

Public and private rulings - a comparison

By John Hsu, consultant and Luis Batalha, principal

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In response to recommendations made in the *Report on Aspects of Income Tax Self Assessment* (the **ROSA Report**), the ATO has recently released *Taxation Rulings* TR 2006/10 and TR 2006/11, outlining both the public and the private rulings systems. The new rulings address issues such as what constitutes a public/private ruling, the status and binding effect of such rulings, and the effect of inconsistent rulings. The new rulings also deal with issues specific to the two different types of systems.

In this article, we examine and compare the public and private rulings systems, and consider the main similarities and differences between the two systems. We also assess aspects unique to each system. This information may assist individuals who are unsure as to whether they are able to rely on public and/or private rulings in relation to their particular situation.

What is a public ruling?

A public ruling is a written binding advice, published by the Commissioner, for use by entities generally. It represents the Commissioner's opinion on a provision of a statute, and will state expressly that it is a public ruling (TR 2006/10, paragraph 4).

What is a private ruling?

A private ruling is an expression of the Commissioner's opinion on how a provision of a statute applies to a particular person or other entity (TR 2006/11, paragraph 4). A private ruling must be in relation to a specified scheme, and a person or an entity needs to apply for it. Also, in certain instances, the ATO can make

additional private rulings, which is an opinion about the way in which another provision relates to the scheme in question, or how the relevant provision applies to a related scheme (TR 2006/11, paragraph 5).

Summary of differences

The main differences between public and private rulings are summarised below:

	Public ruling	Private ruling
Entities covered	Entities generally	Only the entity that has made the application for the ruling
Application	No application required	Application required
Schemes	No specified scheme unless provided otherwise in the ruling	Application must be in relation to specified scheme
Matter(s) dealt with	Any matter related to relevant provision(s)	Restricted to specific matter sought by application
Discretion of Commissioner	Commissioner may tailor public rulings to transactions entered into by a particular class of entities	Commissioner has discretion to make 'related' or 'additional' private rulings. However, there is no obligation to do so.

Status and binding effect

The following table compares the status and binding effect of the two types of rulings:

	Public ruling	Private ruling
When is Commissioner bound?	A public ruling binds the Commissioner if the ruling applies to the entity (or the class of entity) and the entity relies on it (TR 2006/10, paragraph 30).	A private ruling binds the Commissioner if the ruling applies to the entity and it relies on it (TR 2006/11, paragraph 19).
Ability to rely on ruling	You rely on a public ruling by acting (or omitting to act) in accordance with the ruling. An entity can rely on a public ruling even without realising its existence, and may rely	You rely on a private ruling by acting (or omitting to act) in accordance with the ruling. An entity may rely on a private ruling at any time, unless a time limit applies (TR

	on it at any time unless prevented by a time limit imposed by tax law (TR 2006/10, paragraph 31).	2006/11, paragraph 25).
Effect of binding the Commissioner	The effect of binding the Commissioner is that he will not apply the provision in a manner inconsistent with the ruling (TR 2006/10, paragraph 35).	The Commissioner must not apply the provision in a way inconsistent with the private ruling (TR 2006/11, paragraph 19).
When is Commissioner not bound?	Formal rulings which are not public rulings do not legally bind the Commissioner (TR 2006/10, paragraph 39).	If the scheme/material facts are different, misleading or inaccurately stated, the private ruling does not bind the Commissioner (TR 2006/11, paragraph 19).
Discretion of Commissioner	The Commissioner has a discretion to apply a relevant provision of the law as if the entity had not relied on the ruling, if doing so would produce a more favourable result for the entity (TR 2006/10, paragraph 37).	The Commissioner has a discretion to act inconsistently with a private ruling if the correct application of the relevant provision of the law renders a more favourable outcome for the entity (TR 2006/11, paragraph 26).

Status of public/private rulings after an amendment or rewrite of law

As the following table shows, the rules relating to amendments and re-enactments of the law are the same for both public and private rulings.

	Both public and private rulings
What happens if provision is amended or re-enacted?	A public or private ruling is taken to apply to the amended or re-enacted provision, unless the ideas expressed in the new law have substantively changed. In that case, the part of the public/private ruling dealing with the changed law ceases to apply (TR 2006/10, paragraph 49 and TR 2006/11, paragraph 51).
Effect on entities	For schemes commencing after the amendment/re-enactment of the relevant provisions, the entities are entitled to rely on the old public/private rulings, but not parts where the new laws express ideas different to the old laws (TR 2006/10, paragraph 50 and TR 2006/11, paragraph 52).
How to	Entities can assume new laws express the same ideas as old laws, unless

<p>decide whether new law expresses same, or different ideas to old law?</p>	<p>otherwise announced (TR 2006/10, paragraph 51 and TR 2006/11, paragraph 53). Examples of announcement include:</p> <ul style="list-style-type: none"> ▪ explanatory memorandum; ▪ second reading speech; ▪ other relevant extrinsic material relating to a Bill; ▪ tribunal or court decisions; and ▪ public announcements by the ATO that there has been a change in ideas.
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Effect of inconsistent rulings

The following table compares the effect of inconsistent rulings on entities in so far as this relates to public and private rulings.

	Public ruling	Private ruling
If a public ruling and a private ruling are inconsistent, which ruling applies?	Where two public rulings are inconsistent with each other, the entity may rely on either ruling (TR 2006/10, paragraph 53).	Same as for public rulings. That is, where two private rulings are inconsistent with each other, the entity may rely on either ruling (TR 2006/11, paragraph 42).
What happens if a private ruling is inconsistent with a later public ruling?	<p>The earlier private ruling is taken not to have been made if:</p> <ul style="list-style-type: none"> ▪ 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 (TR 2006/10, paragraph 55 and TR 2006/11, paragraph 44). <p>This allows the correction of an erroneous private ruling, but only if the entity has not entered the scheme. Where the above situations have already begun, the entity may still rely on either ruling (TR 2006/10, paragraph 56 and TR 2006/11, paragraph 45).</p>	
What happens if there are 3 or 4 inconsistent rulings?	First take out the rulings that can be taken not to have been made (see above). Then one can choose to rely on any of the remaining rulings (TR 2006/10, paragraph 57 and TR 2006/11, paragraph 47).	
Inconsistency between old	Where two inconsistent rulings are both made before 1 January 2006, the rules (above) to resolve inconsistencies do not apply. Instead, sections	

rulings	170BC to 170BDC and 170BF of the ITAA 1936 apply (TR 2006/10, paragraph 58 and TR 2006/11, paragraph 48).
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Period of effect of rulings

The following table compares the period of effect of public and private rulings.

	Public ruling	Private ruling
When does a ruling begin to have effect?	<p>A public ruling has effect and binds the Commissioner from the date it is published, or from an earlier or later period as stated in the ruling (TR 2006/10, paragraph 59).</p> <p>However, a public ruling that relates to a scheme and that changes the Commissioner's general administrative practice (see paragraphs 71-74) or conflicts with a previous private ruling, will not have effect if:</p> <ul style="list-style-type: none"> ▪ the change is less favourable to the entity than the practice or ruling; and ▪ the entity has started to carry out the scheme (TR 2006/10, paragraph 70). 	<p>A private ruling usually specifies the time from which the ruling will take effect (TR 2006/11, paragraph 54). The starting time may refer to the occurrence of a particular event (e.g. the commencement of a relevant scheme).</p> <p>If no date or event is specified, the ruling has effect from when it is made.</p>
When does a ruling cease to have effect?	<p>Generally, no end time is specified. A public ruling will have future application because it represents the Commissioner's opinion as to the correct interpretation of the law (TR 2006/10, paragraph 63).</p> <p>However, where a public ruling is withdrawn, the ruling will cease to have effect. The Commissioner withdraws a public ruling by publishing a notice of its withdrawal</p>	<p>A private ruling usually specifies the time when the ruling ceases to apply. If no end time is specified, the ruling ceases to apply at the end of the income year or accounting period in which it started to apply (TR 2006/11, paragraph 54).</p>

	<p>in the <i>Gazette</i>. The withdrawal takes effect from the time specified in the notice (TR 2006/10, paragraph 44).</p> <p>The ruling will still apply to a scheme that has already been entered before the withdrawal. However, it will not apply to schemes entered after the withdrawal (TR 2006/10, paragraph 46).</p>	
<p>Do the rulings have retrospective application?</p>	<p>In general, public rulings will have retrospective application unless, on an objective consideration of all factors, it would produce an unfair, absurd, unjustifiable or impractical result (TR 2006/10, paragraphs 62-64).</p>	<p>Private rulings do not have retrospective effect for the parties concerned.</p>

Specific issues on public rulings

The following table summarises issues that relate only to public rulings (but not to private rulings).

<p>Types of public rulings issued by the ATO</p>	<p>The following are formal rulings which are binding on the Commissioner:</p> <ul style="list-style-type: none"> ▪ Taxation Rulings series (TR series); ▪ Taxation Determination series (TD series); ▪ Class Rulings series (CR series); ▪ Product Rulings series (PR series); and ▪ Product Grants and Benefits Rulings series (PGBR series) (TR 2006/10, paragraph 22). <p>The following are formal rulings that do not meet the criteria for binding public rulings. The Commissioner does, however, consider them to be binding on the ATO:</p> <ul style="list-style-type: none"> ▪ Income Tax series (IT series);
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	<ul style="list-style-type: none"> ▪ Miscellaneous Taxation series (MT series) (paragraphs 22-23). <p>The following are other publications made by the ATO, they are not binding public rulings unless stated to be so:</p> <ul style="list-style-type: none"> ▪ <i>TaxPack</i> and <i>E-tax</i>; ▪ return form guides; ▪ information booklets; ▪ media releases; ▪ speeches of senior officers; and ▪ practice statements (paragraphs 24-29).
Relevance of public rulings on reasonably arguable position	<p>A public ruling is relevant as a “relevant authority” for working out whether a taxpayer has taken a reasonably arguable position, in relation to penalty provisions in Division 284 of Schedule 1 to the TAA.</p> <p>Under the penalty provisions, a taxpayer may be liable to pay a shortfall penalty. The level of penalty depends, in part, on whether the taxpayer or their agent treats a relevant provision as applying to a matter or identical matters in a particular way that was not reasonably arguable.</p> <p>The ATO accepts that Taxation Rulings may be considered for the purposes of the penalty provisions (paragraph 42).</p>

Specific issues on private rulings

The following table outlines the issues that relate only to private rulings (but not to public rulings).

What is a relevant provision?	<p>A relevant provision for a private ruling is a provision about any of the following:</p> <ul style="list-style-type: none"> ▪ income tax; ▪ Medicare levy; ▪ fringe benefits tax; ▪ franking tax; ▪ withholding tax; ▪ petroleum resource rent tax; ▪ the administration and collection of the above taxes; ▪ product grants or benefits mentioned in section 8 of the <i>Product</i>
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	<p><i>Grants and Benefits Administration Act 2000</i>; and</p> <ul style="list-style-type: none"> ▪ net fuel amount, or the administration, collection or payment of a net fuel amount (TR 2006/11, paragraph 9). <p>The Commissioner may rule on how a provision applies to you even where the provision does not directly affect your liability or entitlement (paragraph 13).</p>
What can be covered by a private ruling?	<p>A private ruling can deal with anything involved in the specified scheme as it relates to the relevant provision, including liability, administration, procedure and collection and conclusions of fact (paragraphs 15-16).</p> <p>Where the private ruling requires a valuation in relation to property, service or intangible asset, the entity may provide a valuation or ask the Commissioner for a valuation. The Commissioner may accept the applicant's valuation or make its own valuation. The Commissioner is not required to obtain valuation from a valuer (paragraph 17). The Commissioner may also decline to rule where the entity requests for the valuation of a gift or contribution, if it would constitute an unreasonable diversion of resources (paragraph 18).</p>
Who may apply for a private ruling and who is covered by it?	<p>The entity, its agent, or its legal representative may apply for a private ruling. Trustees and partners may apply for ruling in relation to the trust/partnership (paragraph 28). The relevant provision must be capable of applying to you personally (paragraph 29).</p> <p>Generally, only the entity making the application is covered by the ruling but there are circumstances where beneficiaries of a trust are also covered (see paragraph 30).</p>
Form of application and information required	<p>Application must be in the form approved by the Commissioner, available from the ATO website and branch offices. The Commissioner may ask for additional information, which must be provided within a reasonable time (paragraph 33).</p> <p>Where the application depends on a question of fact, the applicant should ensure that the application contains sufficient information addressing those factors (paragraph 35).</p>
How private ruling is made	<p>A private ruling is first recorded by the Commissioner in writing, and then made to the entity electronically or on paper. It must state that it is a private ruling, specify the relevant scheme, the relevant provision, and identify the entity to whom the private ruling applies</p>

	(paragraph 37).
Applications that do not have to be dealt with	<p>The Commissioner, though bound to make a private ruling to an approved form, may decline to rule in certain circumstances. The Commissioner may decline to make a private ruling if:</p> <ul style="list-style-type: none"> ▪ the ruling would prejudice or unduly restrict the administration of a tax law (e.g. application is frivolous or vexatious or not seriously contemplated, or if there are no practical consequences for the applicant); ▪ the applicant does not agree to pay the amount charged for a valuation; ▪ disclosure of certain information would breach tax secrecy provisions; ▪ the ruling amounts to an unreasonable diversion of the Commissioner's resources; ▪ the subject matter has already been considered previously; ▪ additional information required by the Commissioner is not provided within a reasonable time; and ▪ the Commissioner considers that the correctness of the private ruling will depend on certain events in the future (paragraph 39).
Revising private rulings	<p>An existing private ruling may be revised by the Commissioner, but only if the scheme to which the ruling relates and the relevant income year or accounting period have not begun (paragraph 49).</p> <p>Another example of a private ruling being revised is if an inconsistent public ruling is made before the scheme or income year have started (paragraph 50).</p>
Delays in making private rulings	<p>If the Commissioner has not responded within 60 days of the application, the applicant may give a notice to the Commissioner to make the private ruling. If 30 days pass since lodgement of the notice and nothing has been done, the applicant may lobby for an objection (paragraph 55).</p> <p>However, the Commissioner may extend the 30 day period if they:</p> <ul style="list-style-type: none"> ▪ request further information from the applicant; ▪ describe assumptions and additional information to be taken into account; or ▪ refer a valuation matter to a valuer (paragraph 56).
Review of private rulings	<p>An applicant has the right to object to a private ruling if dissatisfied with it. However, a private ruling may not be objected against if:</p> <ul style="list-style-type: none"> ▪ an assessment has been made in relation to the year of income or

	<p>accounting period covered by the private ruling; and</p> <ul style="list-style-type: none">▪ the private ruling relates to withholding tax or mining withholding that that has become due and payable (paragraph 58). <p>If an objection is allowed, the private ruling is taken to have been altered without a new application needing to be made. Where the objection is not allowed, the applicant may appeal to the Federal Court or the AAT (paragraph 59).</p> <p>The Commissioner may consider additional information when dealing with an objection against a private ruling. Depending on what additional information is needed, the Commissioner may ask the applicant to respond to requests, to make a new application altogether (paragraphs 60-61).</p>
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Conclusion

While public and private rulings share common characteristics, they are better viewed as two completely separate rulings systems. As this article highlights, public rulings have a much wider scope of influence than private rulings as they apply to entities generally, and may apply both retrospectively and in the future. Private rulings are generally narrower as they only apply to the entity making the application and the opinion of the Commissioner is restricted to the specific circumstances of the application.