PS LA 2007/12 (Withdrawn) - Conduct of Tax Office Litigation in Courts and Tribunals

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This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9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 2007/12

This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9.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 of Taxation 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 or is considered incorrect. Where this occurs Tax office staff must follow their business line's escalation process.

SUBJECT: **Conduct of Tax Office Litigation in Courts and Tribunals**[1]

PURPOSE: **To advise of policies and guidelines to be followed in the conduct of ATO litigation**

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[1] Includes reference to Administrative Appeals Tribunal, Small Taxation Claims Tribunal and Australian Industrial Relations Commission.

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STATEMENT

Tax Office approach and philosophy to litigation

1. The Tax Office conducts and manages its litigation in accordance with its obligations under the law, the Attorney-General's *Legal Services Directions 2005* (in particular the Model Litigant Obligation), relevant Court and Tribunal rules and directions, and other relevant internal and external policies and guidelines. The Tax Office strives to have all disputes brought to finality in a fair, timely and equitable manner consistent with the law. In taxation disputes, the Tax Office argues its cases consistently with its published view of the tax law. The Tax Office recognises that recourse to the Courts and Tribunals not only provides final, fair and independent resolution of disputes, it will in some cases, achieve law clarification benefits for Government and the community.
2. This practice statement should be read in conjunction with the following:
   - PS LA 2005/22 Litigation and priority technical issues
   - PS LA 2007/2 Management of Decisions of Courts and Tribunals
   - PS LA 2007/15 Briefing Counsel
   - PS LA 2007/16 Risk Management in litigation
   - PS LA 2007/17 Tax technical litigation in the Administrative Appeals Tribunal
   - PS LA 2007/18 Tax technical litigation in Federal Court matters
   - PS LA 2007/19 Tax technical litigation in High Court matters, and
   - PS LA 2007/12 Alternative Disputes Resolution in Tax Office disputes and litigation.

Litigation to which this practice statement applies

3. This practice statement applies to all civil litigation in which the Commissioner is a party.

Principles that guide our conduct

4. In conducting litigation the Tax Office is guided by the following principles:

   (i) the Commissioner in his statutory functions under the executive arm of government has a role to administer various laws enacted by Parliament, such as those related to taxation and superannuation. Consistent with this, the Tax Office will conduct and manage its litigation as a model litigant in accordance with its obligations under the law, the Attorney-General's *Legal Services Directions 2005* (in particular the model litigant obligation), relevant court and tribunal rules and directions, and other relevant internal and external policies and guidelines

   (ii) the model litigant obligation does not prevent the Commissioner from acting firmly and properly to protect its interests

   (iii) the litigation function of the Tax Office will have as its strategic focus the desire to obtain law clarification in a timely way providing greater certainty for the community

   (iv) the Tax Office has as an underlying value in its administration, respect for the rule of law. It follows that this value applies in the conduct of litigation, the resolution of disputes and in managing the outcome of judicial decisions

   (v) the Tax Office seeks to promote an environment

   - where people have a reasonable understanding of their rights and obligations or can readily obtain adequate guidance
   - where in practice the law can be complied with voluntarily
   - where the law is applied and enforced fairly; and where disputes about the law's operation can be resolved expeditiously.[2]

   In keeping with this, the Tax Office respects and supports the rights of taxpayers to access appropriate review processes to achieve final, fair and independent resolution of disputes

   (vi) the Tax Office has a continuing commitment to a public interest Test Case Litigation Program through which taxpayers can be provided with financial support in appropriate circumstances to achieve law clarification

   (vii) an objective of the Tax Office litigation function is to assist decision makers in making well reasoned and supportable decisions so as to avoid unnecessary litigation

   (viii) the Tax Office will argue its cases consistently with Tax Office published views of the law

   (ix) in determining the Tax Office view of the law the Tax Office adopts a 'purposive' approach to statutory construction, consistent with the statutory requirement[3] and guidance of the High Court[4]. For practical purposes this means that where the words of the Act and their

2 C Saunders and K Le Roy, "Perspectives on the Rule of Law", in C. Saunders and K. Le Roy (eds), The Rule of Law (Federation Press, Melbourne, 2003), 5.

3 Acts Interpretation Act 1901 (Cth), section 15AA;

4 CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (1980) 147 CLR 297 Kirby J in Austin v The Commonwealth (2003) 51 ATR 654, 723-724 said, "That in the case of federal legislation, the purposive principle is supported by the Acts Interpretation Act 1901 (Cth)

statutory context allow, a view of the law that reflects the underlying policy is preferred.

(x) the Tax Office will risk assess litigation cases to ensure that cases are appropriately managed. All cases will have appropriately capable teams marshalled to conduct litigation. In particular, cases that will examine 'priority technical issues' will be identified and escalated in accordance with corporate practice guidelines

(xi) the Tax Office will be consistent, yet vigorous, firm and efficient in the conduct of litigation. Where possible and appropriate, emphasis will be placed on resolving disputes through consultation, negotiation, mediation and formal alternative dispute resolution process available through tribunals and courts to avoid unnecessary litigation

(xii) the Tax Office aims to resolve disputes in a fair and timely manner, consistent with the law

(xiii) consistent with the model litigant obligation, the Tax Office aims to handle its cases efficiently and effectively in accordance with its responsibility to the community to deal responsibly with public revenue and also to fulfil their responsibilities to other litigants and the justice system

(xiv) the Tax Office will not adopt an unnecessarily adversarial approach particularly in tribunal matters where the taxpayer is unrepresented

(xv) the Tax Office will show appropriate deference to the decisions of Courts and quasi-judicial decisions, but reserves the right to exercise appeal rights and review and clarify the law through litigation consistently with the model litigant obligation

(xvi) the Tax Office will foster effective relationships with the courts, tribunals and other parts of the legal system

(xvii) the Tax Office will foster a close working relationship with the Attorney-General's department

(xviii) the Tax Office will seek to gain value for money from the provision of external legal services, and

(xix) Tax Office staff will have the range of skills and competencies appropriate to support its litigation strategy.

EXPLANATION

External rules, policies and guidelines

Court and Tribunal rules

5. All Tax Officers must follow the various rules and practice directions of the relevant Court or Tribunal in which the proceedings are held.

6. Rules and practice directions of the various Courts and Tribunals are set out on their web sites and must be reviewed and understood by the litigation team, particularly the Legal Services Branch (LSB) officers. These include:

- Practice Directions of the Administrative Appeals Tribunal
- Rules of the various State Courts
- Rules of the Australian Industrial Relations Commission
- Rules and Practice Directions of the Federal Court, and
- Rules of the High Court.

7. Of particular importance is the requirement under subsection 33(1AA) of the *Administrative Appeals Tribunal Act 1975* which requires decision-makers to use their *best endeavours* to assist the Tribunal to make the 'correct and preferable' decision according to law in the proceedings. The object of the requirement is to allow the Tribunal to conduct its reviews as efficiently as possible.

Legal Services Directions

8. The *Financial Management and Accountability Act 1997* (FMA Act) provides a framework for the proper management of public money and public property. As a Commonwealth agency, the Commissioner has a responsibility under section 44 of the FMA Act to promote efficient, effective and ethical use of Commonwealth resources. This includes a responsibility to properly manage the spending of public money on legal services.

9. The Attorney-General has issued (under section 55ZF of the *Judiciary Act 1903)* the *Legal Services Directions 2005* (the Legal Services Directions) which are legally binding on agencies, including the Tax Office, subject to the FMA Act (called FMA Agencies) on a number of issues, including:

    - Tied Areas of Commonwealth Legal Work
    - The Commonwealth's Obligation to Act as a Model Litigant
    - Handling Monetary Claims
    - The Engagement of Counsel, and
    - Assistance to Employees for Legal Proceedings.

    The Legal Services Directions and information about the Directions can be accessed from www.ag.gov.au/olsc.

10. The Directions help to ensure that Commonwealth agencies receive consistent and well coordinated legal services that are of a high standard, that uphold the public interest and that are sensitive to their context of Commonwealth interests which are broader than any one agency.

11. LSB officers must have a detailed understanding of the Legal Services Directions and ensure that they are followed by all members of the litigation team including all tax officers and any external legal providers.

Obligation to act as a model litigant

12. The Attorney-General, as First Law Officer, is responsible for the maintenance of proper standards in Commonwealth litigation and accordingly requires that the Commonwealth behave as a model litigant in the conduct of its litigation. The requirement for Government litigants to act as model litigants is set out in Appendix B to the Legal Services Directions. The Directions largely restate duties and codes of behaviour that have always been expected of government and its agencies by the courts.[5]

13. In essence, being a model litigant requires that the Commonwealth, as a party to litigation, acts with propriety, fairness and in accordance with the highest professional standards. The obligation applies to the handling of civil claims and litigation before the Courts, Tribunals, Inquiries and in Alternative Dispute Resolution processes. The model litigant obligation requires Commonwealth

[5] See for example, *Melbourne Steamship v. Moorhead* (1912) 15 CLR 333 at 342, *Kenny v. State of South Australia* (1987) 46 SASR 268 at 273 and *Yon v. The Minister for Immigration and Ethnic Affairs* (1996) 75 FCR 155 at 166.

litigants to handle their cases efficiently and effectively in accordance with their responsibility to the community to deal responsibly with public revenue and also to fulfil their responsibilities to other litigants and the justice system.

14. The obligation to act as a model litigant does not prevent the Commonwealth from acting properly to protect the Commonwealth's interests. It does not therefore preclude the Commonwealth from taking all legitimate steps in pursuing claims by it and testing or defending claims against it.[6] The obligation not to pursue an appeal without reasonable prospects of success is not intended to prevent the Commonwealth from lodging notice of appeal to assess whether or not to pursue the matter. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable.[7]

15. The model litigant obligation is to be drawn to the attention of counsel acting on behalf of the Commonwealth so that they understand the standards required of them.

Counsel to comply with their taxation obligations

16. All counsel briefed directly by the Tax Office or on its behalf, must understand that they are required to comply with their taxation obligations. Any issues which arise out of this obligation must be discussed between Counsel and the LSB officer prior to the acceptance of the brief.

17. As of 1 March 2006, the new clause 4A of Appendix D of the Legal Services Directions mandates that:

> A brief issued to counsel is to contain a condition that, in accepting the brief, counsel is taken to warrant that he or she has not, at any time, been declared bankrupt, unless counsel advises of any such bankruptcy.

18. Thus, all direct briefs and all briefs delivered by an external legal provider on behalf of the Tax Office must contain the following paragraphs:

> *The Attorney-General has made it clear to all Commonwealth Departments and Agencies that it is expected that the Commonwealth will not engage counsel who use insolvency as a means of avoiding tax. In accordance with paragraph 4A of Appendix D of the Legal Services Directions 2005, counsel is taken to warrant, unless he or she advises to the contrary, that he or she has not, at any time, been declared bankrupt.*
>
> *Additionally, the Commissioner of Taxation does not wish to engage Counsel who are not complying with their taxation obligations. If you have any concerns about these requirements or wish to discuss any aspect of them please do not hesitate to contact your instructor.*

[6] See for example *Wodrow v. Commonwealth of Australia* (2003) FCA 403 at paragraph 42.
[7] Legal Services Directions 2005, Appendix B, Paragraph 2, Note 4

Breach of the Legal Services Directions

19. The Office of Legal Services Co-Ordination (OLSC) is part of the Attorney-General's Department, and is responsible for monitoring possible breaches of the Legal Services Directions, including the model litigant obligation. They do this in a number of ways, including:

    - by monitoring reports of case law and tribunal decisions
    - by receiving reports from agencies and legal service providers
    - from courts and tribunals, and
    - by receiving complaints from other parties to litigation involving the Commonwealth.

20. Paragraph 11.1(d) of the Legal Services Directions provides that the Chief Executive of an FMA agency is responsible for ensuring that 'the agency gives reports as soon as practicable to the Attorney-General or OLSC about any possible or apparent breaches of the Directions by the agency, or allegations of breaches by the agency of which the agency is aware, and about any corrective steps that have been taken or are proposed to be taken, by the agency'. The Chief Executive of an FMA agency is responsible for giving to OLSC, within 60 days after the end of each financial year, a certificate setting out the extent to which the Chief Executive believes there has been compliance by the agency with the Directions.

21. Guidance Note 3 of 2006 (guidance on reporting breaches of the Directions) and Guidance Note 4 of 2006 (guidance about the investigation of breaches) issued by OLSC[8] can be found on the Attorney-General's website at www.ag.gov.au/olsc.

Internal escalation process for breaches of the Legal Services Directions

22. The Commissioner reports breaches of the Legal Services Directions to OLSC via the ATO General Counsel.

23. A complaint received about our conduct or any instance where a Tax Officer is aware of a breach or an allegation of a breach by the Commissioner of the Legal Service Directions, should be reported to the ATO General Counsel. The ATO General Counsel will ensure that the allegation is investigated, and where appropriate provide a report to OLSC.

APS Values and the Code of Conduct

24. Sections 10 and 13 of the *Public Service Act 1999* set out the Australian Public Service (APS) Values and Code of Conduct. They are supported by the Public Service Commissioner's Directions. All APS employees are required to uphold the APS Values and comply with the Code of Conduct, with sanctions available for breaches of the Code. Agency Heads and members of the Senior Executive Service are required to promote and uphold the APS Values.

[8] OLSC issues Guidance Notes in order to assist Australian Government Departments and Agencies to comply with the Legal Services Directions, procure legal services, and deal with legal issues in an efficient and effective manner.

25. The APS Values and Code of Conduct cover all APS employees and Agency Heads. The principles set out give guidance on personal behaviour as well as on relationships and behaviours between:

- APS employees and the Government and the Parliament
- APS employees and the public, and
- APS employees and colleagues in the workplace

26. A publication of the Australian Public Service Commission *APS Values and Code of Conduct in practice* assists APS employees to understand the practical application of the APS Values and Code of Conduct in both common and unusual circumstances. The publication is a guide not a rulebook. It provides a useful summary of important legal requirements across the APS, although it does not attempt to be comprehensive.

Internal policies and guidelines

27. There are a number of internal Tax Office policies and guidelines which are relevant to the conduct of litigation. All tax officers should be aware of and consider the application of these policies and guidelines to the litigation. These policies and guidelines include:

- Panel firm or AGS/ATO Memorandum of Understanding
- Legal Services Branch Bulletins
- Corporate Management and Law Administration Practice Statements
- Taxpayers' Charter
- Code of Settlement Practice
- Access and Information Gathering Manual, and
- Public Rulings, Determinations and Bulletins.

Exceptions to the usual rules and complaints

28. These policies and guidelines are to be followed by those representing the Commissioner in litigation at all times. However, where following these policies and guidelines produce an anomalous or unintended result (and it is expected that such occasions will be rare), approval must be sought from the relevant LSB Stream Leader or a member of the LSB Executive.

29. Complaints, other than those related to the Attorney General's Legal Services Directions referred to at paragraphs 19 to 21, received from taxpayers or their representatives that our conduct in litigation has fallen short of acceptable standards, should be considered by a senior officer, usually the relevant LSB Stream Leader or a member of the LSB Executive.

Litigation in the Tax Office

30. LSB has corporate responsibility for legal services in the Tax Office. Access to any legal services must go through LSB. As LSB is the central point of reference in respect of all legal work where the Tax Office is using external legal providers (other than prosecutions work), all requests seeking the services of external legal providers must go to LSB.

Working as a team

31. Litigation is handled by several people working together as a team. The team may vary from time to time, but an LSB officer and a business line officer will always be a part of each team. Depending on the case, the litigation team might also include a Tax Counsel Network officer, a business line officer, an officer from the relevant Centre of Expertise (CoE), and an external legal service provider. Presently, the range of external legal service providers available to the Tax Office consists of the Australian Government Solicitor (AGS), legal service providers on any Tax Office panel (such as the Debt Litigation panel, General Law panel and Tax Technical Litigation and Tax Legal Advice panel), and counsel.

32. 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 to ensure that the litigation team works together to achieve the best possible outcome.

The role of LSB in tax litigation

33. 'Tax litigation' includes all litigation undertaken under Part IVC of the *Taxation Administration Act 1953* (TAA), declaratory proceedings brought in any court that will directly affect the taxation liability of a taxpayer, and judicial review under the *Administrative Decisions (Judicial Review) Act 1977* or section 39B of the *Judiciary Act 1903* in relation to any decision made under the Income Tax Assessment Acts, or the TAA. It does not include, for example, employment related litigation or commercial litigation.

34. LSB manages the Tax Office's litigation program. It provides legal and strategic advice through in-house teams of LSB officers. It manages access to external legal service providers, and is primarily responsible for managing legal risks to the Commissioner.

35. LSB is responsible for all appearance work and related advice on legal process and risks, all matters under Part IVC of the TAA, debt matters requiring legal representation, administrative law matters, employment law, commercial law, compensation, other related legal advice and appearance work (except prosecutions), and managing the Test Case Litigation Program.

36. LSB is the central point of reference for all legal work undertaken for the Tax Office by external legal providers. LSB is the conduit for the exchange of any information between the Tax Office and the external legal service provider. LSB provides a single point of contact so that conflicting Tax Office messages are not given.

37. LSB is the central liaison point for the litigation team. Contact with the external legal service provider other than through LSB should be avoided as much as possible. If contact without LSB is unavoidable then the LSB officer and other litigation team members are to be informed and provided with copies of all relevant documents without delay.

38. The LSB officer must ensure that where Tax Counsel is involved, that Tax Counsel is kept fully informed of all important actions arising in the course of litigation. Tax Counsel will be involved where the matter is a strategic litigation matter, or if the matter relates to an existing priority technical issue.[9]

39. The LSB officer will ensure that Tax Counsel is informed of the specific technical issues arising during the course of litigation and provide ample opportunity for Tax Counsel to comment on the technical arguments in the

[9] 'Strategic litigation' is defined in paragraph 6 of PS LA 2005/22 Litigation and priority technical issues.

case. Tax Counsel will be the final decision maker on the technical arguments to be run.

40. Where Tax Counsel is not involved in litigation, LSB will be the final decision maker on all issues arising in the course of the litigation, including the technical argument and issues relating to the conduct of the litigation, such as the litigation strategy or issues concerning Court or Tribunal processes. Although the business line officer will be consulted, the decision will ultimately rest with LSB. If members of the litigation team cannot resolve an issue, it must be escalated to the relevant Senior Tax Counsel (Strategic Litigation)[10] or an Assistant Commissioner, Litigation. Depending on the significance of the issue, it may need to be escalated to the Chief Tax Counsel or the Deputy Chief Tax Counsel.

41. Generally, the LSB officer will:

- provide legal and litigation support
- provide advice on the admissibility and the extent of the factual evidence available to support the Tax Office 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 Tax Office view
- ensure that Tax Office policies and procedures are followed, for example that we do not argue inconsistently with views expressed in public rulings or taxation determinations, and
- ensure that the Tax Office operates as a model litigant.

42. During the conduct of a matter, there will be mutual feedback on any performance or resource issues that arise, and issues should be escalated appropriately.

Strategic litigation

43. The strategic litigation program represents those cases regarded by the Tax Office as being of the greatest importance in terms of law clarification. There are three Senior Tax Counsel providing leadership in strategic litigation, two with responsibility for income tax issues and one with responsibility for indirect tax issues. Strategic litigation may arise from any of the streams in the LSB. The relevant Senior Tax Counsel may either directly undertake the conduct of, or closely monitor, strategic litigation cases, with or without other Tax Counsel involvement.

44. Issues identified for strategic litigation will ordinarily be identified through various risk management actions (see PS LA 2007/16 Risk Management in litigation) or through the Priority Technical Issue process (see PS LA 2005/22 Litigation and priority technical issues). The escalation processes set out in

[10] There are three Senior Tax Counsel involved in strategic litigation, two with responsibility for income tax issues and one with responsibility for indirect tax issues.

the practice statements will ensure that strategic litigation is referred to one of the relevant Senior Tax Counsel (Strategic Litigation). 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.

45. A Strategic Litigation team located in LSB provides support to the Senior Tax Counsel (Strategic Litigation) to ensure that the highest priority litigation is identified, reported and managed corporately. The primary responsibility of the relevant Senior Tax Counsel (Strategic Litigation) is technical leadership and management of strategic litigation.

The role of LSB in non-tax litigation

Debt

46. The Debt Stream within LSB is responsible for litigation relating to the Tax Office collection of tax revenue and insolvency matters, under the laws administered by the Commissioner or other relevant legislation such as the *Corporations Act 2001* and the *Bankruptcy Act 1966*. This includes representing the Commissioner in Court, briefing counsel, and negotiating and settling matters such as company wind ups (and substitutions), creditors petitions, defended debt matters, and voidable preference claims.

Commercial law

47. The ATO General Counsel in LSB is responsible for the provision of expert advice and litigation services in respect of commercial law issues affecting the Tax Office. The commercial law group within LSB deals with issues arising out of contracts (for Information Technology services and goods procurements), tendering and procurement processes and associated administrative law issues, intellectual property rights and real property. The group also provides advice on procurement related corporate management practice statements and other corporate guidelines.

48. External legal advice on commercial law issues must be obtained through the commercial law team. The commercial law team leader is the LSB relationship manager between LSB and Corporate Procurement and Facilities (including Comcover).

Employment law

49. The employment law group deals with issues arising form the Tax Office's relationship with its employees. These issues include litigation relating to termination of employment, industrial disputes and litigation arising from discrimination claims against the Tax Office. Litigation is usually conducted in the Australian Industrial Relations Commission (AIRC), Federal Court, Human Rights and Equal Opportunity Commission and other courts of appeal. The employment law group also provides advice on all aspects of employment, industrial and discrimination law issues as they affect the Tax Office.

The role of tax counsel in litigation

50. Tax Counsel Network (TCN) is a national network of highly skilled tax technical officers. The role of TCN is to provide technical leadership for the Tax Office. TCN works with the business lines and CoE (where appropriate) to resolve the Tax Office's key significant issues. The responsibility for formulating the ATO view on these significant issues rests with TCN. This can involve TCN working on strategic litigation, especially where the Tax Office view on a priority technical issue (PTI) is under challenge.

51. Once a litigation matter has been risk assessed and it is decided that it warrants being a PTI (or is related to an existing PTI), Tax Counsel will have the final say as to the Tax Office view and the preparation of arguments. Usually, once a Tax Counsel becomes involved, they will have an on-going role 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 Appeal Statement is 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.

52. Tax Counsel has an important role in strategic litigation matters. They will ensure that:

- the coherent fabric of the law is maintained and an interpretation of the law will not be pursued where it is not consistent with this principle, and
- cases are prepared and presented in a way that best enables the Tax Office view to be presented to court.

53. Tax Counsel will have the final say in technical arguments arising in litigation. Tax Counsel will also contribute to the management of the wider risk associated with the PTI.

54. Written instructions to external counsel should always be signed off by Tax Counsel, especially where:

- the instruction is to make arguments not previously contemplated *by the Tax Office*
- action is being taken that is contrary to the advice of counsel, or
- there is disagreement between senior officers of the Tax Office regarding the arguments or the strategy put before counsel.

Any such directions provided by Tax Counsel to the LSB officer should be forwarded immediately to the external legal service provider (where they are involved) for the instruction of counsel.

55. 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 the external solicitor.

The role of the Chief Tax Counsel and Deputy Chief Tax Counsels in litigation

56. The Chief Tax Counsel, the various Deputy Chief Tax Counsels, and ultimately the Second Commissioner (Law) have the final say in all tax technical issues argued in litigation. Special Leave applications to appeal to the High Court will be decided by the Chief Tax Counsel. The decision whether or not to appeal an adverse decision will usually be made by the relevant Deputy Chief Tax Counsel or if necessary, the Second Commissioner (Law) on the recommendation of one of the relevant Senior

Tax Counsel (Strategic Litigation), Tax Counsel allocated to cases act on the authority of the Deputy Chief Tax Counsels.

The role of the business lines in litigation

57. Generally, throughout the litigation process, the business line will be responsible for managing the risk associated with the case and dependent cases.

58. The business line has the responsibility of providing a complete and comprehensive statement of facts which cross-references to supporting evidence. This will assist LSB, Tax Counsel or the CoE to ensure that the Tax Office view has been correctly applied.

59. Tax Counsel or LSB are responsible for determining the Tax Office view. It is not determined by the business line.

60. 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.

61. 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 and the community as a whole. The business line is responsible for managing this risk.

62. 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.

63. 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.

64. 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. See PS LA 2007/2 for details on the corporate approach to dealing with the risks to the Commissioner arising from Court and Tribunal decisions.[11]

[11] The business line officer will have a role in drafting the Decision Impact Statement and other documents as discussed in PS LA 2007/2.

The role of external solicitors in litigation

65. Legal services may be provided by external solicitors on the relevant Tax Office panel in the conduct of litigation to which the Commissioner is a party. Solicitors acting for the Commissioner are expected to assist the Commissioner in the conduct of litigation to achieve a timely and appropriate resolution of the particular dispute. This may result in law clarification which provides greater certainty for the community about the law. A solicitor acting for the Commissioner will provide legal services in the conduct of litigation consistent with the professional and ethical standards expected of a solicitor practising in the relevant State or Territory.

66. As the solicitor will have direct dealings with taxpayers or their representatives it is expected that the solicitor will also conduct him or herself consistently with the standards of conduct expected of a tax officer. In particular the solicitor must:

- comply with the Legal Services Directions made by the Attorney-General for the conduct of litigation by Commonwealth Departments and Agencies
- if the solicitor becomes aware of, or suspects, a breach of the Attorney-General's Legal Services Directions, notify the LSB officer immediately of that breach or suspected breach and advise on any possible actions that would minimise the impact of that breach
- comply with the tax law secrecy provisions, and
- avoid conflicts of interest and where one arises, advise the Tax Office immediately.

67. The solicitor will provide general legal services, including advice on the selection of external counsel, drafting and filing Court and Tribunal documents, advise on the adequacy and admissibility of evidence, advise on court requirements and procedures, and undertake advocacy where appropriate.

68. The solicitor needs to clearly understand the requirements of the Commissioner in the conduct of the case, and to relay those requirements to counsel. Thus, it is vital that clear and specific instructions are provided from the LSB officer to the solicitor. In turn, the solicitor is expected to advise the Tax Office of views provided by counsel on the case and any developments in the court timetable.

69. There is a category of legal work which cannot be undertaken by any other external legal service provider but tied legal services providers.[12] This relates to 'tied work' which must be briefed directly to AGS outside of its membership of any panel of external legal service providers. 'Tied work' as defined by the Legal Services Directions comprises areas of government legal work relating to:

Category	**Tied provider**
Constitutional issues	AGS
National security issues	AGS
Legal advice to be considered by Cabinet or relied on in preparing a Cabinet submission or memorandum	AGS
Legal advice on a legislative proposal to be considered for adoption by government or on draft legislation for introduction into Parliament	AGS
Public international law work	
(a) International litigation and arbitration (Government to Government	(a) AGS, AGD[13], DFAT[14]
(b) Advice involving Australia's or another country's obligations under international law	(b) AGS, AGD, DFAT
(c) Advice on treaty implementation	(c) AGS, AGD, DFAT
(d) Advice on implementing a treaty (including bilateral agreements)	(d) AGS, AGD, DFAT
(e) Domestic litigation involving a significant public international law issue	(e) AGS, AGD
Drafting work	
(a) Drafting government Bills and parliamentary amendments of Bills	(a) Office of Parliamentary Counsel
(b) Drafting of regulations, ordinances and regulations of non-self-governing territories and other legislative instruments made or approved by the Governor-General, or published in the Statutory Rules series	(b) Office of Legislative Drafting and Publishing in the Attorney-General's Department

The role of the Strategic Internal Litigation Committee

70. A Strategic Internal Litigation Committee (SILC) is to be convened for every litigation matter, and meetings should be convened at all critical stages of litigation. Each SILC meeting has a particular purpose in managing the litigation matter to ensure that the litigation strategy is appropriate and in place:

- Document Preparation SILC
- Instruction SILC
- Pre-hearing SILC
- Post-hearing SILC
- Pre-decision SILC

[12] Typically AGS, but a full list of tied providers is in Appendix A of the Legal Services Directions.
[13] Attorney General's Department.
[14] Department of Foreign Affairs and Trade.

- Decision SILC
- Post-decision SILC
- Appeal SILC[15]

However, it is recognised that due to the timeframes set by the Courts or Tribunals in particular cases, it is not always possible to convene every SILC for each litigation matter. Good judgment and consultation between the litigation team members is required to ensure continual good management of the case and that key decisions are made collaboratively. The actual SILC can vary depending on the significance of the matter, but will always include an LSB officer and a business line officer. Depending on the particular case, it may also include Tax Counsel and Centre of Expertise officers.

SILC Plan

71. Every litigation matter must have a SILC Plan. A SILC Plan is a document setting out the details and status of a litigation matter, including the litigation strategy and any milestones. The Plan includes amongst other things, a summary of the issues, the Tax Office view and the significance of the matter. The BSL officer is to initially prepare the SILC Plan and provide the document electronically to the LSB officer.

72. The SILC Plan is to be updated by the LSB officer throughout the litigation process, particularly after each SILC meeting. Updated versions of the SILC Plan must be provided to all internal members of the litigation team.

Governance – litigation

73. A corporate level committee (the Priority Technical Issues Committee) chaired by the Chief Tax Counsel provides guidance and direction, and monitors the management of PTIs within the established corporate framework. Litigation forms a part of that framework. LSB also reports to the Law Sub-plan Executive across all litigation work types, including volume trends, resource costs and the amount of revenue at risk. Strategic litigation reports, involving PTI litigation are provided to the Priority Technical Issues Committee.

74. Monthly reports on significant litigation matters are provided to senior management, including the ATO Executive.

75. LSB officers provide monthly assurances on their conduct in litigation on matters including whether the Legal Services Directions have been complied with and whether court time-frames have been met. These monthly assurances are used in the corporate assurance process provided to the Commissioner in the form of a twice yearly Certificate of Assurance.

[15] Details of what is required for each of the SILC's should be outlined in the SILC Plan (see paragraphs 71 and 72 of this practice statement).

Subject references	Litigation
Legislative references	AAT Act 1975 33(1AA) AD(JR) Act 1977 Bankruptcy Act 1966 Corporations Act 2001 FMA Act 1997 FMA Act 1997 44 Judiciary Act 1903 39B Judiciary Act 1903 55ZF Public Service Act 1999 10 Public Service Act 1999 13 TAA 1953 PT IVC Federal Court Rules Order 52 Rule 4
Related public rulings	
Related practice statements	PS LA 1998/1; PS LA 2005/22; PS LA 2007/2; PS LA 2007/15; PS LA 2007/16; PS LA 2007/17; PS LA 2007/18 PS LA 2007/19; PS LA 2007/23
Case references	Kenny v. State of South Australia (1987) 46 SASR 268 Melbourne Steamship v. Moorhead (1912) 15 CLR 333 Wodrow v. Commonwealth of Australia (2003) FCA 403 Yon v. The Minister for Immigration and Ethnic Affairs (1996) 75 FCR 155
Other references	APS Values and Code of Conduct in practice Legal Services Directions 2005 www.ag.gov.au/olsc
File references	07/2541
Date issued	21 June 2007
Date of effect	21 June 2007
Other Business Lines consulted	All – Ongoing
Amendment history	30 January 2008 References to Model Litigant "Guidelines" changed to "Obligation". Relevant practice statements that were subsequently issued included. Paragraph 4 amended to provide clearer articulation of the Tax Office's role in litigation (as distinct from the role of Parliament), include the Tax Office's commitment to resolve disputes consistently with the Rule of Law, and include an explanation of the Tax Office's purposive approach to interpreting the law. References to the new Tax Technical Litigation and Tax Legal Advice panel now available to the Tax Office included. Changes made to remove reference to Strategic Litigation team, and articulate how strategic issues are identified through the risk management strategies and the PTI process.