative should be adopted – see the Law Council's submission to the House of Representatives Standing Committee on Economics dated 22 February 2013.
23. With respect to these paragraphs, and in respect to other revisions made throughout the revised draft PSLA, consideration should be given to consistently applying the same references (definitions/termination) in respect of the ‘pre-2013 amendment law’ and the ‘post-2013 amendment law’.

Paragraph 105 – typographical error

24. The last sentence of paragraph 105 should add “no” after “there seems to be”.

Paragraph 140 – use of language

25. Suggestion is made that the words ‘may suggest’ should replace the word ‘means’ in the second line of the first sentence of paragraph 140.

Paragraph 151 – addition to the heading preceding that paragraph

26. The words ‘-possible double taxation’ should be added at the end of the words for the heading to paragraph 151.

If you have any questions in relation to this submission, in the first instance please contact the Committee Chair, Adrian Varrasso, on 038608 2483 or via email: adrian.varrasso@minterellison.com

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

John Keeves, Chairman
Business Law Section