# *PS LA 2008/17 (Withdrawn) - Obtaining legal services*

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This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9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 2008/17

This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9.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:** | **Obtaining legal services** |
| **PURPOSE:** | **To set out the Tax Office policy regarding the corporate and legal requirements that must be followed when engaging internal or external legal service providers for litigation, legal advice or other legal services, or when engaging the services of alternative dispute resolution practitioners.** |

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## STATEMENT

1. This practice statement applies to all staff proposing to:

   - engage the services of internal legal service providers via the Legal Services Branch (LSB)
   - approve and/or engage the services of external legal service providers,[1] and
   - approve and/or engage the services of alternative dispute resolution (ADR) practitioners.[2]

2. This practice statement does not apply to:

   - Tax Agents Board related legal matters (except for the requirement to have all engagements of legal service providers authorised through the ATOLegals system)
   - the engagement of external specialists in fields unrelated to law, such as accounting specialists required at the pre litigation stage
   - criminal prosecutions that require the engagement of the Commonwealth Director of Public Prosecutions (CDPP) by the Tax Office's In-House Prosecutions Service or Serious Non-Compliance (SNC),[3] and
   - actions arising pursuant to the *Proceeds of Crime Act* 2002 (POCA).[4]

3. LSB is the central co-ordination point within the Tax Office for the provision of legal services. All requests for external legal services must be referred through LSB.

4. Any officer who wishes to engage a legal service provider must obtain the approval of their manager before approaching LSB either for in-house legal services, or to engage an external legal service provider.

### Related practice statements

5. Related Law Administration Practice Statements include:

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

[1] External legal service providers include panel firms of solicitors, the Australian Government Solicitor (AGS) and senior and junior counsel.

[2] An ADR practitioner may not necessarily be a legal service provider, but for the purposes of this practice statement, unless otherwise stated, the policy relating to the engagement of external legal service providers will equally apply to ADR practitioners. For more information on the Tax Office policy on the use of ADR, see Law Administration Practice Statement PS LA 2007/23 Alternative Dispute Resolution in Tax Office disputes and litigation.

[3] This practice statement similarly does not apply to matters handled by the Tax Office's In-House Prosecutions Services that are not referred to the CDPP. Most of these matters relate to undefended prosecutions for failure to lodge Income Tax Returns, Business Activity Statements, or superannuation Member Contributions Statements. Other matters handled by the In-House Prosecutions Service that are not referred to the CDPP include undefended prosecutions of unregistered Tax Agents.

[4] Legal Services will provide support to SNC in preparing the brief, considerations of evidence, etcetera when requested by SNC. Any requests for advice from solicitors or counsel as regards POCA will require the services of LSB.

- PS LA 2007/15 Briefing counsel
- PS LA 2005/22 Litigation and priority technical issues
- 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 2007/23 Alternative Dispute Resolution in Tax Office disputes and litigation.

## EXPLANATION

### Types of legal matters involving the Commissioner

6. The Commissioner is engaged in matters of a legal nature every day. The most prevalent matters concern the recovery of tax related debts, and tax related decisions that arise under Part IVC of the *Taxation Administration Act 1953* (TAA).

7. Other legal matters the Commissioner may be involved in which will require the services of LSB include:

    - seeking legal advice about the interpretation of legislation, the legality of certain actions or proposed actions, such as the conduct of section 264 of the *Income Tax Assessment Act 1936* (ITAA 1936) interviews, employment matters and matters involving contracts, intellectual property and copyright
    - disputes about Freedom of Information (FOI), securing of taxpayer assets to ensure payment of tax debts and insolvency matters
    - the service upon the Commissioner of a summons or subpoena requiring the production of documents or giving evidence in proceedings, for instance, prosecution proceedings or proceedings in the Family Court of Australia[5]
    - applications by the Commissioner for penalties under the promoter penalty provisions, and under the *Superannuation Industry (Supervision) Act 1993*
    - recovery of civil penalties
    - instances where the Commissioner requests another agency to act on his behalf, and that agency subsequently incurs legal expenses to carry out the request for example, where the Commissioner requests the Australian Federal Police (AFP) to execute a warrant on his behalf, and the AFP subsequently incurs legal expenses arising from that execution
    - instances where the Commissioner indemnifies a liquidator or trustee and that liquidator or trustee initiates court action, and
    - claims for monetary compensation arising from maladministration or negligence, and reviews of administrative decisions and reviews of tax

[5] The Commissioner may or may not be a party in the proceedings.

related decisions under the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903*.

**Legal Services Branch**

8. LSB is the corporate budget holder for most of the Tax Office's legal services. LSB provides in-house legal services, and is the central co-ordination point in the Tax Office for obtaining legal services from external providers. This ensures that:

- the Tax Office is better able to monitor compliance with obligations under the Attorney General's *Legal Service Directions 2005* in particular, its obligation to act as a model litigant
- instructions to external legal service providers are consistent and in accordance with Tax Office processes and procedures
- the Tax Office can monitor workloads, costs and trends in the use of external legal services and ADR services
- the Tax Office can monitor the quality and timeliness of legal advice and litigation services received from external legal service providers
- the Tax Office can assess and match legal service needs with cost-effective service delivery for example, by not incurring the cost of obtaining similar advice from different legal service providers
- the Tax Office has a risk management process in place whenever the Commissioner is a party to litigation[6] or required to appear as a witness in any litigation, and
- the central reporting system for legal services expenditure, ATOLegals, is appropriately utilised and managed to capture all relevant expenditure.

9. LSB provides legal services in the following manner:

- *In-House Legal Services – carriage of the case*

  This can be in relation to advice or litigation. In this situation, LSB will undertake all solicitorial functions, any necessary advocacy, and also facilitate communication between all relevant stakeholders.

- *External Legal Service Providers*

  Where appropriate,[7] LSB will engage external legal service providers in relation to advice or litigation. LSB should consult with the business line (BSL) requesting the legal advice, and take into consideration the legal, policy and economic aspects and risks associated with the issues relevant to the advice sought to determine whether, which and how many external legal service providers are necessary. Where it is appropriate for an external legal service provider to be engaged, LSB will undertake many of the solicitorial functions, including case management, and facilitate communication between all stakeholders. This is vital as these cases will often involve a number of internal stakeholders such as Tax Counsel

[6] See PS LA 2007/16 Risk management in litigation.
[7] Generally, litigation involving a Priority Technical Issue (PTI) should have the involvement of an external legal service provider.

Network (TCN) and Centres of Expertise (CoEs) as well as the BSL. LSB will consult with all relevant stakeholders, but will be the final decision maker as to which external legal service providers are selected to represent the Commissioner.

10. Certain matters are not referred to LSB by a BSL but are referred directly to LSB from outside the Tax Office. Once notified, LSB will advise the appropriate areas of the Tax Office accordingly. These matters include:

- Federal Court Part IVC Tax Appeals – via the AGS (See Federal Court Rules Order 52B Rule 4(4) Commencement of appeals)
- Administrative Appeals Tribunal (AAT) Part IVC Tax Appeals – direct notification to LSB by the AAT
- other litigation where the Commissioner is the respondent – direct service by the Applicant on LSB
- subpoena – served directly on LSB or via mail
- FOI applications – directly to LSB via mail, and
- maladministration and related monetary claims – directly to LSB via mail.

11. Where a BSL receives notification directly of a legal proceeding in relation to which legal services are required, it must advise LSB in writing (via the regional manager of the relevant LSB stream) immediately and also arrange for the notice/defence/appeal to be provided to LSB immediately.

12. Matters that are initiated internally will generally relate to the seeking of advice. However, there are also a range of matters where the Commissioner will commence proceedings. These include:

- actions for recovery of tax-related and other debts
- company and personal insolvency (including bankruptcy) matters
- securing taxpayer assets to ensure funds for payment of tax related debts for example Mareva Injunctions
- applications under the promoter penalty provisions (primarily seeking injunctions to prevent certain activities)
- civil prosecutions under the Superannuation legislation
- declaratory proceedings, and
- enforcement of contractual and other commercial matters.

13. To engage the services of LSB, the BSL officer should make initial contact with the regional manager of the relevant LSB stream. An outline of the legal assistance requested must be provided so that appropriate resources can be allocated.

14. The roles of litigation stakeholders are detailed in PS LA 2007/12 Conduct of Tax Office Litigation in Courts and Tribunals. For a discussion about the roles of relevant stakeholders in strategic and/or PTI litigation matters, refer to PS LA 2005/22 Litigation and priority technical issues.

## Early involvement of LSB in potential Federal Court litigation

15. On 21 April 2008, the Federal Court of Australia issued the Directions for the Taxation List which aims to improve the conduct and management of tax cases. These new Directions impose a strict timetable for Part IVC Tax Appeals filed in the Federal Court at first instance. As a result, the timetable leading to hearing is significantly shortened and times for filing documents and evidence are also significantly brought forward with little or no opportunity for extensions of time.

16. To ensure that the Commissioner complies with the abbreviated timetable contained in the Directions, a Litigation Risk Matrix has been developed to identify cases at the objection stage which are likely to proceed to litigation. Where it looks likely that an objection decision will be litigated, there are additional steps that need to be followed to ensure that all avenues aimed at preventing the ongoing dispute with the taxpayer are exhausted.

17. Where likely litigation cases are identified, the BSL will work with the taxpayer to endeavour to resolve the dispute. This may include the BSL contacting the ADR Network for assistance. If the objection decision continues to look like it is headed for litigation, the relevant BSL must contact LSB via the relevant LSB Part IVC Manager.

18. For those cases where an appeal appears likely to be filed in the Federal Court, the LSB Part IVC Manager will work with the BSL to reduce the risk of litigation where possible and to prepare the case for litigation. A main focus will be the preparation of a draft Appeal Statement and the management of documents and evidence prior to the filing of an application.

## External legal service providers

### *Solicitors*

19. There are currently a number of panels of solicitors in place which provide legal services to the Tax Office in particular areas of law:

- *Debt Litigation Panel* – litigation and legal advisory work in relation to revenue collection, corporate insolvency law, bankruptcy and enforcement action.
- *General Law Panel* – litigation and legal advisory work in relation to areas of non-tax law including:
  - FOI
  - privacy and secrecy provisions
  - access and information-gathering issues
  - commercial law
  - employment and anti-discrimination (for example covering issues arising under the *Public Service Act 1999* and other statutes relevant to the management and behaviour of staff)
  - tort law
  - defamation, and

- other non-tax issues arising under laws such as *Crimes Act 1914*, *Criminal Code Act 1995, POCA* and the *Financial Management and Accountability Act 1997*.

- *Tax Technical Litigation and Tax Legal Advice Panel* – litigation and legal advisory work in relation to such matters as:
  - all litigation undertaken under Part IVC of the TAA involving reviewable decisions, including assessments and private rulings
  - declaratory proceedings brought in any court that will directly affect the taxation liability of a taxpayer
  - 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 ITAA 1936 and the *Income Tax Assessment Act 1997*, or the TAA, and
  - other tax related litigation, such as decisions under section 334 of the *Superannuation Industry (Supervision) Act 1993.*

20. There are areas of work, such as 'tied work' which cannot be undertaken through the panel system and must be briefed directly to AGS. 'Tied work' and a more general discussion on the role of external legal services in litigation are covered in Law Administration Practice Statement PS LA 2007/12 Conduct of Tax Office Litigation in Courts and Tribunals.

### *Counsel*

21. Counsel may be engaged to provide legal advice or to represent the Commissioner in legal proceedings either:
    - through an external solicitor, or
    - by direct brief from an LSB officer.

22. When briefing counsel, staff must follow the guidelines set in PS LA 2007/15 Briefing counsel.

### *ATO Special Counsel*

23. The Tax Office may retain former Judges, Queens Counsel and Senior Counsel to perform services for the Tax Office. They are referred to by the title ATO Special Counsel. Their services are usually limited to the provision of advice, on matters of significance to the Tax Office.

24. TCN facilitates access to ATO Special Counsel and undertakes a review of all briefing materials forwarded to ATO Special Counsel to ensure that such materials are of an appropriate quality. All requests seeking access to Special Counsel must be referred to the appropriate person in TCN.

25. To assist with quality control BSLs should work with LSB in the first instance to ensure that the briefing materials are of an appropriate standard.

### *Alternative Dispute Practitioners*

26. These practitioners may or may not be legal practitioners. See PS LA 2007/23 Alternative Dispute Resolution in Tax Office disputes and litigation

### *Authorisation to engage external providers – ATOLegals*

27. Once it is determined that it is appropriate to engage an external legal service provider, including ADR practitioners, LSB must commence the process by creating a work item on ATOLegals, the central reporting system for legal services expenditure. All ATOLegals work items must originate from LSB. Once completed, the work order form must be forwarded to an authorised officer of LSB (listed on ATOLegals) for approval.

28. The approval will be made within two business days from the time of receipt unless further information is requested by the LSB authorising officer.

29. The ATOLegals database details legal work undertaken by all external legal service providers, including ADR practitioners, and sets out details of their engagement and invoices. This ensures that the Tax Office:

- captures, records and reports legal services expenditure
- knows and understands the nature of all legal services procured
- monitors the use and performance of external legal service providers, and
- has information on fees payable.

30. LSB must authorise all requests to engage the services of an external legal service provider. Initial written instructions to an external legal service provider (other than direct briefs to counsel)[8] must be accompanied by an ATOLegals form.

31. A new ATOLegals referral is required for all new matters. A new matter occurs when the litigation moves to a new phase for example the initial proceedings will be a new matter and any subsequent appeal will be a new matter. Any advice arising during the course of the proceedings will not be a new matter. Such advice might, for example, be on evidence or prospects of success or the interpretation of a provision or case.

32. An existing ATOLegals referral number must not be used to seek multiple services from an external provider, even if in connection with a single project or for the general purposes of a single business line.

33. In relation to requests for advice outside of litigation every instance of a discrete new request for advice (even if related to a previous request) will be a new matter except where some minor request for clarification of an advice is being sought. For example during the course of an audit, advice might be sought on three separate occasions for the use of access powers, the formulation of a notice under a tax law, and the meaning of a term or provision of a document. This will mean that there have been three discrete instances for advice requiring three ATOLegals numbers and authorisations.

[8] Whilst direct briefs need to be captured on ATOLegals, the form does not need to be sent to Counsel as Counsel and alternative dispute resolution practitioners will send their invoices directly to the LSB case officer, and not via ATOLegals.

34. In every instance the advice referred to above is to be captured on the Opinions Database (see paragraph 35 of this practice statement).

## Related matters

### *The ATOlaw Opinions Database*

35. The Opinions Database on ATOlaw is a central database that includes legal advice obtained from both internal and external sources. All of the legal advice is arranged in broad categories and the full text of each advice is searchable. Each advice includes a summary and a list of legislation and cases referred to. In many cases the legislation and cases are linked to other relevant materials in the ATOlaw database.

36. Maintenance of an Opinions Database for the Tax Office ensures that:

    (i) all relevant legal advice is in an organised and accessible form

    (ii) up to date legal advice on a wide range of issues is available to authorised staff to apply in researching and advising on current issues, and

    (iii) staff can determine whether or not legal advice on a particular issue has already been obtained and so avoid incurring the cost of obtaining duplicate advice.

37. LSB must ensure that the Opinions Database has been checked before new advice is prepared internally or obtained from external legal service providers. New advice must only be prepared or obtained when no legal advice on the Opinions Database addresses the issues, or if the existing legal advices are considered to no longer reflect the current state of the law.

38. The legal advice must be provided electronically and in the format required (LSB will inform external providers of the Tax Office's desired format). When forwarding the opinion or advice to LSB, the officer who requested the opinion must also forward a summary of the advice. LSB will review the summary, consider whether it is appropriate for the advice to be included on the database, and if so, arrange for the advice and summary to be placed on the Opinions Database. It may be appropriate in certain circumstances to include background briefing papers on the Opinions Database. LSB officers should refer to the LSB Instruction Bulletin 2007/1.

39. There are occasions where a taxpayer will provide to the Tax Office a legal opinion/advice. Similarly, there will be instances where an external party receives an advice or opinion on behalf of the Tax Office. In both these instances, the advice must be forwarded to LSB with a summary so that it can be appropriately considered for inclusion on the Opinions Database.

40. There may be instances where it is decided that the inclusion of a legal advice should be deferred, for example where there is ongoing litigation. Certain sensitive information may be removed or edited from opinions prior to posting on the database (for example names or other details of taxpayers or staff) and other opinions may be embargoed for a period of time if required, due to the sensitivity of the subject matter. Approval to defer the inclusion of an opinion or advice must be sought from an SES in LSB.

41. Access to the Opinions Database is limited to LSB staff and TCN. If other officers require access, it must be authorised by an SES or an EL2 stream leader in LSB, and will be revoked when it is no longer required (for example if an officer moves to an area or position for which access to opinions is not relevant). Any requests for access must be forwarded to the Legal Opinions Administrator, who is contactable through the Tax Office Legal Opinions mailbox. The request must include a business case as to why access should be granted.

42. Officers who do not have access to the Opinions Database can request that a search be conducted on the Opinions Database for opinions or legal advice previously received by the Tax Office on certain issues. Requests for searches can be made to the Legal Opinions Administrator and must include the following details:

- name of officer seeking the request
- the requesting officer's BSL
- topics to be researched
- business reason for the request, and
- an endorsement by the requesting officer's manager.

43. Where existing legal opinions are considered to be no longer reliable, the matter must be escalated to LSB by sending an email to the Legal Opinions Administrator at "Opinions Database" in Outlook, explaining the reasons why the opinion is no longer reliable.

44. LSB is responsible for the administration of the Opinions Database. This ensures that each legal advice is appropriately formatted and sanitised, and includes a summary and list of cases and legislation referred to in the advice.

### *Payment of accounts*

45. Payment of all appropriate accounts from counsel, other external legal service providers or ADR practitioners must be made within 30 days, in accordance with Commonwealth policy. In circumstances where the Tax Office has a specific contract, payment should be made in accordance with the terms and conditions of that contract.

46. Where counsel and other legal service providers have been directly briefed by the Tax Office, the record of engagement must be recorded on ATOLegals and the accounts will be paid by LSB through the normal process of accounting for public monies.

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| Subject references | Legal services, Legal advice, AGS, External Legal Service Providers, ADR practitioners, ATOLegals, Legal Services Branch, Gateway, ATO Special Counsel, Instructing legal providers, ATOlaw, legal opinions; |
| Legislative references | AD(JR) Act 1977<br>Crimes Act 1914<br>Criminal Code Act 1995<br>Financial Management and Accountability Act 1997<br>ITAA 1936<br>ITAA 1936 264<br>ITAA 1997<br>Judiciary Act 1993<br>Judiciary Act 1903 39B<br>Proceeds of Crime Act 2002<br>Public Service Act 1999<br>SISA 1993<br>SISA 1993 334<br>TAA 1953<br>TAA 1953 Part IVC |
| Related public rulings | |
| Related practice statements | PS LA 1998/1; PS LA 2005/22; PS LA 2007/12; 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 | |
| Other references | Federal Court Rules<br>Federal Court of Australia Directions for the Taxation List<br>Legal Service Directions 2005<br>LSB Instruction Bulletin 2007/1 |
| File references | 072351 |
| Date issued | 27 November 2008 |
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| Other Business Lines consulted | **All** |