# *PS LA 2007/19 (Withdrawn) - Tax technical litigation in High Court matters*

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This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9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 2007/19**

This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9.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

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| **SUBJECT:** | **Tax technical litigation in High Court matters** |
| **PURPOSE:** | **To outline the best practice in carrying on tax technical litigation in High Court matters.** |

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## STATEMENT

1. The procedures set out in this practice statement are a general guide for all officers involved in legal proceedings on behalf of the Commissioner in the High Court in tax technical issues which arise generally under Part IVC of the *Taxation Administration Act 1953* and certain judicial review matters.[1]

2. Law Administration Practice Statements PS LA 2007/17 and PS LA 2007/18 provide guidance for officers involved in legal proceedings in the Administrative Appeals Tribunal and the Federal Court.

3. Officers should generally comply with all aspects of this practice statement but should apply common sense in a given situation. When in doubt about any aspect of the management of a case in the High Court, officers should seek guidance from any of the Assistant Commissioners, Litigation in the Legal Services Branch (LSB) or if necessary a Deputy Chief Tax Counsel (DCTC).

[1] This includes reviewable decisions under section 334 of the *Superannuation Industry (Supervision) Act 1993.*

4. Those involved in High Court litigation include LSB officers and officers from the Tax Counsel Network (referred to as Tax Counsel), the respective business line (BSL) officers, Centres of Expertise, and external legal service providers, including counsel. It is of vital importance that all of these parties communicate effectively and work collaboratively in order to ensure that the Commissioner adheres to all of the laws, policies and guidelines with which the Commissioner must comply as a model litigant in the High Court.

5. The roles of each of the areas involved in litigation are set out in PS LA 2007/12 Conduct of Tax Office Litigation in Courts and Tribunals. Importantly, LSB has a responsibility to manage the litigation process and to ensure that as a litigant, the Commissioner acts in accordance with all relevant internal and external policies and guidelines. Tax Counsel and the Centres of Expertise, where involved, have an important role in ensuring that the ATO view is maintained in the way the case is prepared for the Court. The business lines retain risk ownership of the case.

6. This practice statement outlines in chronological order the procedures required to be observed by officers involved in High Court matters.

7. References in this practice statement to various High Court Orders and statutory provisions are general guides only. Officers relying on the statements made should refer to the actual rules and provisions for the full detail and to ensure that the references are current.

## General obligations to be adhered to throughout the proceedings

### *Legal Services Directions 2005*

8. The statutory obligations imposed on the Commissioner in a matter before the High Court are listed in paragraph 15 of this practice statement. Outside of these specific obligations, the Tax Office's conduct in all litigation as a Commonwealth agency must follow the guidelines set out by the Attorney-General's Legal Services Directions 2005. These directions are issued by the Attorney-General pursuant to section 55ZF of the *Judiciary Act 1903*. One of the most important of these Directions is the Model Litigant Guidelines contained in Appendix B. These guidelines require that the Commissioner and the external legal providers that represent the Commissioner act honestly and fairly in handling claims. All tax officers involved in litigation on behalf of the Commissioner must be aware of and adhere to the specific obligations set out in the Model Litigant Guidelines and ensure that all external legal providers are made aware of and act in accordance with them.

## Special leave to appeal to the High Court

9. There is no automatic right of appeal from a decision of the Full Federal Court to the High Court of Australia. The party dissatisfied with a decision of the Full Federal Court, whether it is the Commissioner or the taxpayer, must apply to the High Court for Special Leave to appeal to the High Court of Australia.

10. Section 73 of the Constitution confers the appellate jurisdiction on the High Court. Its jurisdiction to hear and determine appeals from judgments of the Federal Court of Australia is subject to the regulations prescribed by section 33 of the *Federal Court of Australia Act 1976* (FCA). An appeal cannot be brought to the High Court from a judgment of the Federal Court constituted by a single judge[2] and an appeal may not be brought from the judgment of the Full Court of the Federal Court unless the High Court gives special leave to appeal.[3]

11. A decision to seek Special Leave is an important matter for the organisation and must be approved by the Chief Tax Counsel (CTC). To ensure that the CTC and relevant DCTC have adequate time to consider the decision to seek leave and the proposed application, the litigation team in collaboration with the relevant Senior Tax Counsel (Strategic Litigation),[4] must commence planning immediately on receipt of an adverse Full Federal Court decision.

12. The Tax Office's actions in response to a taxpayer's Special Leave application should also be carefully managed. There are, however, some applications which have little merit or are made by an unrepresented litigant. These will not generally be considered as strategic litigation, and will require little or no involvement from the CTC. The appropriate decision maker will need to be agreed between the relevant Senior Tax Counsel (Strategic Litigation) and the relevant DCTC once an application has been received.

13. A 'Pre-decision Strategic Internal Litigation Committee' (SILC) should be held prior to the Special Leave hearing. If leave is refused the decision of the Court below becomes final at that point, which may raise immediate implications. The purpose of this SILC is therefore to review and put into place a strategy to address and mitigate any potential risks arising from the outcome of the Special Leave application. The litigation team should agree at this time on who is responsible for delivering aspects of the strategy. The Senior Tax Counsel (Strategic Litigation) and if relevant to the particular case, the Senior Tax Counsel (Strategic Litigation) Aggressive Tax Planning or Senior Tax Counsel (Strategic Litigation) Indirect Taxes should be involved in the development of this strategy. The strategy should, in particular, consider who needs to be notified immediately after the Special Leave application has been decided and whether or not there ought to be a media strategy.

14. The paragraphs that follow give an indication of the timelines and events that happen in the course of a Special Leave application.

15. The procedures of the High Court are governed by the following provisions:

- Part 41 of the High Court Rules 2004
- Schedule 1 to the High Court Rules 2004 (Forms)
- Practice Direction No. 3 of 1996
- High Court of Australia (Fees) Regulations 2004

All further references to 'Rules' in this practice statement are to the High Court Rules 2004.

[2] Subsection 33(2) of the FCA.
[3] Subsection 33(3) of the FCA.
[4] 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.

16. The following are the main steps in seeking Special Leave to appeal to the High Court.

| When | Action |
|---|---|
| | Decision of a Full Federal Court is delivered. |
| Within 28 days of pronouncement of judgment<br>Rule 41.02<br>(Time reckoned exclusive of the first day and inclusive of the last day. Part 4 Rule 4.01) | Appellant files an application with accompanying documents. (Form 23 – Rule 41.01.1; judgment of court below and the primary judgment; orders; such other documents as are necessary for the proper determination of the application – Rule 41.01.2) |
| Within 7 days of filing an application | Applicant serves copies of the application and accompanying documents on the Respondent (Rule 41.03.1) and lodges a copy of the application on the Registrar of the Court below (Rule 41.03.2) |
| Within 7 days of service of the application | Applicant files an affidavit as to service within 7 days of such service and lodgment. |
| 28 days after filing the application | Applicant files and serves a Summary of Argument on the Respondent.<br>(Rule 41.05.1)<br>A draft Notice of Appeal is to be filed and served with the Applicant's Summary of Argument.<br>(Rule 41.05.3) |
| 21 days after service of the Applicant's Summary | The Respondent files and serves a Summary of Argument on the applicant.<br>(Rule 41.06.1) |
| Within 7 days of service of Respondent's Summary | Applicant may file and serve a reply.<br>(Rule 41.08) |
| | The Registrar will circulate a Draft Index and arrange an appointment to settle the Application Books. |
| | Application Books are prepared and provided to the other party. |
| | The Registrar will provide a hearing date. |
| | Parties need to notify the Court of the names of counsel and instructing solicitors. |

17. Under rules commencing on 1 January 2005, applications by unrepresented applicants will be considered in the first instance by two Justices who may order that the application be dismissed without the need for a response by the respondent.

18. Applications may be considered on the papers without hearing oral argument.

19. The documents to be filed in the High Court should be of the highest quality in terms of presentation and content. The requirements of the High Court rules are to be followed strictly.

20. Summaries of Argument are to be in a specific form. The Applicant's Summary is to be consistent with Form 18 (Rules 41.05.2 and 41.10.3(a)). The Summary should contain:

- special leave questions
- factual background
- Applicant's argument
- reasons why leave should be granted
- order as to costs
- authorities, legislation and other material, and
- advice on whether the party wishes to supplement the Summary with oral argument.

21. The Respondent's Summary of Argument should comply with Form 19 (Rule 41.06.2) and contain:

- reasons why leave should not be granted
- factual issues in contention
- Respondent's argument
- special order as to costs
- authorities, legislation and other material, and
- whether the party wishes to supplement the Summary with oral argument.

22. A draft Notice of Appeal is to be filed and served with the Applicant's Summary of Argument (Form 24 Rule 41.05.3).

23. Preparation for Special Leave should be undertaken with a realistic understanding of how the High Court approaches Special Leave applications. The matters that the High Court will have regard to when considering whether to grant an application for special leave to appeal to the High Court are listed in section 35A of the *Judiciary Act 1903* as follows:

- whether the proceedings in which the judgment to which the application relates was pronounced involved a question of law:
  - that is of public importance, whether because of its general application or otherwise, or
  - in respect of which a decision of the High Court, as the final appellate court is required to resolve differences of opinion between different courts, or within one court, as to the state of the law, and

- where the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

24. The Special Leave questions and argument should be drafted in close consultation with counsel. Tax Counsel should ensure that the issues of importance to the Commissioner are properly advanced. This means that Tax Counsel will ensure appropriate consultation with the relevant DCTC and where necessary, the CTC through this process. In consultation with counsel, the questions must be crafted to provide the fundamental issues of importance that the High Court will wish to hear. Ideally, a first draft of the Summary of Argument should be prepared for counsel by the litigation team. The main outcome from providing a draft is to ensure that counsel understands why we are seeking leave. The draft should highlight what the Tax Office sees as the important points and why they are important.

25. The factual background must state the facts as found and not the facts as the party sees them.

26. The Summary of Argument is not to exceed 10 pages (Rules 41.07.1 and 41.10.3(b)). The reply is not to exceed 5 pages (Rule 41.08.2). The page limits are subject to strict compliance and therefore great care should be taken to make sure that the very best use is made of the space to make the point (or points) that are required to be made. Once the final draft is received from counsel, the document should be checked carefully for punctuation and grammar. The following quality measures should be considered:

- Does the Summary express the points of importance that the Commissioner wishes to make?
- Is each sentence and section necessary?
- Does each thought follow from the previous one?
- Is each thought explained or illuminated by the statements that follow?
- Are non-obvious conclusions supported by citation or argument?

27. There are specific rules on the contents of the Application Book and how they should be arranged (Rules 41.09.2 and 41.09.3) The Books will usually contain:

- judgments at first instance and on appeal
- orders
- Summaries of Argument
- draft Notice of Appeal, and
- any section 78B Notice under the *Judiciary Act 1903*.[5]

[5] The *Judiciary Act 1903* requires parties to give notice if the matter raises any constitutional issues.

28. With the approval of the Registrar, the Books may contain other material, for example affidavits or other material documents. An important aspect of Special Leave preparation is to consider the need for affidavit evidence or other materials. The LSB officer is to discuss this early with counsel. If there are issues of public importance they can sometimes be appropriately put before the Court by way of affidavit, such as showing the revenue implications if the decision below is left uncorrected. The confusion caused by apparently conflicting decisions of lower courts can sometimes be illustrated with professional articles that have been published on the point. These issues should be discussed with counsel.

29. If a party intends to refer to a case, text book, article, statute, regulation or any other material not referred to in the Application Book, four copies are to be lodged with the Registry no later than 9.00am on the day preceding the hearing.[6]

30. Tax Counsel and the LSB officer will attend Special Leave application hearings and will be available to provide assistance to our solicitors and counsel.

**The appeal process**

31. High Court cases are extremely important to the Tax Office. It is essential that our preparation is of the highest standard. Tax Counsel will be expected to provide technical leadership on these cases, with the full assistance of the rest of the litigation team. This may include drafting submissions for discussion with counsel or at least to provide written instructions and research materials. Close liaison is required with the CTC and the relevant DCTC to ensure that they are given adequate time to provide comments on draft submissions or provide advice on issues and strategies as they arise.

32. To ensure that the CTC and relevant DCTC have adequate time to consider submissions, the litigation team in collaboration with the relevant Senior Tax Counsel (Strategic Litigation), must commence planning immediately following the Special Leave decision to ensure the availability of the CTC and relevant DCTC when critical decisions will need to be made through the appeal process.

33. Once special leave is granted, the following table summarises the main steps in an appeal to the High Court.

[6] Practice Direction No. 3 of 1996.

| When | Action |
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| | Leave or special leave is granted to file an appeal |
| Within 21 days after the latest of: grant of leave or special leave to appeal; certificate to appeal; or date of the judgment below<br>Rule 42.03<br>(Time reckoned exclusive of the first day and inclusive of the last day. Part 4 Rule 4.01) | Appellant files a Notice to Appeal (Form 24 – Rule 42.02.1)<br>A Notice to Appeal shall:<br>- state the name of the court or the name of the judge together with the date of judgment being appealed<br>- state the date on which leave or special leave was granted or state the date when a certificate to appeal was granted<br>- set out particulars of terms where leave or special leave has been granted<br>- state whether the whole, or part, of the judgment below is appealed from<br>- set out the grounds of appeal, and<br>- specify the precise form of order which the appellant contends the Court should be making including any special order as to costs (Rule 42.02.2) |
| Within 21 days after the latest of: grant of leave or special leave to appeal; certificate to appeal; or date of the judgment below<br>Rule 42.03 | Unless the appeal is from a Justice, the Notice of Appeal shall be filed by the Appellant in the office of the Registry in the State or Territory in which the proceedings in the Court below were commenced (Rules 42.04, 42.05.3) |
| Within 21 days after the latest of: grant of leave or special leave to appeal; certificate to appeal; or date of the judgment below<br>Rule 42.03 | Notice of Appeal shall be served by the Appellant on each person named as a Respondent or as directed by the Court or a Justice (Rules 42.05.1, 42.05.2) |
| 14 days after service of the Applicant's notice of appeal<br>Rules 42.06, 42.08.1 | Respondent files and serves on the Applicant a Notice of Appearance (Rules 42.06.1, 42.06.2 – Form 7)<br>or<br>Alternatively, the Respondent may file a Notice of Cross Appeal (Rules 42.08.1, 42.08.2 – Form 26, 42.08.4)<br>or<br>The Respondent may file a Notice of Contention (Rule 42.08.5 – Form 27) |
| Within 14 days of instituting an appeal<br>Rule 42.10.1 | Appellant shall file a copy of the Appeal Book before the court or Judge below; and a list of all exhibits and the exhibits (Rule 42.10.1) |

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| When documents required by Rule 42.10 are filed | When the above documents have been filed, the Registrar will appoint a time, date and place for settling the Index of the Appeal Book (Rule 42.11.1) |
| Within 7 days of being notified of the appointment Rule 42.11.2 | Appellant shall prepare and file a Draft Index of the proposed contents of the Appeal Book (Rule 42.11.2) |
| Reasonable time before the appointment to settle the index Rule 42.11.3 | Appellant shall serve the draft index on the Respondent (Rule 42.11.3) |
| | Registrar and parties settle the index (Rule 42.12.2) |
| Within 7 days after the index has been settled Rule 42.12.3 | Appellant to file a clean copy of the settled index (Rule 42.12.3) |
| Within 21 days after the date on which the Index is settled Rule 42.13.15 | Appeal book to be filed by the Appellant – 10 copies to the Registrar and 3 copies to each Respondent (Rule 42.13.15)<br>Appellant shall also file a certificate that one of the 10 Appeal Books has been examined and is correct (Rule 42.13.16) |
| If required At any time after the filing of the Notice of Appeal Rule 42.15.1 | Registrar to give directions as to any matter which appears to be a convenient matter upon which to give directions or may issue a summons requiring the parties to attend before the Registrar (Rules 42.15.1, 42.15.2) |
| | The Registrar will provide a hearing date |

34. Care should be taken in preparation of the appeal and conferences should be arranged with counsel to discuss any perceived difficulties and to ensure that counsel understands the Commissioner's case. Tax Counsel will provide technical leadership through this process. The LSB case officer will ensure that all communications are relayed quickly between the litigation team and our external solicitors and counsel. Action plans should be agreed with counsel to ensure that all necessary research and preparation is undertaken early. Clear accountabilities should be established in the preparatory work to be done. Ideally a first draft of submissions will be provided to counsel by the Tax Office ensuring that the arguments the Commissioner wishes to advance are well set out.

35. Tax Counsel and the LSB case officer as a minimum must attend High Court hearings and provide assistance to counsel.

36. PS LA 2007/2 Management of Decisions of Courts and Tribunals must be followed to ensure that appropriate mitigation strategies are in place to manage any risks, and critical decisions and actions are communicated to senior staff and government. The CTC should be contacted in the event of any doubt during the course of preparation of a High Court case.

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| Subject references | |
| Legislative references | TAA 1953 Pt IVC<br>FCA 1976 33<br>FCA 1976 33(2)<br>FCA 1976 33(3)<br>Judiciary Act 1903 35A<br>Judiciary Act 1903 55ZF<br>Judiciary Act 1903 78B<br>Commonwealth of Australia Constitution Act 73<br>High Court Rules 2004 Pt 4<br>High Court Rules 2004 Pt 41<br>High Court Rules 2004 Pt 42<br>High Court Rules 2004 Sch 1<br>High Court of Australia (Fees) Regulations 2004<br>Superannuation Industry (Supervision) Act 1993 334 |
| Related public rulings | |
| Related practice statements | PS LA 1998/1; PS LA 2007/2; PS LA 2007/12; PS LA 2007/15; PS LA 2007/16; PS LA 2007/17; PS LA 2007/18 |
| Case references | |
| Other references | High Court Practice Direction No. 3 of 1996 |
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