# *PS LA 2007/23 - Alternative Dispute Resolution in ATO disputes and litigation*

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Note: This practice statement is being amended as a result of the publication of PS LA 2012/1. Until this amendment is finalised, references to escalation to the Tax Counsel Network or Centres of Expertise in this practice statement should be read having reference to the new guidelines for engagement of Law as provided in PS LA 2012/1.

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Australian Government
Australian Taxation Office

# Practice Statement Law Administration

# PS LA 2007/23

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**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 ATO staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs ATO staff must follow their business line's escalation process.*

| | |
|---|---|
| **SUBJECT:** | **Alternative Dispute Resolution in ATO disputes and litigation** |
| **PURPOSE:** | **To provide instruction to ATO staff on what policies and guidelines must be followed when attempting to resolve or limit disputes by means of alternative dispute resolution** |

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## STATEMENT

### ATO approach to Alternative Dispute Resolution

1. The ATO recognises and supports the use of Alternative Dispute Resolution (ADR) in appropriate cases as a cost effective, informal, consensual and speedy means of resolving disputes.

2. ADR may also be used to restrict the scope of discrete areas of a dispute including by clarifying technical issues, streamlining procedures and dealing with ongoing relationship issues between the parties.[1]

3. Relatively few ATO disputes are currently resolved through a judicial determination. Most disputes are finalised at some stage prior to a hearing. The ATO aims to resolve disputes as early as practicable in the dispute process.

4. Not all cases are suitable for ADR, but, for those that are, it is essential that parties make an informed consideration and select a process which is suited to the circumstances and nature of the dispute.

5. Commonwealth agencies and their legal services providers have an obligation under Appendix B to the Attorney-General's *Legal Services Directions 2005* to act as model litigants in the conduct of litigation and in alternative dispute resolution processes.[1A] The model litigant obligation requires agencies to endeavour where possible to avoid, prevent and limit the scope of legal proceedings including by giving consideration in all cases to ADR before initiating legal proceedings and by participating in ADR where appropriate. The requirement to consider alternative methods of dispute resolution is a continuing obligation from the time litigation is contemplated[1B] and throughout the course of litigation.[1C] When participating in ADR agencies must do so fully and effectively.[2] An obstructive or uncooperative attitude indicates a failure to participate in good faith.[3] However participation in good faith does not require a party to act other than in their self-interest.[4]

6. This practice statement should be read in conjunction with PS LA 2009/9 Conduct of Tax Office Litigation.

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[1] Page 5, Submission by the National Alternative Dispute Resolution Advisory Council in response to the *Issues Paper on the Review of the Legal Services Directions*.
[1A] Legal Services Directions 2005 Schedule Part 4 Dictionary section 15: **litigation**, unless otherwise indicated, includes proceedings before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes, and the preparation for such proceedings.
[1B] Legal Services Directions 2005 Appendix B section 5.1.
[1C] Legal Services Directions 2005 Appendix B section 2(e)(iii).
[2] Legal Services Directions 2005 Appendix B section 5.2.
[3] *Capolingua v. Phylum Pty Ltd (as Trustee for the Gennoe Family Trust and Ors)* (1991) 5 WAR 137.
[4] *Aiton Australia Pty Ltd v. Transfield Pty Ltd* [1999] NSWSC 996 [156].

### Disputes to which this practice statement applies

7. This practice statement is written primarily in terms relating to taxation disputes.[5] However many of the principles set out in the practice statement will apply to other disputes in which the ATO is a party.

## EXPLANATION

### Whether participating in ADR is appropriate

8. Officers playing a role in the management of ATO disputes particularly those in litigation must consider whether it would be appropriate to participate in some form of ADR to attempt to resolve the dispute. In doing so officers must have regard to the circumstances of the case, applicable law and relevant ATO policies, the attitude of the other party to ADR and the attitude of the relevant court or tribunal if in litigation.

9. By way of general observation the following are hallmarks of when ADR may be appropriate:

- there must be issues that are able to be negotiated
- the ATO has something to give
- the taxpayer/other party has something to give
- the dispute is capable of being settled within existing settlement policies and practices, and
- settlement must be preferable to judicial determination.

10. In practice ADR may be appropriate for ATO disputes if, for example:

- the dispute may be able to be resolved by having a **wide ranging discussion of the issues** on a non-prejudicial basis. An ADR practitioner may be able to facilitate a more effective and wide ranging discussion with a larger range of outcomes than one restricted to, for example, decisions on the issues in an objection against an assessment. To achieve resolution, parties to a dispute may be able to offer each other things that a court or tribunal has no power to order. The possible outcomes from such a broad discussion may be to the advantage of both parties to a dispute and allow an outcome which may be better suited to the needs of each party than that provided by a judicial determination of the issues.
- **a narrowing or clarification of the facts or issues** in the dispute is warranted, for example to reduce the scope and cost of subsequent litigation. If an agreement on the facts arising out of such an ADR process may affect or constrain future litigation, the business line (BSL) case officer should seek advice from the Tax Counsel Network (TCN), for a Priority Technical Issue, or Legal Services Branch (LSB) on the terms of the agreement.

[5] See paragraphs 10 to 14 of Code of Settlement Practice.

- it is likely to result in a **quicker and therefore more cost effective resolution** of the dispute or part of the dispute. While court and tribunal based mediator services may be of no extra cost to the parties, there may be cases where having the issues dealt with outside the court or tribunal may be a better option.
- **evidentiary difficulties** for one or both parties increase the risks of proceeding to hearing.
- complex or unique facts or issues in the dispute make a potentially costly and time-consuming judicial determination of the dispute of **little utility** to the Commissioner or other taxpayers.
- resolution of the dispute may facilitate a certain and/or an **earlier payment of any tax**.
- **building an improved ongoing relationship** between the ATO and the other party to the dispute is likely to improve their compliance with their taxation obligations.

11. ADR may not be appropriate where for example:

- it would be in the public interest to have judicial clarification of the issues in dispute and the dispute is a suitable vehicle to test the issues
- resolution can only be achieved by departure from an established 'ATO view' on a technical issue,[6] and
- the dispute is of a kind where the state of the relationship between the parties is such that any proposed ADR is unlikely to be successful.

12. ATO policies and guidelines which are relevant to whether participating in ADR or settling a particular dispute would be appropriate include:

- PS CM 2003/09 Resource Management in the ATO: Framework Statement
- Code of Settlement Practice[7]
- PS LA 2011/4 Recovering disputed debts and PS LA 2011/7 Settlement of debt recovery litigation, and
- PS CM 2004/05 Handling compensation and similar monetary claims against the ATO.

[6] Where it appears the technical view is in error it should be escalated to TCN or the relevant Centre of Expertise.
[7] The Code applies to settlements of taxation disputes whether or not they occur in the course of an ADR process.

## Authority to conclude settlements

### *Resolve the whole dispute*

13. When attempting to finalise a dispute through negotiation, it is highly desirable to strive to resolve all aspects of the dispute at once. For this reason it will be important to ensure that the spokesperson on behalf of the ATO has access to a variety of ATO resources. For example, in addition to dealing with a substantive taxation interpretation/assessment issue, it will often be very useful to deal with issues of penalty, interest, payment arrangements and release options at the same time. This can involve ensuring that one or more officers from the Operations Sub-plan are available at the time of any mediation or other ADR session.

14. Officers have a duty to ensure they have appropriate delegation or authorisation in relation to decisions they make and must ascertain the limits of their power. This includes spending delegations.

## When to consider ADR

15. There is no universally optimal time to refer a dispute to ADR. ADR may not be useful unless there is a realistic prospect of achieving some of the positive outcomes of ADR such as resolving the dispute, narrowing the issues in the dispute, or resolving issues hindering progress of the dispute to trial. Indiscriminate or overzealous use of ADR may increase the costs of the parties and delay a judicial determination by adding another layer to the process of finalising the dispute.

16. When the purpose of referring a dispute to ADR is to attempt to finalise the dispute as a whole, referral at too early a stage may mean there is little likelihood of achieving a resolution of the dispute as the parties may not yet be ready to settle. Assessment of whether and when a dispute should be referred to ADR requires good judgment and a sound understanding of the issues, relevant law, relevant ATO policies and guidelines, the ADR processes available and whether ADR is likely to assist in the circumstances and particular stage of the dispute.

17. When the purpose of referring a dispute to ADR is to manage or limit the scope of the issues or to resolve a discrete portion of the dispute, the appropriate time for referral to ADR will also need to be carefully considered in order to maximise the opportunity to resolve that portion of the dispute.

18. When the purpose of referring a dispute to ADR is to manage interlocutory processes, delaying progress to trial of substantive issues, consideration of referral of such issues to ADR may be included as part of the initial case planning strategy and before any delays in progressing to trial occur. Recommending or agreeing to ADR either with a court appointed or an external ADR practitioner may save both parties substantial costs and assist in allowing an earlier hearing of the primary issues in dispute.

19. An ADR process may assist in the resolution of a dispute at any stage in the dispute including:

    - when a position paper is issued by the ATO in the course of an audit, and
    - at the objection stage prior to a decision disallowing the objection.

20. Consideration should be given to ADR options at an early stage in a litigated dispute as ADR processes may assist in limiting costs and achieving a more

timely resolution of, or limiting the scope of, proceedings. This consideration should be made at the Instruction SILC (Strategic Internal Litigation Committee[8]) in a dispute in litigation and if ADR at that stage is not appropriate, again at each subsequent SILC as the litigation progresses and whenever requested to do so by the court, tribunal or the other party to the dispute.

### Types of ADR

21. ADR is a very broad term and includes direct negotiation of disputes by the parties without outside assistance. Where negotiation between the parties does not resolve the dispute, the case officer or team handling the dispute should consider whether it would be appropriate to participate in other ADR processes, but care should be taken not to increase costs by adding another layer to the dispute resolution process.[9]

22. ADR processes can generally be classified as facilitative, advisory or determinative, and be expected to have the following features:

- In facilitative processes an ADR practitioner assists the parties to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole of the dispute. Mediation is an example of facilitative dispute resolution.
- In advisory processes an ADR practitioner considers and appraises the dispute and provides advice on some or all of the facts of the dispute, the law, and possible or desirable outcomes. Neutral evaluation and case appraisal are examples of advisory processes.
- In determinative processes an ADR practitioner evaluates the dispute and makes a determination. Arbitration and expert determination are examples of determinative processes.
- In combined dispute resolution processes the ADR practitioner plays multiple roles. For example in conciliation and conferencing, the ADR practitioner may facilitate discussions as well as provide advice on the merits of the dispute.

23. Facilitative and advisory ADR processes or a combination of the two are most likely to be applicable to ATO disputes. Determinative processes such as arbitration are not generally appropriate for ATO disputes.

### ADR in litigation

24. When a dispute is in litigation the parties can participate in ADR using a court or tribunal appointed ADR practitioner or agree on an ADR practitioner of their choice.

[8] SILCs are convened by the LSB officer for all Court and Tribunal matters. Other attendees in the SILC will vary depending on the BSL involved and the strategic importance of the case, but are likely to include relevant officers from the BSL and Centres of Expertise, and the tax counsel. The first SILC is held within two weeks of the commencement of litigation, and subsequent SILCs are mandated at each critical stage of litigation.

[9] Federal Civil Justice Strategy Paper, December 2003 p133.

### *ADR in the Administrative Appeals Tribunal*

25. The term *alternative dispute resolution processes* is defined in section 3 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) to mean procedures and services for the resolution of disputes and includes:

    (a) conferencing

    (b) mediation

    (c) neutral evaluation

    (d) case appraisal

    (e) conciliation, and

    (f) procedures or services specified in the regulations,

    but does not include:

    (g) arbitration, or

    (h) court procedures or services.

26. Division 3 of Part IV of the AAT Act relates to alternative dispute resolution processes. ADR processes may be conducted by a member or officer of the Administrative Appeals Tribunal (AAT) or a person engaged for the purpose and considered to be suitable by the Registrar (section 34C and section 34H of the AAT Act). Parties will not incur any costs of the ADR unless an external ADR practitioner is requested by the parties.

27. Information provided at ADR is not able to be used in a later hearing unless parties agree (section 34E of the AAT Act). However a case appraisal or neutral evaluation report prepared by the person conducting the ADR will be able to be admitted during the hearing unless one of the parties objects prior to the hearing (subsection 34E(3) of the AAT Act). A party may object to the person conducting the ADR participating in the hearing (section 34F of the AAT Act).

28. Where agreement is reached between the parties during ADR in relation to part or all of the proceedings the Tribunal will allow the parties seven days to reconsider, and if they choose, withdraw from the agreement (section 34D of the AAT Act).

29. The AAT has published on its website (http://www.aat.gov.au) general background information on ADR as set out in the AAT Act as well as *Alternative Dispute Resolution Guidelines and Process Models* for each of the five types of ADR mentioned at paragraphs 25(a) to 25(e) of this practice statement.

30. ADR at the AAT includes the Tribunal's routine practice of referring all matters to a conference. LSB officers or an external legal service provider for the ATO should make detailed preparation for and participate fully in conferences.

### *ADR in the Federal Court*

31. Section 53A of the *Federal Court of Australia Act 1976* states that any proceedings or part of proceedings can be referred by the Court to mediation or arbitration. The Court will not refer proceedings to arbitration without the consent of the parties. Order 72 of the Federal Court Rules relates to mediation and arbitration. Rule 7 of Order 72 sets out the way a Mediation Conference must be conducted.

32. Practice Note 8 issued by the Chief Justice of the Federal Court on 8 April 1994 relates to Assisted Dispute Resolution. The Practice Note states that if mediation is successful the agreement of the parties may be embodied in a consent judgment. *Practice Note TAX 1: Tax List* issued by the Chief Justice of the Federal Court on 25 September 2009 sets out revised arrangements for management of tax cases to *promote the just and efficient determination of tax disputes in a timely manner*. The Pre-Trial Schedule which is established at the scheduling conference includes consideration of whether ADR is an appropriate interlocutory step.[9A]

33. The Federal Court has also published a significant amount of material relating to mediation on its website (http://www.fedcourt.gov.au) as a guide for litigants. Most mediations are conducted by Registrars however occasionally the Court will refer the case to an external lawyer to conduct the mediation. Where the mediation is conducted externally the parties will pay the agreed fee to the mediator.

34. The mediator will not disclose information about the mediation to a Judge or anyone else. Where a part of the case is settled at mediation the Federal Court Rules allow the mediator to report to the Court only on the agreement reached between the parties. At the end of the mediation the only other record of the mediation kept by the Court is a note that the mediation took place.

### *ADR in the Federal Magistrates Court*

35. Division 2 of Part 4 of the *Federal Magistrates Act 1999* applies to dispute resolution for proceedings other than family law or child support proceedings. Referrals to mediation may be made by the Court without the consent of the parties and evidence of any admissions during mediations is not admissible in any court (section 34 of the *Federal Magistrates Act 1999*). Referrals to arbitration may only be made with the consent of the parties (section 35 of the *Federal Magistrates Act 1999*).

### *ADR in the state Supreme Courts*

36. Each of the state Supreme Courts has separate rules relating to ADR and different types of ADR are available. For example, mediation is available in the Supreme Courts of NSW and Victoria and in the Supreme Court of Queensland ADR takes two forms – mediation and case appraisal.

## Confidentiality and admissibility of communications made during ADR

37. For ADR processes to be effective in bringing disputes to a conclusion without unnecessary delay and with finality, it is highly desirable for negotiations to be conducted on an ‘in-confidence’ and ‘without prejudice’ basis. ADR

[9A] Practice Note TAX 1: Tax List at clause 5.4(c).

practitioners have an ethical obligation not to disclose information obtained during an ADR process.[10] This promotes open and honest communication during the ADR process. ADR practitioners also have an obligation not to disclose information provided during the ADR process by one party in a session without the consent of the other party. Tax officers involved in negotiation also have an obligation to observe any lawful commitment made to another party in connection with information obtained during the ADR process, including only to discuss the information with colleagues on a 'need to know' basis.

38. Privilege attaches to 'without prejudice' communications made in the course of negotiations for the compromise of legal claims on the express or implied condition that they are not to be used in evidence without the consent of both parties.[11] Subsections 131(1) and (2) of the *Evidence Act 1995* exclude evidence of settlement negotiations generally. Where an ADR process is conducted by a court or tribunal officer the rules of the court or tribunal will apply to exclude evidence subject to some exceptions. Where the parties are referred to ADR by the Federal Court or AAT, section 53B of the *Federal Court of Australia Act 1976* and section 34E of the AAT Act determine whether any admissions during the ADR are admissible in later proceedings.

39. A sensible approach may be for the parties and the ADR practitioner to make an agreement of confidentiality at the start of the ADR process. Parties may also agree that certain matters may be disclosed. An example of such an agreement is the following:

> The mediator and the parties and all persons brought into the mediation will not disclose and will not seek to rely on or introduce as evidence in court proceedings any of the following:
>
> - exchanges whether oral or documentary
> - views expressed or suggestions or proposals made by the mediator
> - admissions made
> - the fact that any party has indicated willingness to accept any proposal for settlement by the mediator or by any party, or
> - notes or statements made.[12]

40. Note that a confidentiality provision might typically allow for a party to make a disclosure about an agreement:

- to its professional advisers or insurers – if those persons undertake to keep the terms confidential
- to a person or body with the power to compel such disclosure, or
- in the case of the ATO – to the Parliament, or a Parliamentary Committee, or a Commonwealth Minister or other external scrutineer to respond to any issue arising from the dispute.

41. Section 53B of the *Federal Court of Australia Act 1976* makes admissions to mediators during mediation under section 53A of the *Federal Court of Australia Act 1976* inadmissible in later proceedings. Section 34 of the *Federal Magistrates Act 1999* also has similar terms.

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[10] *Rajski & Anor v. Tectran Corporation Pty Limited and Ors* (2003) NSWSC 476 (26 May 2003).
[11] *Field v. Commissioner for Railways* (NSW) (1957) 99 CLR 285.
[12] Lancken, S 'The responsibility of the neutral in respect of mediation confidentiality', *ADR Bulletin*, 2004, 7(2), p 25.

42. Section 34E of the *AAT Act* excludes from admissibility evidence of anything said or done at an ADR process. Exceptions relate to a situation where:

- a party agrees to the evidence being admissible, and
- a case appraisal or neutral evaluation report has been prepared by the ADR practitioner unless a party objects to the admission of the report.

43. The *AAT Act* does not exclude a member of the AAT who has conducted an ADR process from participating in the hearing. However if a party notifies the AAT of an objection to the person participating in the hearing, section 34F provides that the person will not be entitled to participate.

**Choice of ADR practitioner and costs of ADR**

44. If using a third party ADR practitioner, the practitioner must be an independent, impartial and neutral person who is sufficiently trained and experienced in ADR processes to conduct the particular ADR process agreed on by the parties or directed by the court or tribunal. The experience of the ADR practitioner must be sufficient to deal with the level of complexity or sensitivity of the particular dispute. Selection can be made from a number of sources including Law Societies, the Australian Commercial Dispute Centre, the Institute of Arbitrators and Mediators Australia, and Lawyers Engaged in ADR (LEADR). LSB is able to assist in selection and engagement of a suitable ADR practitioner.

45. When a dispute is in litigation the parties can participate in ADR using a court or tribunal appointed ADR practitioner or conduct the ADR entirely outside the court or tribunal processes using an ADR practitioner selected by the parties.

46. *Annexure A: Obtaining Legal Services* to *Law Administration Practice Statement PSLA 2009/9 Conduct of Tax Office Litigation* sets out ATO policy in relation to approving and/or engaging the services of ADR practitioners. Costs of ADR will generally be shared equally between the parties. In exceptional situations consideration will be given to the ATO meeting the costs of ADR, for example in employment law disputes with its own staff.

**Roles and responsibilities in ADR**

47. The following table sets out the roles and responsibilities of the various ATO stakeholders in the course of an ADR process:

| Task | Responsibility [pre-litigation stage] | Responsibility [litigation stage][13] |
|---|---|---|
| Identifying and reviewing ADR opportunities | BSL case officer | LSB case officer in consultation with litigation team |
| Providing advice on ADR generally | LSB case officer | LSB case officer |
| Agreeing to ADR | LSB case officer | LSB case officer (or TCN) in consultation with litigation team |
| Approval of expenditure on | LSB case officer | LSB case officer |

[13] If a dispute is in litigation all decisions including the decision on whether to settle are made by the Law Sub-plan. In practical terms the LSB case officer, or TCN if the case involves a Priority Technical Issue, will usually make the decision. Any differences of view relating to settlement can be resolved through the Law Sub-plan escalation processes.

| | | |
|---|---|---|
| ADR practitioner | | |
| Selecting ADR practitioner | BSL case officer with assistance of BSL or LSB ADR specialists if necessary | LSB case officer (or TCN) in consultation with litigation team |
| Engaging external ADR practitioner[14] | LSB | LSB |
| Documenting each stage of ADR process | BSL case officer | LSB case officer |
| Agreeing the ADR process used [and if necessary a protocol for the process] | BSL case officer with assistance of LSB and/or TCN | LSB case officer (or TCN) in consultation with litigation team |
| Preparing for and attending the ADR | At least 2 BSL officers | At least 2 members of litigation team |
| Drafting documents at the ADR[15] | BSL case officer | LSB case officer (or TCN) in consultation with litigation team |
| Agreeing terms of an agreement at ADR | BSL delegate to conclude settlements[16] | LSB case officer (or TCN) in consultation with litigation team |
| Authorising a settlement arising out of ADR | BSL delegate to conclude settlements – may be more than one depending on issues subject to resolution | BSL delegate to conclude settlements – may be more than one depending on issues subject to resolution |
| Completing settlement documentation including entering data on settlement register, raising any agreed amended assessment/s | BSL case officer | BSL case officer |
| Completing the ADR Register | LSB case officer | LSB case officer |

### *Agreeing a protocol for the ADR*

48. It will be necessary for the parties and the ADR practitioner to agree on protocols for the ADR. The protocol will be different in different types of disputes and in different ADR processes. If the dispute is being litigated and an officer of the court or tribunal is conducting the ADR, then guidelines of the court or tribunal may set out the protocol for the ADR process.

49. If the parties determine the ADR process and the protocol to be followed, the circumstances of each dispute will need to be considered to decide what protocol will be appropriate for that dispute, for example:

- the type of ADR process to be used
- where the ADR process will be conducted (ideally at a neutral venue)
- the role of the ADR practitioner
- the terms and conditions of the engagement of the ADR practitioner

[14] Corporate Procurement undertake, manage and supervise all complex procurements (see PS CM 2005/19 Spending of public money – consultancy services).
[15] Documents should include a term as to whether they are intended to be admissible in any later proceedings.
[16] If it is not possible for a tax officer with authority to finalise the dispute or conclude a settlement to attend the ADR an authorised person should be available by phone so that an in-principle agreement can be made during the ADR.

- the responsibilities of the ADR practitioner
- all communications during an ADR process are 'without prejudice' and confidential
- what records are made and kept of the ADR process
- whether any documents arising in the course of the ADR are admissible in later proceedings or for any other purpose
- whether legal advisers are permitted during the ADR process, and
- early termination of the ADR process.

50. LSB is able to provide advice on the above related issues.

### *Who attends the ADR for the ATO?*

51. At least two tax officers should attend an ADR process. This requirement is consistent with the requirements of the Code of Settlement Practice. If the dispute is in litigation, the litigation team will decide who will attend the ADR. The LSB case officer should always attend the ADR. At least one other person from the litigation team should also attend the ADR. Possible attendees will include the BSL decision maker, external legal service providers, TCN representative, the BSL case officer and the Debt case officer. Tax Officers present at the negotiation should be clear in advance about their respective roles, including who is to be the principal negotiator on the day.

52. Wherever practicable the ATO representatives attending the ADR should have authority to settle the matter or, if this is not practicable, clear instructions on the possible terms of settlement or finalisation of the dispute that would be acceptable to the ATO.[17] The authority to finalise the dispute or to conclude a settlement of a tax technical dispute is granted to different level officers depending on the nature of the dispute. LSB case officers will be responsible for providing advice to the BSL on who is authorised to conclude a settlement in any litigation. While it is preferable that a person with authority to finalise the dispute or to conclude a settlement attends the ADR this will not always be possible. In circumstances where it is not possible an authorised person should be available by phone so that an in-principle agreement can be made between the parties on the day of the ADR.

### *Preparation for ADR*

53. Those attending the ADR must have a good understanding of the facts, issues, law, public rulings and ATO policies etc underpinning the dispute. Prior to the ADR they must have carefully considered and creatively explored any appropriate options for resolution of the dispute and discussed these with a person authorised to finalise the dispute or conclude a settlement.

54. Tax officers attending the ADR must be fully conversant with the relevant ADR process. LSB will provide advice where necessary on the process. Prior to the ADR process the LSB officer should send a letter to the taxpayer or their representative [and to the court or tribunal if in litigation] to advise of the ATO's approach in ADR. Provision of these details in advance of the ADR process will give the taxpayer or the court/tribunal an opportunity to discuss any issues arising prior to the day of the ADR process.

[17] Appendix B to the Legal Services Directions 2005: The Commonwealth's obligation to act as a model litigant – paragraph 5.

### *Participation in ADR*

55. It is highly desirable to persist with negotiations at ADR while there is any real possibility of a positive outcome. On occasion this may take more than one day – in fact it can sometimes be beneficial for the parties to have an opportunity to re-evaluate their settlement opportunities during a break in proceedings, even overnight. However it is equally desirable that the proceedings should be brought to an end if it becomes clear that there is no real possibility of a positive outcome. The time when this can be evaluated will depend on the circumstances of the particular dispute and of the features of the particular ADR process.

### *Documents drafted in the course of ADR*

56. Tax officers attending the ADR must ensure that any documents drafted during the ADR process are clear, definite and unambiguous and that they include a term stating the intention of the parties as to:

- whether, and when, any further steps are to be taken by either party after the settlement to give it effect, for example raising an amended assessment, lodging a notice of discontinuance at court or making a payment, and
- whether the document can be admissible in later proceedings.

57. It may be necessary for the tax officer to arrange to take facilities to the ADR venue to create documents, for example a portable computer and printer to create, edit or print an instrument recording the terms of the settlement for execution by the parties on the day.

## Settlements of taxation disputes following ADR

58. For the purposes of achieving certainty and finality for the parties, it is highly desirable for the terms of any negotiated settlement to take effect immediately on execution of a settlement agreement. In AAT ordered mediation a 'cooling off' period is allowed (see paragraph 28 of this practice statement).

59. A settlement of a taxation dispute must be made in accordance with the Code of Settlement Practice which sets out guidelines for settlement of disputed taxation liabilities or entitlements. The Code applies to settlement of taxation disputes whether or not they occur in the course of an ADR process.

60. If a dispute is in litigation all decisions should be made in a collaborative way with all of the stakeholders involved in the litigation, but the final decision on whether to settle is made for the ATO by the Law Sub-plan. In practical terms the LSB case officer, or TCN if the case involves a PTI, will usually make the final decision. Any differences of view relating to settlement can be resolved through the Law Sub-plan escalation processes.

**Amendment history**

| Date of amendment | Part | Comment |
|---|---|---|
| 20 July 2011 | Paragraph 12 and references | Changed ATO Receivables Policy to PS LA 2011/4 and PS LA 2011/7. |
| 25 October 2010 | Paragraph 5<br>Paragraph 12<br><br>Paragraph 49<br>Paragraph 54 | Minor revisions to amend grammar.<br>Minor revisions to make typographical changes.<br>Minor revisions to amend grammar.<br>Text added instructing contact with the taxpayer prior to ADR. |
| 7 May 2010 | Paragraph 5<br><br><br><br>Paragraph 6<br><br>Paragraph 32<br><br>Paragraph 46<br>Paragraph 47<br><br>References | Revise the scope of model litigant obligation requirements and references to the Legal Services Directions 2005<br>Update reference from PS LA 2007/12 to PS LA 2009/9<br>Add information about and reference to Practice Note TAX 1<br>Add reference to PS LA 2009/9<br>Table of roles and responsibilities in ADR process updated<br>Update reference from PS LA 2007/12 to PS LA 2009/9 |
| 20 October 2008 | Paragraph 5<br><br>Footnote 2 | Add to the scope of model litigant obligation requirements<br>Add a reference to the Legal Services Directions 2005 |
| 11 September 2008 | Paragraph 12<br><br>References | References to PS LA 2006/11 removed<br>Reference to PS LA 2006/11 removed and link to ATO Receivables Policy added |

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|---|---|
| Subject references | alternative dispute resolution; litigation; settlement |
| Legislative references | AAT Act 1975 3<br>AAT Act 1975 Pt IV Div 3<br>AAT Act 1975 34<br>AAT Act 1975 34C<br>AAT Act 1975 34D<br>AAT Act 1975 34E<br>AAT Act 1975 34E(3)<br>AAT Act 1975 34F<br>AAT Act 1975 34H<br>Evidence Act 1995 131(1)<br>Evidence Act 1995 131(2)<br>Federal Court of Australia Act 1976 53A<br>Federal Court of Australia Act 1976 53B<br>Federal Magistrates Act 1999 Pt 4 Div 2<br>Federal Magistrates Act 1999 34<br>Federal Magistrates Act 1999 35 |
| Related public rulings | |
| Related practice statements | PS CM 2003/9; PS CM 2004/5; PS CM 2005/19;<br>PS LA 2009/9; PS LA 2011/4; PS LA 2011/7 |
| Case references | Capolingua v. Phylum Pty Ltd (as Trustee for the Gennoe Family Trust and Ors) (1991) 5 WAR 137<br>Aiton Australia Pty Ltd v. Transfield [1999] NSWSC 996 [156]<br>Rajski & Anor v. Tectran Corporation Pty Limited and Ors (2003) NSWSC 476 (26 May 2003)<br>Field v. Commissioner for Railways (NSW) (1957) 99 CLR 285 |
| File references | 07/7388 |
| Date issued | 22 September 2007 |
| Date of effect | 22 September 2007 |
| Other Business Lines consulted | All |