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# ATO Private Rulings – When, Why & How?

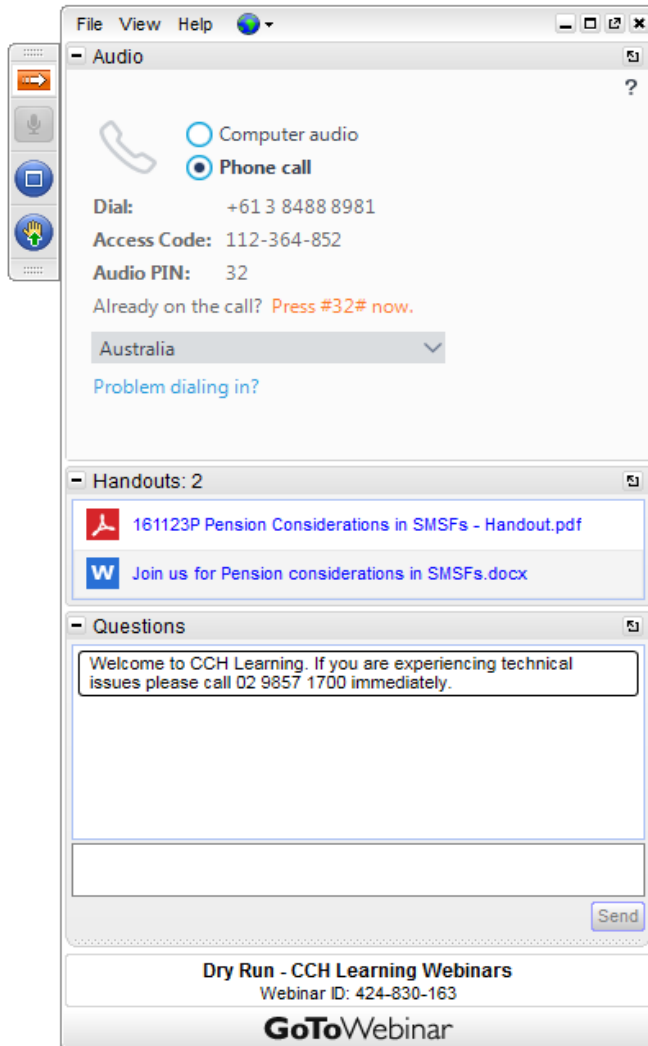
Bruce Collins – Tax Controversy  
Partners

Tuesday 28 March 2023

 Wolters Kluwer



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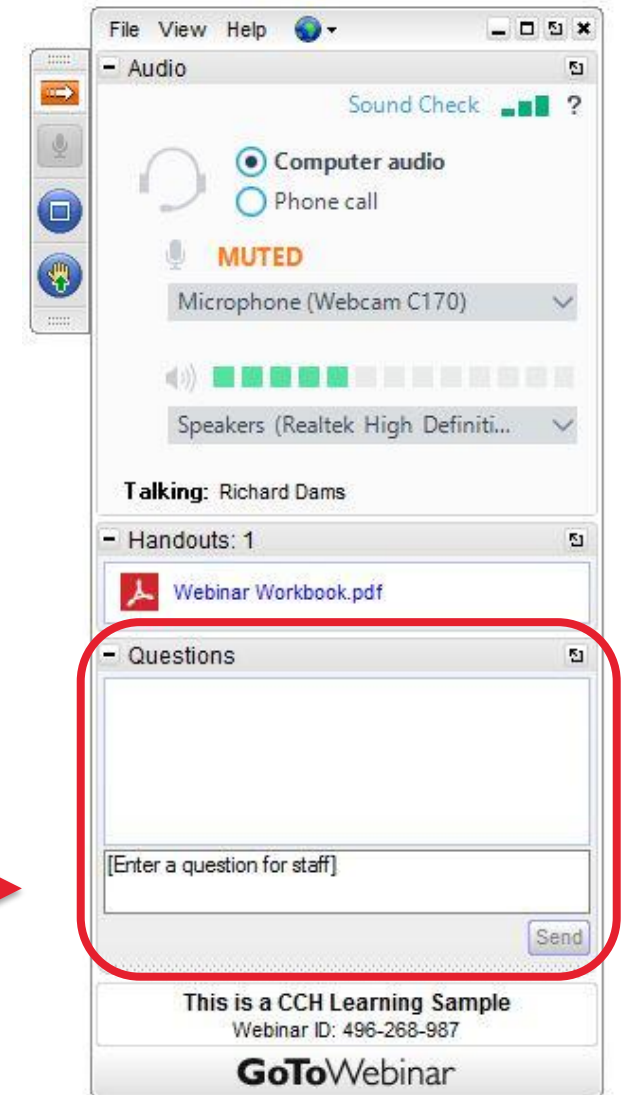
# Questions?



Susannah Gynther  
Moderator



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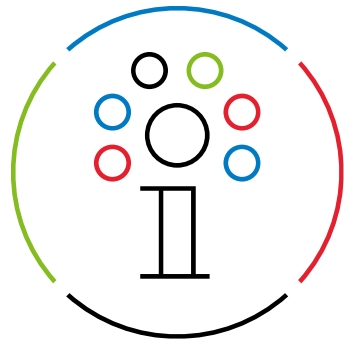
# Your Presenter



Bruce Collins is the founder and principal solicitor at Tax Controversy Partners, currently helping clients to resolve all types of tax issues with the ATO and SROs. Before moving into private practice in 2017, Bruce worked for over 35 years in the Tax Office, a third of this time as a Senior Executive in what is now Client Engagement Group, covering most ATO functions. Bruce was the leader of the Technical & Case Leadership area in Private Wealth for several years prior to leaving the ATO, as well as having previously been the strategic and technical leader for many of the ATO's law clarification and compliance risk programs. Bruce was previously involved in designing many of the systems and procedures guiding the ATO's private ruling processes.

**Bruce Collins**  
**Founder and Principal Solicitor**  
**Tax Controversy Partners**

# Today's session will cover

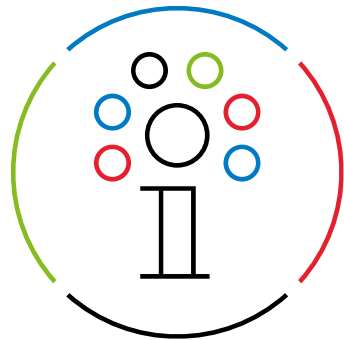


- Introduction to the ATO PBR System
- What matters can (or can't) be subject to an ATO PBR?
- Why would you want a ATO PBR?
- Who can apply?
- The Private Ruling Process
  - Forms – why are they important?
  - What does the ATO do with your application?
  - Refusal to Rule – when can the ATO say no?
- When can a taxpayer rely on an ATO PBR?
- Interactions between Public and Private Rulings
- Challenging ATO PBRs
  - Objections
  - Appeals to the AAT and Federal Court
- Things to consider before applying

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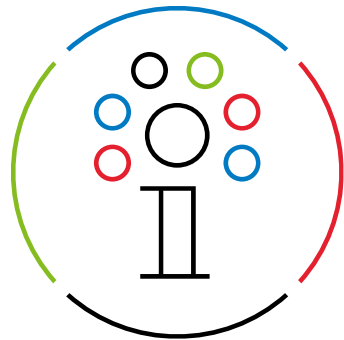
# Who are you?

- a) Accountant or tax agent
- b) Lawyer
- c) Financial planner
- d) Student
- e) Other



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# Who are you?



- a) In private practice, with experience with PBRs
- b) In private practice, with no experience with PBRs
- c) In public practice
- d) Other



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# Introduction to the ATO Private Binding Ruling System

- The ATO Private Binding Rulings (PBR) system was established as part of the introduction of self-assessment and is intended to provide taxpayers with certainty over their tax liabilities in a self-assessment environment.
- The current legislative framework under which the PBR system operates as set out in Div 359 of the *Taxation Administration Act 1953* (TAA53) and complements the public ruling system set out in Div 358 TAA53. The primary provisions – s359-5(1) states:

*The Commissioner may, on application, make a written ruling on the way in which the Commissioner considers a relevant provision applies or would apply to you in relation to a specified \*scheme. Such a ruling is called a **private ruling**.*

- The requirements for the PBR system and its administration are very specific – so it is important to understand how the rules operate, including when it may be beneficial to seek a PBR or when some other avenue may be more effective/efficient in obtaining certainty on how a tax law applies to a specific set of circumstances.
- [TR 2006/11 – Income tax, fringe benefits tax and product grants and benefits: Private Rulings](#) provides guidance on how the ATO administers Div 395 TAA53.

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# Introduction to the ATO Private Binding Ruling System

- A private ruling may only be made for specified taxpayers for a specific period of time (ie. the PBR will say which period the ruling relates to).
- The taxpayers named in the PBR can rely on the ruling when lodging their tax return, BAS or in addressing machinery or administrative obligations in the tax legislation.
- This means the Commissioner is bound by that ruling even if it is later shown to be incorrect and the taxpayer will be protected from any liability for a tax shortfall or any non-compliance penalties that would otherwise arise.
- If the PBR is found to be incorrect, the ATO will only apply to the law correctly if it gives the taxpayer a more favourable outcome.
- In that sense, ‘the best ruling may be a wrong’, provided that the ruling is MORE beneficial than the outcome that the law would deliver.

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# What matters can (or can't) be subject to an ATO PBR?

- A PBR is made on a 'relevant provisions' which are defined in s357-55 TAA353 to include provisions relating to the following:
  - Income tax
  - Medicare levy
  - Fringe Benefits Tax
  - Franking tax (including franking deficit tax, over-franking tax and venture capital deficit tax)
  - Indirect tax (including GST, WET and LCT)
  - Administration and collection of above taxes, levies and duties
- The Commissioner can only rule on tax law – **cannot rule on trust law, corporation law or common law even if those laws affect how a tax law is applied to the taxpayer/transactions.**
- A PBR can be issued on the valuation of something where it is necessary to deal with how the relevant tax laws apply. The ruling application can either provide a valuation for the Commissioner to review, ask the Commissioner to provide his own valuation or both.

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# Why would you want a ATO PBR?

- A PBR can provide the taxpayer with certainty about the tax consequences of an arrangement – provided it is implemented in the manner set out in the facts of the PBR.
- Generally, a taxpayer doesn't have to follow a private ruling, suggesting that seeking a PBR is often a win-win for the taxpayer, however, this is not always the case in practice:
  - If the Applicant does not agree with the PBR – they can choose to ignore it and lodge their tax return based on their view of the law. *However*, taxpayer may be exposed to other types of shortfall penalties if the Commissioner amends their assessment. (Reasoning behind this is that ignoring the PBR position can be taken as not taking reasonable care unless the position can be shown to be reasonably arguable).
  - The Commissioner can also seek to make what the Applicant may see as unrealistic or inappropriate assumptions which are material to the way the arrangement operates. If so, this will therefore adversely affect the tax consequences of that arrangement. Such assumptions would make the ruling of little value to the taxpayer – noting that the Commissioner is required to provide notice of such proposed assumptions prior to making them, but is NOT compelled to agree with taxpayer feedback that may be provided.

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## Why would you want a ATO PBR?

- The Commissioner can request further information before making the PBR. This can open up new enquiries about material facts – beyond what the Applicant considered relevant to the arrangement. This can widen the scope of the arrangement to be considered for the PBR.
- The Commissioner can also seek further information from third-parties. This power has a narrowing impact on the Applicant's ability to describe the material circumstances of the arrangement – as the Commissioner can seek to replace assumed facts with different ones (The Commissioner must provide notice, but again is NOT required to accept taxpayer feedback).
- Under s359-45 TAA53, the Commissioner is allowed to make a related ruling addressing questions not asked by the Applicant - which could be adverse to the taxpayer's proposed position. An example would be the taxpayer seeks a favourable PBR that a tax benefit is available which the Commissioner agrees to, but then issues a related ruling that an anti-avoidance provision applies to that scheme denying the desired benefit.
- Taxpayers should also consider whether a PBR is required where the ATO view on the arrangement is clear and published in public rulings/determinations. If you disagree with the ATO view, then there are other more effective ways to challenge that view.



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# Who can apply?

- The taxpayer applying needs to have legal capacity to apply – either directly themselves or on behalf of another person (usually a tax agent, lawyer, POA, executor).
- An application can be made by (or an agent of) on of the following entities:
  - An individual
  - A body corporate
  - A body politic
  - A partnership
  - Any other unincorporated association or body of persons
  - A trustee of a trust
  - A superannuation fund

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# Private Ruling Process: Forms and why they are important?

- Section 359-10(2) requires that the application **must** made in the approved form.
- The ATO standard PBR form can be found [here](#).
- If the form is not used, then the application must contain all the following information to make the PBR:
  - Details of the taxpayer/s who the ruling will apply
  - Contact details of person/s representing the taxpayer/s
  - Questions to be answered – should be clear so issues can be identified and framed as a questions for a ‘Yes/No’ answer. Where are a tax professional prepares application, the specific provision of law must be identified
  - Describe the facts of the scheme/arrangement - must include all material facts (and potentially assumptions) and details of any previous rulings on the same issue
  - Arguments on how you think the law applies to the questions – must be provided tax professional prepares application. It should include what you think the answer is.
  - Supporting documents

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# Private Ruling Process: What does the ATO do with your application?

- The ATO will advise the applicant of receipt and whether the application is valid.
- In [Hacon Pty Ltd & Ors v FC of T](#), the taxpayers applied for a PBR and were advised by the Commissioner that he was inclined to decline to make the ruling as there wasn't sufficient information. No further information was requested, but the taxpayer provided the information. On appeal to the [Full Fed Court](#), the Commissioner's decision to decline to rule was quashed – saying that the Commissioner was subject to an imperative obligation to request information that he considered necessary.
- If the application involves Part IVA – that matter may be taken to the General Anti-Avoidance Rule (GAAR) Panel for advice.
- If a ruling has not been made or declined to rule at the end of 60 days after the application was made, the Applicant can make a written request requiring the Commissioner to make a ruling. If the Commissioner does not make the ruling or declines to rule within 30 days, the applicant can lodge an objection. The 60-day period is extended where the Commissioner requests further info.



# Private Ruling Process: Refusal to Rule – When can the ATO say ‘No’

- Section 359-35(2) and (3) provides circumstance in which the Commissioner can refuse to rule on an application:
  - (2) The Commissioner may decline to make a private ruling if:*
    - (a) the Commissioner considers that making the ruling would prejudice or unduly restrict the administration of a taxation law, or*
    - (b) the matter sought to be ruled on is already being, or has been, considered by the Commissioner for you.*
  - (3) The Commissioner may also decline to make a private ruling if the matter sought to be ruled on is how the Commissioner would exercise a power under a relevant provision and the Commissioner has decided or decides whether or not to exercise the power.*
- The ATO can refused to issue a ruling if the question is about how the Commissioner would exercise a power (eg a discretion).
- The ATO can also refuse to issue a ruling if:
  - It asks for further information and it is not provided within a reasonable time
  - It considers tat the correctness of a PBR relies on certain assumptions, and it cannot make those assumptions

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# When can a taxpayer rely on an ATO PBR?

- A taxpayer can rely on a PBR where all the following conditions are met:
  - If they are the Applicant to whom the PBR was issued (the ‘**rulee**’),
  - For the time period covered in the private ruling, and
  - If the facts and assumptions set out in the PBR are not ***materially different*** from those in the arrangement as actually implemented.
- Where these conditions are met, the ATO is bound to following the ruling – even if it is incorrect *unless* the correct outcome under the law would be a more favourable outcome for the Applicant.
- If the law is subsequently amended, the PBR continues to apply to the extent that the amended law expresses the same ideas as the old law – but if not then the PBR ceases to apply (s357-85)
- If the Commissioner subsequently issues a revised PBR, then the original PBR ceases to apply and cannot be relied upon from that point on. The Applicant can instead rely on the new PBR, BUT.
  - A PBR can only be revised where the scheme to which the original PBR relates and/or the relevant income year has not yet begun.
  - This is an important limitation to protect the certainty given by PBRs.

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# Interactions between the Public and Private Ruling systems

- A public ruling sets out the Commissioner's opinions on how a provisions of the law applies to taxpayers generally. It is binding on the Commissioner and can be relied upon by any taxpayer to whom it applies. If a PBR is inconsistent with an earlier public ruling – then the Applicant can choose which ruling they rely on.
- A PBR cannot be relied upon where an inconsistent public ruling is issued after the PBR but before either the scheme/arrangement or the relevant income year to the PBR has started.
- [Bellinz Pty Ltd v FCT](#) highlights the issues that can arise – [on appeal](#), the Court said the Commissioner was only bound to follow those rulings only in relation to the types of arrangements described within them – rather than in relation to their underlying philosophy.
- In [FCT v Macquarie Bank Limited & Anor](#), the Full Court made it clear that when the Commissioner has formed a view on how the tax law applies to a particular taxpayer, he has a duty to assess the taxpayer in accordance with that view.
- In the PSLA 2011/27, the ATO states that *“It is preferable that a decision on whether or not to apply the ATO view of the law in relation to past years or periods be made as early as practicable in any compliance process. However, you may make such a decision at any time before issuing an assessment (including an amended assessment). This may result in the ATO declining to re-assess the taxpayer.”*

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# Challenging an ATO PBR: Objections

If an objection against a private ruling is allowed in full or in part, then the private ruling is taken to have been altered in accordance with the objection decision once the appeal period has lapsed.

- Section 359-60 makes a PBR a tax decision to which the Applicant can lodge an objection and applies with the AAT and Federal Court under Part IVC.
- However, s359-60 also precludes an objection to a PBR being lodged where:
  - An assessment has been made in respect of the year of income covered by the private ruling. An objection must be lodged against the relevant assessment or amended assessment
  - The PBR relates to withholding tax (including mining withholding tax) that has become due and payable
  - The PBR relates to excise duty or an amount payable on goods under an excise law and the Commissioner has decided about that excise duty or other amount as the decision is reviewable under excise law.
- During the objection, if the Commissioner obtains further information from the Applicant or a third party which is materially different from the ruling scheme, the Commissioner must ask the Applicant to apply for a new PBR based on the re-defined facts – and the objection is not considered.

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# Challenging an ATO PBR: Appeals to the AAT and Federal Court

- The Applicant is restricted to the facts outlined in the PBR when appealing to the AAT or Fed Court.
- The questions to be addressed are restricted as to whether the law has been correctly applied to the facts and assumptions outlined in the PBR (and not whether those facts are correct or not) – [FC of T v McMahon & Anor](#)
- The ruling scheme is static and cannot be redefined based on any additional facts or evidence – [Rosgoe Pty Ltd v FC of T](#)
- The importance of correctly establishing the facts on which the PBR was given was considered in [Case 2/2014](#) – the AAT held it could not find that the facts relied upon in the PBR were incorrect.

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# Things to consider before applying for an ATO PBR

- Can the arrangement be described well?
- How strong or arguable is the position taken on the operation of the law in the PBR application?
- Do you know the trigger points for withdrawing a PBR application?
- Understand the options for responding to an unfavourable PBR:
  - Accept the ruling and lodge the relevant tax return based on advice in the ruling
  - If an assessment has not been issued for the period covered by the PBR lodge an objection to the PBR and seek to resolve the issue for lodging the relevant tax return
  - Lodge the return in accordance with the PBR and lodge an objection against the self-assessed position with which the taxpayer disagrees
  - Ignore the PBR and self-assess according to the contrary view – noting that shortfall penalties for either/both a lack of reasonable care and/or not having a *Reasonably Arguable Position* will likely apply if the Commissioner later amends the assessment.

# Questions

You can type them in the “Questions” box now  
Or contact me via:



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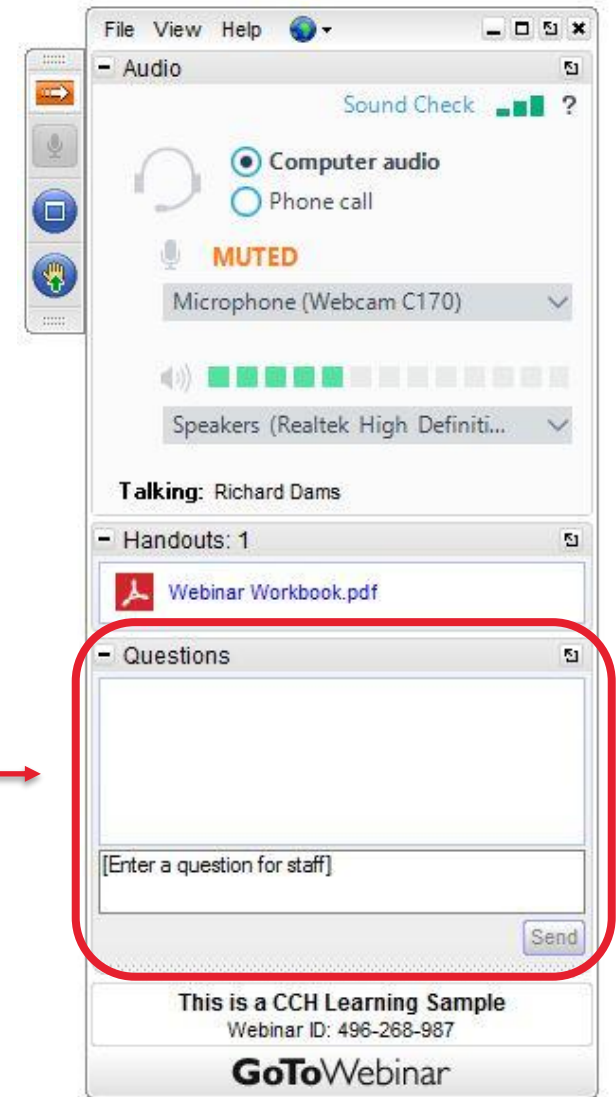
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Susannah Gynther,  
Moderator



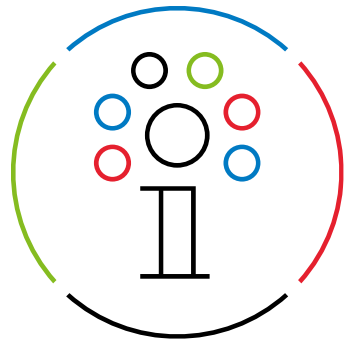
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- 4 April – Cyber Security Update – April 2023
- 4 April – Division 7A Advanced
- 5 April – Clients Downsizing? Deliver Quality Aged Care Advice
- 6 April – The New IFRS S1 re General Sustainability-related Disclosures
- 12 April – Putting a Cap on Contributions and Benefits – Don't get Caught Out

# Questions

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