# *PS LA 2005/22 (Withdrawn) - Litigation and priority technical issues*

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This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9

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# Practice Statement Law Administration

## PS LA 2005/22

**This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9.**

**FOI status: may be released**

*This practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by Tax office staff unless doing so creates unintended consequences. Where this occurs Tax office staff must follow their Business Line's escalation process.*

**SUBJECT:** **Litigation and priority technical issues**

**PURPOSE:** **To set out procedures for the management of priority technical issues arising in the course of, or resulting in, litigation.**

### STATEMENT

1. Litigation will sometimes arise from an existing priority technical issue (PTI), and at other times a PTI will be identified as a result of the commencement of litigation.

2. This practice statement requires tax officers to follow certain procedures in relation to PTIs arising in the course of, or resulting in, litigation. This practice statement is supplementary to Law Administration Practice Statement PS LA 2003/10, which deals with the general management of priority technical issues.

3. As with PS LA 2003/10, this practice statement should be read in conjunction with the following:

   - Corporate Management Practice Statement PS CM 2003/02 (G) ATO Risk Management which provides guidance on the ATO Risk Management Policy, and

   - Corporate Management Practice Statement PS CM 2003/05 (DPM) Project Management and Governance which prescribes the policy and processes for project initiation, approval and management.

4. This practice statement deals with the management of litigation in the context of the Tax Office's approach to risk management and provides guidelines for the identification of potential PTIs arising in the course of litigation. These guidelines determine:

   A. the management of anticipated litigation for issues identified as PTIs prior to litigation,

B. the management of litigation where issues identified as PTIs arise in the course of litigation,

C. the circumstances in which Court, Tribunal and potential litigation cases are to be escalated to the Tax Counsel Network (TCN) and when Centres of Expertise (CoE) should be involved,

D. the litigation which is to be managed in the Strategic Litigation Team of the Legal Services Branch (LSB), and

E. how litigation PTIs will be recorded on the PTI Register.

## Definitions

5. For the purposes of this practice statement, *PTI litigation* is an actual or potential litigation case which has an underlying technical issue that has been assessed as a PTI in accordance with PS LA 2003/10, either because the litigation is part of a strategy to address the risk or because the litigation itself gives rise to a risk. The litigation will be tracked against the recorded technical issue on the PTI Register, as the litigation is expected to clarify the law in relation to the issue. As it is the underlying issue that is to be recorded as the PTI, rather than the actual litigation itself, a single case in litigation may need to be recorded against multiple PTIs. This requirement highlights the need to manage all of the risks inherent in litigation and not just the major risk.

6. *Strategic litigation* refers to litigation that leverages compliance through clarification of the law in key high risk areas. Strategic litigation also includes cases where law clarification opportunities are not the primary objective, but the other risks to the Commissioner are sufficiently severe as to warrant a strategic corporate response. Strategic litigation is the wider term and will include all PTI litigation.

## Risk assessment of litigation

7. Litigation should be risk assessed using the ATO risk matrix.

8. There are two possible scenarios in which PTI litigation can arise:

A. where the litigation is an anticipated and integral part of a strategy to address a particular risk associated with an established PTI – for example, where there are competing arguable positions in relation to a technical issue, litigation may be one of the strategies used to resolve the issue, or

B. where the possible consequences of a Court or Tribunal decision (adverse or favourable to the Commissioner) are assessed as giving rise to a level of risk that needs to be strategically managed and the technical issue underlying that risk is either linked to an existing PTI or is escalated and approved as a PTI in its own right.

## Escalation of PTI litigation

9. In some cases, litigation will arise as a resolution strategy for dealing with issues where a PTI has already been registered. In other cases, an issue will arise during the course of litigation that does not fall within an existing PTI. In either case, reference may be made to Attachment A as a guide to the types of cases that may contain issues that warrant identification as a PTI, subject to the views of the relevant Deputy Chief Tax Counsel.

### *Where litigation relates to an existing priority technical issue*

10. PTIs may be resolved in any of a number of ways, and the resulting views expressed in a number of media including the issue of public and private rulings, and these views may be restated in educational material, scripts and guides and applied through audit processes and objections. The resolution of PTIs may result in litigation or may involve litigation as part of the resolution strategy. For example, litigation may follow the issue of a private binding ruling, or the issue of an amended assessment. There may be occasions when the ATO view, as set out in a public ruling, will subsequently be challenged through litigation.

11. The likelihood of, and response to, litigation should be addressed by the risk owner[1] in consultation with TCN as part of the broader resolution strategy.

12. The litigation will be recorded against the PTI of the underlying technical issue, to ensure holistic management of the issue. The finalisation of the issue will be determined in accordance with paragraphs 35 to 38 of PS LA 2003/10.

13. Where it has been decided that an issue ought to be tested in the courts, or it is clear that the emerging ATO view is unlikely to be accepted by a taxpayer or class of taxpayers, the Senior Tax Counsel (Strategic Litigation) should be advised and a member of the strategic litigation team allocated to assist with the selection of a potential case and the management of the litigation. The role of the strategic litigation team is to ensure that a corporate response is given to the issue and, with the assistance of Tax Counsel, to ensure that the issue is explored and argued in a manner conducive to achieving the best possible guidance from the courts.

[1] Risk ownership generally lies with a business line. Priority technical issues usually arise from the business service line risk identification strategies. Refer to PS LA 2003/10.

### *Where a PTI arises as a result of the commencement of litigation*

*Part IVC litigation*[2]

14. Due to the inherent legal risks arising from litigation, all litigation arising in the Administrative Appeals Tribunal (AAT), the Federal Court, High Court and State and Territory Supreme Court and Courts of Appeal should be risk assessed to determine whether or not the litigation gives rise to a PTI[3]. Generally, litigation that involves a factual dispute will not give rise to a PTI. Business lines, with the assistance of LSB are required to risk assess all Part IVC litigation. An analysis of risk by the business line, together with the preparation of PTI proposal, will ensure that, if required, the relevant Deputy Chief Tax Counsel can allocate a TCN officer at the earliest possible time.

15. Unexpected challenges can also arise in the course of litigation to well established Tax Office positions as well as core tax principles not previously identified under the present PTI process. In these circumstances, escalation as a potential PTI is required to ensure that TCN and/or CoE resources are added to the litigation team. A challenge to an ATO view is as important as the earlier resolution of the ATO view on that issue.

16. Identification of PTI litigation and the formulation of the strategic litigation program will require coordination and collaboration between the Senior Tax Counsel (Strategic Litigation) with the relevant Second Commissioner, the Deputy Chief Tax Counsels, the First Assistant Commissioner (Aggressive Tax Planning) and the risk owners.

17. The risk owner is responsible for the risk assessment of litigation and the preparation of PTI proposals. At the preliminary Strategic Internal Litigation Committee (SILC)[4] meeting, the business line representative and the LSB case officer will discuss the management of any new appeal and the LSB officer will provide assistance, if required, for the business line to risk assess the underlying issues of the case to determine whether the issues warrant the preparation of a PTI proposal. In this circumstance it is appropriate that the SILC should make a recommendation to the risk owner as to the priority level (Priority 1, 2 or 3)[5] of the issue.

18. The PTI proposal, with a clear strategy and project plan, including a mitigation strategy in the event of a loss, will be prepared by the business line. Where guidance is needed in relation to risks associated with the litigation, LSB will provide assistance and advice to the business line. Once the proposal is approved by the SES Risk Owner, it is forwarded to the relevant Deputy Chief Tax Counsel in accordance with PS LA 2003/10 and that business line's normal PTI procedures. A copy of the proposal will also be sent to the Senior Tax Counsel (Strategic Litigation). For an indirect tax or mass marketed scheme matter, a copy of the proposal should also be sent to the relevant Senior Tax Counsel who has oversight of those matters.

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[2] Part IVC of the *Taxation Administration Act 1953* allows for the review of a Commissioner's decision on an objection to an assessment or a private ruling, an appeal to a court from an objection decision or a subsequent appeal from the Administrative Appeals Tribunal (AAT) or Federal Court.

[3] Examples of factors to consider in the risk assessment process can be found in Attachment A

[4] The SILC process is a formal mechanism for ensuring collaboration between the LSB and the business line. A SILC is a meeting of the stakeholders involved in a litigation case and in addition to the LSB litigation officer and the business line case officer will include other participants depending on the issue and the significance and complexity of the case.

[5] Paragraph 16 of PS LA 2003/10 sets out the relative priority levels of PTIs and how these are derived.

19. It is recognised that any strategy or project plan prepared in the course of litigation will evolve as circumstances change that may affect the strategy. Circumstances that may cause the case plan to be reconsidered include unexpected actions taken by the taxpayer, new evidence, court directions and timetables, and decisions from other cases.

20. As a backup measure for the escalation process, all new appeals will also be considered within the LSB callover process. These callovers should be convened by the local LSB business manager and attended, where possible, by either or both the Senior Tax Counsel (Strategic Litigation) and/or the Part IVC Litigation Stream leader. The purpose of these callovers is to monitor the progress of new and existing cases, and to identify and manage emerging risks.

21. By considering the risks arising from the litigation of a matter, the Senior Tax Counsel (Strategic Litigation) may, after subsequent consultation with the relevant Deputy Chief Tax Counsel, request the business line involved to prepare a PTI proposal and to escalate the issue according to the procedures set out in PS LA 2003/10, if that process has not already been commenced. Once it is decided that the issues underlying an appeal warrant approval as a PTI, a TCN officer will be allocated.

22. All PTI litigation, as well as other cases considered by the relevant LSB business manager to require closer examination, will be reviewed at the Strategic Litigation Callovers, held every six months at every LSB site nationally. They are normally attended by the LSB case officer, Tax Counsel and business line representatives. The technical issues in these cases are often discussed in some detail. The callover panel includes the Senior Tax Counsel (Strategic Litigation), the Part IVC Stream leader and the relevant LSB business manager.

23. Separate callovers are usually conducted on mass marketed scheme/ aggressive tax planning cases and debt litigation.

*Non-Part IVC litigation*

24. Risk owners, with the assistance of LSB, where appropriate, are required to risk assess all litigation commenced in the Supreme, Federal and High Courts. PTI proposals should be prepared for all non-Part IVC litigation such as litigation under the *Administrative Decisions (Judicial Review) Act 1977* and under section 39B of *Judiciary Act 1903*, unless the underlying issues are purely factual, or involve a review of an administrative decision where no technical issues are likely to flow from the decision.

25. Other litigation in Tribunals or lower State and Territory Courts, may warrant escalation, depending on the level of risk associated with the particular case.

26. In view of the high volume and factual nature of litigation arising in debt, lodgment, registration, and in house prosecutions, it will only be necessary to risk assess those cases where complex or unique features exist[6]. Where risk assessment is warranted, the relevant business line staff and the LSB case officer will collaboratively risk assess the litigation and then determine whether a PTI proposal should be prepared.

[6] Examples of factors to consider in the risk assessment process can be found in Attachment A

27. In all other non-Part IVC litigation identified as having underlying issues that may be a potential PTI, LSB officers should work with business line staff to identify and rate the underlying risk, determine a recommended priority and clarify responsibility for dealing with related issues (for example handling media queries, dealing with clients and their advisers, quantifying revenue exposure and so on). Responsibility for these latter tasks will usually rest with the risk owner.

28. Prior to the commencement of any litigation process, as part of the risk assessment undertaken by the business line, consideration should be given to whether or not external counsel should be engaged to give advice at the dispute or reviewable decision stage, and this should then be discussed with LSB.

### *Lead Cases*

29. Where a number of cases emerge that are factually similar, such as participants in mass marketed schemes, it is the lead case or cases only that should be recorded on the PTI Register against the particular technical issue or issues. The PTI should reflect the major issue to be dealt with in the litigation. However, the cases that are dependent on the resolution of the lead cases should be appropriately managed, and care is needed to ensure that they are sufficiently similar to the lead cases and that they do not contain any special or materially distinguishing features.

## Working as a Team

30. Litigation is handled by several people working together as an integrated team. The litigation team may vary from time to time, but will usually include a TCN officer, a business line officer, an LSB officer and external counsel. Other senior staff and CoE staff may also be involved in litigation at various times. The Australian Government Solicitor (AGS) will also often be involved.

31. The following is a general outline of the individual roles of each member of the litigation team. It is meant to provide guidelines rather than be prescriptive. The team must work collaboratively and appropriate arrangements need to be made to ensure that the litigation team works together to achieve the best possible outcome.

### *The role of the business line in litigation*

32. Throughout the litigation process, the business line will be responsible for managing the risk associated with the case and dependent cases.

33. The business line's role will include the collection of any additional facts and evidence to assist Tax Counsel or the CoE to ensure that the ATO view has been correctly applied.

34. The business line has a continuous role throughout the course of litigation. Where the business line has collected the facts at the audit and objection stage, it will have an expertise in the knowledge of the location of documents and the underlying facts. The business line will support the litigation process with that knowledge. The business line is responsible for issuing assessments and amended assessments, and will harness the corporate expertise to ensure the accuracy of assessments issued before and after the litigation process has commenced.

35. The business line will have an integral role in identifying whether or not an issue arising from litigation is a PTI. The business line will make an assessment of the risks posed to the Commissioner which arise from the litigation. This necessarily requires an understanding of not only the 'legal' or 'technical' issue but also of the business context in which it arises, its impact in terms of numbers of taxpayers affected, the revenue at risk and the implications for government, Treasury and the community as a whole. The business line will need to manage this risk.

36. At the commencement of the litigation process, the business line must assess (or review) the risk in relation to the litigation and the underlying technical issue (with input from LSB in relation to the legal risks which could arise). If it is determined that the case and/or underlying issue warrants a PTI, the business line must prepare a PTI proposal and escalate it in accordance with its normal PTI procedures to the relevant Deputy Chief Tax Counsel.

37. If the business line requires assistance to decide whether the underlying technical issue of a case should be classified as a PTI, the business line can ask the relevant Deputy Chief Tax Counsel to have Tax Counsel allocated to assist in determining whether or not a PTI is warranted.

38. Whether or not the case is linked to a PTI, business lines must adhere to their own governance practices to ensure decision making is made by the right staff in a timely manner and at the appropriate seniority.

39. Where litigation is not linked to a PTI or strategic litigation, business line case officers are responsible for escalating within the business line and reporting on any contemplated decision or instruction that is contrary to the advice of LSB or counsel. In these circumstances, it may be necessary to again risk assess technical issues in the case for possible escalation to Tax Counsel. Where the disagreement is in relation to the conduct of litigation, a litigation strategy, or involves court or tribunal processes, the issue needs to be escalated to the STC Strategic Litigation or LSB Stream Leader.

40. The business line (with the assistance of other members of the litigation team where required) will be responsible for developing a strategy to explain and manage the implications of the court decision, and the associated compliance impact.

### *The role of LSB in litigation*

41. The LSB is responsible for liaising with the business line, TCN and the AGS (where they are involved) and external counsel in regard to the ATO's view (but not the formulation of the ATO's view). LSB is the conduit for the exchange of any information between the Tax Office and AGS (where involved) and counsel. LSB provides a single point of contact for AGS and

counsel to ensure that conflicting Tax Office messages are not given. TCN will not usually involve AGS or counsel without first advising the relevant LSB case officer of the proposed course of action. Where it is not possible to follow that course, Tax Counsel will keep LSB and the business line informed and provide copies of all relevant documents.

42. When Tax Counsel is involved in litigation, the LSB case officer must also ensure that Tax Counsel is kept fully informed of all important actions arising in the course of litigation.

43. The LSB case officer will ensure that Tax Counsel is informed of the specific technical issues arising during the course of litigation and will give Tax Counsel ample opportunity to add to or comment on the technical arguments in the case. This includes all factual matters bearing on those issues.

44. The LSB case officer will:

- provide general solicitorial support
- provide advice on the admissibility and the extent of the factual evidence available to support the ATO view
- identify any technical or procedural issues that require further discussion and development by or with Tax Counsel
- ensure that any matters requiring the advice of Tax Counsel are supported with sufficient information and documentation to enable an informed decision to be made
- ensure that Tax Counsel is invited to any conference with counsel that is directed towards technical arguments or important directions of the case
- provide assistance to Tax Counsel on the refinement and presentation of the ATO view
- ensure that Tax Office policies and procedures are followed, for example we do not argue inconsistently with views expressed in public rulings or taxation determinations, and
- ensure that we operate as a model litigant.

45. During the conduct of a matter, there will be mutual feedback on any performance or resource issues that arise.

### *The role of the strategic litigation team*

46. The strategic litigation team is a small national team within the Part IVC litigation stream in the LSB. The team manages the most strategically important litigation in the Tax Office. Strategic litigation may arise from any of the streams in the LSB. Not all strategic litigation will be actually allocated to the litigators within the strategic litigation team. Indeed, most strategic litigation will remain in its LSB stream and will be monitored by the Senior Tax Counsel (Strategic Litigation) or a member of the strategic litigation team.

47. Apart from managing the conduct of high priority litigation, the strategic litigation team is also responsible for managing the identification of potential litigation cases where a technical issue is to be resolved by finding an appropriate case and testing the issues in litigation. Issues identified for strategic litigation will ordinarily be referred to the Senior Tax Counsel (Strategic Litigation) by a member of the Priority Technical Issues Committee (PTIC). The Senior Tax Counsel (Strategic Litigation) will be required to report to PTIC on the progress of strategic litigation. Relationship management is a key aspect of strategic litigation.

48. The role of the strategic litigation team is to ensure that the highest priority litigation is managed corporately. The primary responsibility of the Senior Tax Counsel (Strategic Litigation) is technical leadership of the Part IVC litigation team and the management of strategic litigation.

49. The strategic litigation program represents those cases regarded by the Tax Office as being of the greatest importance in terms of leveraging compliance through law clarification. Where practicable, the most strategically important cases are to be located within the strategic litigation team.

50. There may be PTI category 1, 2 or 3 cases that are not located within the strategic litigation team. The Senior Tax Counsel (Strategic Litigation) nonetheless is responsible for ensuring that those cases are appropriately managed, and will require the support and assistance of the litigation team and their managers to ensure that this happens.

### *The role of the Australian Government Solicitor in strategic litigation*

51. The AGS is an external service provider to the Tax Office. Where AGS is involved in strategic litigation they provide further solicitorial support required for the particular case. The allocated solicitor will assist in advising on the selection of external counsel, the drafting of documents, advising on the adequacy and admissibility of the evidence, advising on court requirements and procedures, and may provide advocacy at appropriate times before the AAT and courts.

52. Where AGS is the point of contact with counsel, the AGS solicitor needs to clearly understand the requirements of the Commissioner in the conduct of the case, and to relay those requirements to counsel. In turn, the AGS solicitor is expected to advise the Tax Office of views provided by counsel on the case and any developments in the court timetable.

53. The question of whether AGS should be involved in litigation should be raised at the initial SILC meeting. The Federal Court Rules (Order 52, Rule 4 (4)) require that all appeals before the Federal Court be served on the AGS.

### *The role of the Centres of Expertise (CoE) in litigation*

54. The role of a CoE is to create precedential ATO views in accordance with PS LA 2003/3 Precedential ATO view. Generally, cases being litigated will already have such a view established because a private binding ruling or objection decision must be based on an existing ATO view. Where a precedential ATO view established by a CoE is being challenged in litigation, the relevant CoE will be advised and will have an opportunity to be involved and contribute to the preparation of arguments.

55. However, once a litigation matter has been risk assessed and it is decided that it warrants being a PTI, Tax Counsel will have the final say as to how a matter will be progressed. Tax Counsel will consult with the CoE on the level of assistance required from the CoE in the conduct of the litigation, having regard to the assistance already available from the business line, LSB and AGS (where involved).

56. In rare situations, cases may reach the litigation stage before the Tax Office has developed a considered ATO view on the question put in issue before the court or tribunal. In such a case, any relevant CoE with a role for developing precedent in that area of the law will be advised of the case and assist in the development of the ATO view, to determine whether the matter should be litigated or not.

57. A common sense approach is required to ensure the efficient and effective use of scarce technical resources to ensure the best outcome for the Tax Office and the community.

### *The role of Tax Counsel in litigation*

58. Usually, once Tax Counsel becomes involved, they will have an on-going interest throughout the litigation process. The level of involvement of Tax Counsel may vary from case to case and from milestone to milestone (for example when the Statement of Facts Issues and Contentions are being drafted, or when submissions are being settled). This will ultimately be at the discretion of Tax Counsel, who should work collaboratively with other members of the team, and ensure that the skills and expertise of the other members are fully utilised.

59. Tax Counsel have an important role in strategic litigation matters. They will ensure that:

- the overall integrity of the law is maintained, and
- cases are prepared and presented in a way that best enables the ATO view to be presented to court.

60. As the sole arbiter of the ATO view on technical issues arising in litigation, Tax Counsel will have the final say in technical arguments. Tax Counsel will also contribute to the management of the wider risk associated with the PTI. Centres of Expertise may also be involved in litigation on a needs basis when requested by Tax Counsel in developing final views or in managing the wider risks.

61. Written instructions to external counsel will always be signed off by Tax Counsel where:

- the instruction is to make arguments not otherwise contemplated, so that the proposition being advanced is fully understood
- action is being taken that is contrary to the advice of counsel, or
- there is disagreement about the content of arguments or the strategy put before counsel.

Any such directions provided by Tax Counsel to the LSB case officer will be forwarded immediately to AGS (where they are involved) for the instruction of counsel.

62. Tax Counsel will be informed by LSB (or by others in the litigation team) of the specific technical issues arising during the course of litigation and will be given ample opportunity to add to or comment on the technical arguments in the case.

***The role of the Deputy Chief Tax Counsel in Litigation***

63. The various Deputy Chief Tax Counsels, the First Assistant Commissioner Aggressive Tax Planning, and ultimately the Chief Tax Counsel have the final say in all tax technical issues argued in litigation. The final decision on whether or not to appeal an adverse decision will be made at this level on the recommendation of the Senior Tax Counsel (Strategic Litigation), the Senior Tax Counsel (Indirect Taxes) and/or the Senior Tax Counsel (Aggressive Tax Planning). Tax Counsel allocated to cases act on the authority of the Deputy Chief Tax Counsels, or the First Assistant Commissioner Aggressive Tax Planning.

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|---|---|
| *Subject references* | PTI Litigation<br>priority technical issues<br>PTI<br>risk management<br>significant issues |
| *Legislative references* | Part IVC *Taxation Administration Act 1953*<br>Part IVA *Income Tax Assessment Act 1936*<br>s165 *A New Tax System (Goods and Services Tax) Act 1999*<br>*Administrative Decisions (Judicial Review) Act 1997*<br>*Judiciary Act 1903* |
| *Related Practice Statements:* | PS CM 2003/02 (G) ATO Risk Management [this link is only available in the Tax Office].<br>PS CM 2003/05 (DPM) ATO Project Management and Governance [this link is only available in the Tax Office].<br>PS CM 2003/14 (CGR) Provision of formal ATO advice to Treasury [this link is only available in the Tax Office].<br>PS LA 2003/3<br>PS LA 2003/10<br>PS LA 2002/16 |
| *File references* | 05/2352 |
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| Other Business Lines consulted | All Business Lines were consulted. |
| Amendment history | **8 August 2008**<br>Business line updated<br><br>**4 December 2006**<br>Paragraph 7 – hyperlink to ATO Risk Matrix changed |

**Attachment A**

**Indicators for Strategic Litigation Cases**

1. The following criteria are a guide to when the underlying issues are considered potential PTIs:

   A. Proceedings involving general anti avoidance provisions (for example Part IVA in the *Income Tax Assessment Act 1936*; section 165 in the *A New Tax System (Good and Services Tax) Act 1999*)

   B. Aggressive Tax Planning issues

   C. Cases where test case funding has been granted

   D. Where revenue at risk is $50 million or more

   E. Any matter where it might be perceived that the proposed Tax Office arguments are inconsistent with an expressed ATO view

   F. Any matter where there are difficulties in supporting an expressed ATO view

   G. Any matter where an ATO view is being challenged. This will include any view expressed by Tax Counsel or other Tax Office peak technical body such as the Rulings Panel or Part IVA Panel. It will include any forum where a Commissioner, Second Commissioner or Deputy Chief Tax Counsel has provided a considered view

   H. Appeals to the Full Federal Court

   I. All cases coming before the High Court

   J. Any case where our external counsel has advised that our legislation is defective and the intent of the law is unlikely to be enforced by the court or tribunal (especially so for recent tax reform measures)

   K. Any case where the legislation is likely to be given its intended effect but it is likely that the effect will be shown to be oppressive or unjust such as to attract adverse publicity

   L. Any case which is likely to attract media interest (for example, prominent people/sensitive issues)

   M. Any case involving an issue which provides a strong possibility that special leave may be sought from the High Court. This will include issues that will provide law clarification opportunities for the Tax Office. Some cases may emerge which give the Tax Office an opportunity to challenge past decisions of the Full Federal Court or High Court which are, with respect, not seen as correct, or

   N. Any litigation brought against the Commissioner, or initiated by the Commissioner, or to which the Commissioner becomes a party that could have potentially serious consequences for the Tax Office's administration of any of the taxing Acts.

2. It is anticipated that most Federal Court litigation will carry sufficient risk to warrant the escalation of the case as a PTI. Cases of a purely factual nature or straight forward administrative decision reviews would rarely carry the level of risk to warrant escalation to Tax Counsel.

3. Through the LSB callover process (see paragraphs 20 to 23), the relevant Deputy Chief Tax Counsel must be made aware when litigation falls within any of the above criteria and the underlying issue has not otherwise been assessed as a potential PTI.