PS LA 2009/9 - Conduct of Tax Office litigation

Note: This practice statement is currently being updated. In addition, references within this practice statement to escalation of issues should be read in light of the publication of PS LA 2012/1.

This document has changed over time. This version was published on *6 September 2010*

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 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**

PURPOSE: **To outline the policies and guidelines to be followed in the conduct of Tax Office litigation**

TABLE OF CONTENTS **Paragraph**

STATEMENT **1**

How to navigate within this practice statement 2

Litigation to which this practice statement applies 4

SECTION 1. TAX OFFICE APPROACH TO LITIGATION **6**

Principles that guide our conduct 8

External rules, policies and guidelines 9

Court and tribunal rules 9

Legal Services Directions 12

Obligation to act as a model litigant 16

Alternative dispute resolution 21

Breach of the Legal Services Directions 26

Internal escalation process for breaches of the Legal Services Directions 29

APS Values and the Code of Conduct 31

Internal policies and guidelines and precedential ATO view documents 34

Exceptions to the usual rules and complaints 35

SECTION 2. LITIGATION STAKEHOLDERS – ROLES AND RESPONSIBILITIES **37**

Working as a team 39

Legal Services Branch 41

The role of LSB generally 44

The role of LSB in tax technical litigation 48
The role of LSB in debt litigation 51
Strategic litigation and the Test Case Litigation Program 60
The role of LSB in non-tax litigation 65
Commercial law 65
Employment law 67
Other stakeholders in litigation 68
Chief Tax Counsel and Deputy Chief Tax Counsel 68
Tax Counsel Network 69
Centres of Expertise 74
Business lines 77
ATO Special Counsel 84
External legal service providers 87
Solicitors 87
Counsel 94
Alternative dispute practitioners 96
SECTION 3. THE LITIGATION PROCESS – TAX TECHNICAL MATTERS 97
Litigation in the AAT 100
Litigation in the Federal Court 103
Early involvement of LSB in potential Federal Court litigation 105
Litigation in the High Court 109
Case management 114
Consideration of ADR 116
SILC Case Management Plan 118
Management of court and tribunal decisions 121
SECTION 4. RISK MANAGEMENT IN TAX OFFICE LITIGATION 124
Where litigation relates to an existing priority technical issue 126
Engagement of TCN during litigation 129
Reduce or eliminate risk through settlement or ADR 133
SECTION 5. ADMINISTRATION AND RELATED MATTERS 135
Costs ordered by the court 135
GST implications of legal costs 139
Payment of accounts 141
The ATOlaw Opinions Database 143
ANNEXURE A – OBTAINING LEGAL SERVICES Page 35
ANNEXURE B – BRIEFING COUNSEL Page 38

ANNEXURE C – TAX TECHNICAL LITIGATION IN THE ADMINISTRATIVE APPEALS TRIBUNAL **Page 50**

ANNEXURE D – TAX TECHNICAL LITIGATION IN THE FEDERAL COURT **Page 61**

Attachment to Annexure D – Taxation List – Pro Forma Questionnaire **Page 83**

ANNEXURE E – TAX TECHNICAL LITIGATION IN THE HIGH COURT **Page 84**

ANNEXURE F – MANAGEMENT OF DECISIONS OF COURTS AND TRIBUNALS **Page 92**

Attachment 1 to Annexure F – Indicators for Strategic Litigation Cases **Page 113**

Attachment 2 to Annexure F – Document Distribution **Page 114**

ANNEXURE G – RISK MANAGEMENT IN LITIGATION **Page 115**

ANNEXURE H – COSTS AWARDED BY THE COURTS **Page 127**

ANNEXURE I – THE GOODS AND SERVICES TAX IMPLICATIONS IN THE RECOVERY OF LEGAL COSTS (PROFESSIONAL FEES AND DISBURSEMENTS) AWARDED BY COURTS OR SETTLED BY AGREEMENT BETWEEN THE PARTIES **Page 138**

Attachment to Annexure I – Table of legislation and court rules in each jurisdiction **Page 154**

STATEMENT

1. This practice statement provides a comprehensive set of guidelines for staff involved in litigation. It sets out the Tax Office's approach to litigation, our obligations as a Commonwealth litigant, and the process that tax officers must follow to ensure that we meet those obligations, as well as those imposed by the courts and tribunals.

How to navigate within this practice statement

2. The practice statement is structured under 2 main parts:

   The first part is a general outline which provides information about how the Tax Office conducts litigation and highlights the many considerations and rules the Commissioner needs to observe. This general outline is divided into the following 5 sections:

   SECTION 1 Tax Office approach to litigation – paragraphs 6 to 36

   SECTION 2 Litigation stakeholders – roles and responsibilities – paragraphs 37 to 96

   SECTION 3 The litigation process – tax technical matters - paragraphs 97 to 123

   SECTION 4 Risk management in Tax Office litigation – paragraphs 124 to 134

   SECTION 5 Administration and related matters – paragraphs 135 to 153

   Within these 5 sections are references to Annexures A to I.

The second part of this practice statement consists of Annexures A to I, which provide detailed instructions on the specific areas of the litigation process and can be read independently. Annexures A to I were separate practice statements (as listed at paragraph 3 of this practice statement) but they have been withdrawn and now form part of this consolidated practice statement on how Tax Office litigation is conducted. Annexures D, F and I also each contain one or more Attachments.

ANNEXURE A Obtaining legal services – pages 35 to 37

ANNEXURE B Briefing counsel – pages 38 to 49

ANNEXURE C Tax technical litigation in the Administrative Appeals Tribunal – pages 50 to 60

ANNEXURE D Tax technical litigation in the Federal Court – pages 61 to 83

ANNEXURE E Tax technical litigation in the High Court – pages 84 to 91

ANNEXURE F Management of decisions of courts and tribunals – pages 92 to 114

ANNEXURE G Risk management in litigation – pages 115 to 126

ANNEXURE H Costs awarded by the courts – pages 127 to 137

ANNEXURE I The goods and services tax implications in the recovery of legal costs (professional fees and disbursements) awarded by courts or settled by agreement between the parties – pages 138 to 155

3. This practice statement, with its Annexures A to I, replaces the following practice statements:[1]

PS LA 2002/3 Engaging external legal providers

PS LA 2005/22 Litigation and priority technical issues

PS LA 2007/1 Costs awarded by the courts

PS LA 2007/2 Management of Decisions of Courts and Tribunals

PS LA 2007/12 Conduct of Tax Office Litigation in 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

PS LA 2008/16 The GST implications in the recovery of legal costs (professional fees and disbursements) awarded by courts or settled by agreement between the parties

PS LA 2008/17 Obtaining legal services

[1] PS LA 2007/23 Alternative Dispute Resolution in Tax Office disputes and litigation is excluded from the following list, and will remain a standalone practice statement as it deals with alternative dispute resolution policy and processes relevant to all disputes, not just those that have resulted in litigation.

Litigation to which this practice statement applies

4. All civil litigation in which the Commissioner is a party (including proceedings before courts, tribunals, inquiries and the various commissions) is subject to the external rules, policies and guidelines set out under Section 1 of this practice statement.

5. Sections 2 to 5 of this practice statement do not apply to:

   - Tax Practitioners Board related legal matters, and
   - Legal actions directed at prosecutions undertaken by the Tax Office In-house Prosecutions Service[2] or by Serious Non-Compliance; or those criminal prosecutions for which the Commonwealth Director of Public Prosecutions is engaged.

SECTION 1. TAX OFFICE APPROACH TO LITIGATION

6. The Tax Office conducts and manages litigation in accordance with its obligations under the law, the Attorney-General's *Legal Services Directions 2005* (Legal Services Directions) (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. The Tax Office supports the appropriate use of alternative dispute resolution techniques to limit the need for litigation and to simplify and/or reduce the cost of litigation. 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.

7. The Tax Office's approach to litigation is never to win at all costs. The Tax Office strives to ensure that legislation is given its intended effect as best as can be discerned from the law, informed by its knowledge of the underlying policy.

Principles that guide our conduct

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

   (a) the Commissioner in his statutory functions and under the executive arm of Government has responsibility for administering various laws enacted by Parliament, such as those related to taxation and superannuation. Administering those laws properly will involve litigation. The Tax Office will conduct and manage litigation as a model litigant in accordance with its obligations under the law, the Legal Services Directions, relevant court and tribunal rules and directions, and other relevant internal and external policies and guidelines

   (b) the model litigant obligation does not prevent the Commissioner from acting firmly and properly to protect the interests of the Commonwealth

[2] Most of these matters relate to undefended prosecutions for failure to lodge income tax returns, activity statements, or superannuation member contributions statements. Other matters handled by the In-house Prosecutions Service that are not referred to the Commonwealth Director of Public Prosecutions include undefended prosecutions of unregistered tax agents.

(c) the Tax Office will have regard to its strategic focus, the desire to obtain law clarification in a timely, cost effective matter which provides greater certainty for the community

(d) the Tax Office holds respect for the law as an underlying principle and applies this principle in the conduct of litigation, the resolution of disputes and in managing the outcome of judicial decisions

(e) the Tax Office seeks to promote an environment:

- where taxpayers have a reasonable understanding of their rights and obligations or can readily obtain adequate guidance to provide that understanding
- 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

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

(g) an objective of the Tax Office litigation function is to assist decision makers in reaching well reasoned and supportable decisions to avoid unnecessary litigation

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

(i) in determining the ATO 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 and Full Federal Court.[4] For practical purposes this means that where the words of the legislation and their statutory context allow, a view of the law that reflects the underlying policy is preferred

(j) 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

(k) the Tax Office will be consistent, vigorous, firm and efficient in the conduct of litigation

(l) Where possible and appropriate, emphasis will be placed on resolving disputes through consultation, negotiation, mediation and formal alternative dispute resolution (ADR) processes available through tribunals and courts to avoid unnecessary litigation and related costs

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

[3] *Acts Interpretation Act 1901*, 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*.'

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

(o) the Tax Office will not adopt an unnecessarily adversarial approach where the taxpayer is unrepresented

(p) the Tax Office will show appropriate deference to the decisions of courts and tribunals, but reserves the right to exercise appeal rights and review and clarify the law as appropriate through litigation consistently with the model litigant obligation

(q) the Tax Office will foster appropriate relationships with the courts, tribunals and other parts of the legal system to promote efficiency in the conduct of litigation practice and procedure

(r) the Tax Office will foster a close working relationship with the Attorney-General's department, as the agency responsible for law and justice matters and policies

(s) the Tax Office will seek to gain value for money from the engagement of external legal services providers, and

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

External rules, policies and guidelines

Court and tribunal rules

9. All tax officers must follow the various rules and practice directions of the relevant court or tribunal in which the proceedings are held.

10. 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
- Fair Work Australia Rules
- Rules and Practice Directions of the Federal Court, Federal Magistrates Court and Family Court, and
- Rules of the High Court.

11. 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 that Tribunal to make the 'correct and preferable' decision according to law in the proceedings. The object of the requirement is to allow that Tribunal to conduct its reviews as efficiently as possible.

Legal Services Directions

12. The *Financial Management and Accountability Act 1997* (FMA Act) provides the framework for the proper management of public money and public property. As the Chief Executive of 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.

13. The Attorney-General has issued the Legal Services Directions under section 55ZF of the *Judiciary Act 1903*. These Legal Services Directions are legally binding on the Tax Office and other agencies, which are subject to the FMA Act, 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 them can be accessed from www.ag.gov.au/olsc.

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

15. 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

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

17. 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 ADR processes. The model litigant obligation requires Commonwealth litigants to handle their cases efficiently and effectively in accordance with their responsibility to the community to safeguard public revenue and also to fulfil their responsibilities to other litigants and the justice system.

[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.

18. 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 a notice of appeal to allow appropriate opportunity to assess whether or not to pursue the matter. It does not preclude pursuing litigation 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]

19. An instruction to comply with (and a copy of) Appendix B to the Legal Service Directions must be included in all briefs to counsel and other external legal service providers when engaging them in litigation matters or if the provider has been involved prior to litigation, at the point at which they are provided with instructions to act in the litigation. The purpose of the instruction to comply is to ensure that they are informed about the obligations imposed by the Commonwealth when they act on its behalf.

20. Taxpayers and their advisors must also be advised of the model litigant policy at the commencement of litigation.[8] See LSB Instruction Bulletin 2009/1 which is available on the Legal Services intranet site.

Alternative dispute resolution

21. The model litigant obligation imposes a positive and ongoing obligation on officers involved in the conduct of litigation on behalf of the Commonwealth and its agencies to consider the use of ADR 'to avoid, prevent and limit the scope of legal proceedings wherever possible, including giving consideration in all cases to ADR before initiating legal proceedings and by participating in ADR processes where appropriate'.[9]

22. The Tax Office recognises and supports the use of ADR as a cost effective, informal, consensual and speedy means of resolving disputes. This extends to using ADR to deal with only part of a dispute, or to deal with procedural or interlocutory matters in relation to a dispute. All tax officers handling disputes are required to consider whether the use of ADR, which includes direct engagement and negotiation with taxpayers, would be an appropriate means which might assist in the resolution of the dispute or might limit the scope of the dispute in some material way.

23. Not all cases are suitable for ADR but, for those that are, it is essential that parties carefully consider and select a process which is suited to the circumstances and nature of the dispute.

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[6] See for example *Wodrow v. Commonwealth of Australia* [2003] FCA 403 at paragraph 42.
[7] Legal Services Directions, Appendix B, Paragraph 2, Note 4.
[8] With the exception of routine non-contested debt matters.
[9] Appendix B to the Legal Services Directions 2005: The Commonwealth's obligation to act as a model litigant - paragraph 2(d) and 5 as well as specific provisions in various Acts including the *Administrative Appeals Tribunal Act 1975*, the *Fair Work Act 2009*, and the *Civil Procedure Act 2005* (NSW).

24. A full discussion of the policies and guidelines that tax officers must follow when attempting to resolve or limit disputes by means of ADR is set out in Law Administration Practice Statement PS LA 2007/23 Alternative Dispute Resolution in Tax Office disputes and litigation.

25. The Tax Office ADR home page contains a large amount of ADR information and links on ADR which are relevant to officers handling disputes. An ADR network, with representatives from relevant business lines, has also been established. Any questions or comments about ADR can be directed to any member of the ADR network or to LSB staff.

Breach of the Legal Services Directions

26. 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. OLSC does 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
- by monitoring comments from courts and tribunals, and
- by receiving and reviewing complaints from other parties to litigation involving the Commonwealth.

27. Paragraph 11.1(d) of the Legal Services Directions provides that the Chief Executive of an agency subject to the FMA Act 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 agency subject to the FMA Act 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 Legal Services Directions.

28. OLSC Guidance Notes 3 of 2005 (guidance on reporting breaches of the Legal Services Directions) and 4 of 2005 (guidance about the investigation of breaches) can be found on the Attorney-General's website.[10]

Internal escalation process for breaches of the Legal Services Directions

29. The Commissioner reports breaches of the Legal Services Directions to OLSC via the Assistant Commissioner, Legal Services.

[10] OLSC issues Guidance Notes 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.

30. A complaint received about the Tax Office's conduct in relation to litigation 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 Assistant Commissioner, Legal Services. The Assistant Commissioner, Legal Services will ensure that the allegation is investigated, and where appropriate provide a report to OLSC. The OLSC may itself consider whether and in what respects the Legal Services Directions have been breached and may advise the Commissioner and any other party accordingly.

APS Values and the Code of Conduct

31. Sections 10 and 13 of the *Public Service Act 1999* set out the Australian Public Service (APS) Values and Code of Conduct, which are supported by the Public Service Commissioner's Directions 1999. 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 of Conduct. Agency Heads and members of the Senior Executive Service (SES) are required to promote and uphold the APS Values.

32. The APS Values and Code of Conduct cover all APS employees and Agency Heads. The principles 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.

33. 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. This publication is a guide and 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 and precedential ATO view documents

34. 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:

- Legal Services Branch Instruction Bulletins
- Corporate Management and Law Administration Practice Statements
- Taxpayers' Charter[11]
- Code of Settlement Practice
- ATO Receivables Policy, and
- Access and Information Gathering Manual.

[11] Where consideration is being given not to meet the commitments made in the Taxpayers' Charter, advice should be sought from the Taxpayers' Charter Team.

Tax officers must also be aware of and follow documents containing precedential ATO views.[12] This includes public rulings, ATO Interpretative Decisions and Decision Impact Statements.

Exceptions to the usual rules and complaints

35. Precedential ATO views and the internal Tax Office policies and guidelines referred to in paragraph 34 of this practice statement are to be followed by those representing the Commissioner in litigation at all times. However, where following these policies and guidelines produces an anomalous or unintended result (and it is expected that such occasions will be rare), approval to take a different approach must be sought from the relevant LSB Stream Leader or a member of the LSB Executive.

36. Complaints received from taxpayers or their representatives that our conduct in litigation has fallen short of acceptable standards should be escalated to the relevant LSB manager, who will determine how the issue should be appropriately managed and if it needs to be further escalated. In these circumstances, tax officers should refer to Corporate Management Practice Statement PS CM 2005/08 Complaint Management in the Tax Office.

SECTION 2. LITIGATION STAKEHOLDERS – ROLES AND RESPONSIBILITIES

37. 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, all requests seeking the services of external legal providers must be referred to LSB. Annexure A of this practice statement sets out the requirements and process that must be followed when engaging the services of external legal providers, including ADR practitioners.

38. This section does not apply to Tax Practitioners Board related legal matters and criminal prosecutions (refer to paragraph 5 of this practice statement).

Working as a team

39. Litigation is handled by several people working together as a team. The team may vary from time to time, but the LSB officer and the business line case officer will always be a part of each team.[13] Depending on the case, the litigation team might also include a Tax Counsel Network (TCN) officer, another business line officer,[14] an officer from the relevant Centre of Expertise (CoE), and an external legal services provider. Presently, the range of external legal services providers available to the Tax Office consists of the legal services 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.

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12 See Law Administration Practice Statement PS LA 2003/3 Precedential ATO view.
[13] LSB will not be involved in routine debt litigation matters.
[14] The other officer could be: a litigation co-ordinator; a topic expert; the business line case officer's team leader; or the original decision-maker.

40. 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 achieve the best possible outcome.

Legal Services Branch

41. 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 Legal Services Directions, including in particular, its obligation to act as a model litigant
- instructions to external legal services 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 services providers
- the Tax Office can assess and match legal services needs with cost-effective service delivery for example, by not incurring the cost of obtaining similar advice from different legal services providers
- the Tax Office has a risk management process in place whenever the Commissioner is a party to litigation 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.

42. LSB provides legal services in the following manner:

- *In-house Legal Services – complete 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 engaged*

  Where appropriate, LSB will engage external legal service providers in relation to advice or litigation.[15] LSB should consult with the business line 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 services providers are necessary. Where it is appropriate for an external legal services 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 TCN, CoEs as well as the business line. LSB will consult with all relevant stakeholders, but will be the final decision maker as to which external legal services providers are selected to represent the Commissioner.

[15] Generally, strategic litigation should have the involvement of an external legal service provider.

43. Legal matters the Commissioner may be involved in which will require the services of LSB include:

- tax technical litigation as described in paragraph 44 of this practice statement
- debt litigation as described in paragraph 53 of this practice statement
- 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
- securing of taxpayer assets to ensure payment of tax debts
- 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[16]
- 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 considers providing indemnities for legal costs, such as:
  - where other agencies are requested to deal with issues related to tax matters by the Commissioner, such as where the Commissioner requests the Australian Federal Police to execute a warrant and there are consequent legal costs
  - where a liquidator or trustee initiates court action where they have been indemnified by the Commissioner for the costs of initiating such action
  - where litigants request the Commissioner to provide test case funding
- instances where a liquidator initiates action to recover from the Commissioner a payment considered to be an unfair preference
- claims for monetary compensation arising from maladministration or negligence, and
- reviews of administrative decisions and reviews of tax related decisions under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR) and the *Judiciary Act 1903.*

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

The role of LSB generally

44. LSB is responsible for managing all appearance work before courts, tribunals and enquiries and related advice on legal process and risks. It is the central liaison point for the litigation team and provides a single point of contact with our external stakeholders, including taxpayers and their representatives, our external legal services providers and court and tribunal personnel so that conflicting Tax Office messages are not given. Contact with the external legal services 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.

45. Generally, the LSB officer will:

- provide legal and litigation support
- provide advice on the admissibility and the extent of the factual evidence required and available to support the ATO view
- identify any technical or procedural issues that require further discussion with relevant stakeholders
- ensure that Tax Office policies and procedures are followed, for example that we do not argue inconsistently with a precedential ATO view without appropriate escalation and approval, and
- ensure that the Tax Office operates as a model litigant.

46. 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 where otherwise unresolved.

47. Where Tax Counsel is not involved in the 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 SES officer in LSB who will further escalate the issue if appropriate. Significant issues arising from tax technical and debt matters should be escalated to the Senior Assistant Commissioner, Strategic Litigation and the relevant Senior Tax Counsel, Strategic Litigation. Depending on the significance of the issue, it may need to be escalated to the relevant Deputy Chief Tax Counsel (DCTC) or the Chief Tax Counsel (CTC).

The role of LSB in tax technical litigation

48. 'Tax technical 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 ADJR or section 39B of the *Judiciary Act 1903* in relation to any decision made under both ITAA 1936, *Income Tax Assessment Act 1997* (ITAA 1997), or the TAA. In short, tax technical litigation refers to matters associated with the establishment of a substantive tax liability. It does not include, employment related litigation, commercial litigation or debt litigation (which relates to the collection of the substantive tax liability).

49. The LSB officer must ensure 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 (as defined in paragraph 60 of this practice statement, or if the matter relates to an existing priority technical issue.[17] Tax Counsel will be the final decision maker on the technical arguments to be run.

50. Where Tax Counsel is involved, the LSB officer must also 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
- that Tax Counsel is invited to any conference with counsel that is directed towards technical arguments or important directions of the case, and
- assistance is provided to Tax Counsel to refine the Tax Office view where appropriate.

The role of LSB in debt litigation

51. The Debt Litigation 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 responsibility includes representing the Commissioner in court, briefing counsel, negotiating and settling matters such as winding up companies (and substitutions), creditors petitions, defended debt matters and voidable preference claims.

52. The services of the Debt Litigation Stream are utilised once other Tax Office debt recovery areas have been unsuccessful in securing compliance on the part of taxpayers in payment of their taxation liabilities.

53. The range of matters allocated to the Debt Litigation Stream includes:

- prosecution of civil claims for recovery which have been defended by the taxpayer. Those claims include court proceedings commenced to secure payment by company directors under the Director Penalty Notice regime of unpaid PAYG tax liabilities incurred by companies
- filing creditors' petitions to secure the bankruptcy of a taxpayer where satisfactory payment arrangements have not been made
- filing applications to wind up companies, after a statutory demand has not been paid and where satisfactory payment arrangements have not been made
- opposing applications by companies for the setting aside of statutory demands
- opposing where appropriate applications made by taxpayers to the Small Taxation Claims Tribunal for their release from liability for certain classes of tax debts

[17] 'Priority Technical Issue' is defined in paragraph 11 of PS LA 2003/10.

- acting on behalf of the Commissioner in relation to claims made by bankruptcy trustees and the liquidators of companies for the repayment of alleged preference payments
- acting on behalf of the Commissioner in opposing applications to set aside Departure Prohibition Orders, or in pursuing Mareva injunctions where there is a real risk of creditor prejudice through dissipation of a taxpayer's assets
- recovering monies owed to the Commissioner pursuant to Reparation Orders
- providing legal advice to the business line in relation to litigation conducted by the Debt Litigation Stream, and
- Family Law intervention proceedings.

54. Recovery action is commenced and conducted by the Debt Litigation Stream via firm but fair action to secure the recovery of tax liabilities in line with the Legal Services Directions, ATO Receivables Policy and other debt related practice statements and external practice directions, such as the various court practice directions.

55. The use of ADR processes – formal and informal – is an important part of pre-litigation processes and is actively pursued to lessen the cost of litigation to the taxpayer, community and Tax Office.

56. Debt litigation has a number of outcomes, including:

- payment of outstanding debt by taxpayers
- implementing an agreed payment arrangement by taxpayers
- clarification of the law, or
- ensuring that compliant taxpayers remain within the tax system.

57. Ultimately debt litigation focuses on those taxpayers at the high risk end of the Tax Office compliance model. Various techniques are required to ensure compliance and that taxpayers meet their obligations under the relevant tax and corporation laws.

58. The LSB officer must ensure 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 (as defined in paragraph 60 of this practice statement, or if the matter relates to a current priority technical issue.[18] Tax Counsel will be the final decision maker on the technical arguments to be run.

59. Where Tax Counsel is involved, the LSB officer must also 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
- that Tax Counsel is invited to any conference with counsel that is directed towards technical arguments or important directions of the case, and
- assistance is provided to Tax Counsel to refine the Tax Office view where appropriate.

[18] 'Priority Technical Issue' is defined in paragraph 11 of PS LA 2003/10.

Strategic litigation and the Test Case Litigation Program

60. Strategic litigation refers to litigation that leverages compliance through clarification of the law in key high risk areas. Strategic litigation also includes cases where law clarification opportunities are not the primary objective, but the other risks to the Commissioner are sufficiently severe as to warrant a strategic corporate response.

61. The Senior Assistant Commissioner, Strategic Litigation provides technical leadership and is responsible for ensuring that strategic litigation is managed effectively, and is argued consistently with precedential ATO views. There are also three Senior Tax Counsel providing technical leadership in strategic litigation, two with responsibility for income tax issues and one with responsibility for indirect tax issues. Strategic litigation may arise from the Debt Litigation and Part IVC stream in LSB. The relevant Senior Tax Counsel may take direct responsibility, or closely monitor, the strategic litigation cases, regardless of other Tax Counsel involvement.

62. A strategic litigation team provides support to the Senior Assistant Commissioner, 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.

63. The strategic litigation team also manages the Test Case Litigation Program, and provides the secretariat for the Test Case Litigation Panel.

64. The purpose of the program is to clarify the operation of the laws administered by the Commissioner where:

- there is uncertainty or contention about how the law operates
- the issue is of significance to a substantial section of the public or has significant commercial implications for an industry, and
- it is in the public interest for the issue to be litigated.

The role of LSB in non-tax litigation

Commercial law

65. 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 commercial law group also provides advice on procurement related corporate management practice statements and other corporate guidelines.

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

Employment law

67. The employment law group within the office of ATO General Counsel deals with issues arising from 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, 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.

Other stakeholders in litigation

Chief Tax Counsel and Deputy Chief Tax Counsel

68. The CTC, relevant DCTC, 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 CTC. The decision whether or not to appeal an adverse decision will usually be made by the relevant DCTC or, if necessary, the CTC or the Second Commissioner, Law on the recommendation of the relevant Senior Tax Counsel, Strategic Litigation.

Tax Counsel Network

69. 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 significant tax technical issues. The responsibility for formulating the ATO view on these significant issues rests with TCN.

70. Where Tax Counsel is involved in litigation, they will have the final say as to the ATO 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.

71. 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 ATO view to be presented to court.

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

73. In strategic litigation 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 instructed to be 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 to be put to counsel.

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

Centres of Expertise

74. Where the litigation raises a tax technical issue that requires the creation of a precedential ATO view, or where there is a challenge to an existing precedential ATO view, the relevant CoE must be consulted.

75. The level of assistance required from a CoE will vary in each case, depending on the nature of the litigation, but the relevant CoE should be notified of the case and consulted to determine their appropriate level of involvement.

76. With assistance from the LSB case officer, the business line will refer the issue to the CoE gatekeeper for confirmation that the issue needs to be referred.[19] Once it is determined that CoE involvement is appropriate and a CoE officer has been allocated, the CoE officer will be part of the litigation team and will be consulted at all critical stages of the litigation to ensure that the ATO view has been correctly applied.

Business lines

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

78. The business line has the responsibility of providing a complete and comprehensive statement of facts. Where necessary LSB will assist the business line case officer in cross-referencing the facts to supporting evidence.

79. With tax technical and debt matters the business line case officer has a key role in assisting others in the litigation team to develop a full understanding of the scope and operation of the relevant tax law and how the underlying compliance and administrative issues have shaped the precedential ATO views on its operation. The business line case officer is an important link to the relevant experts on the law within the business lines.

[19] Officers should follow their normal business line procedures for the referral of issues requiring CoE assistance.

80. The business line has a continuous role throughout the course of litigation. Where the business line has collected the known facts at the audit and objection stage, it will have valuable knowledge regarding the location of documents and the underlying facts (including what facts have not been asserted or established). 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.

81. The business line will have an integral role in identifying whether or not a tax technical issue arising from litigation is significant and requires escalation to TCN. 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.

82. At the commencement of the litigation process, the business line in consultation with LSB must assess (or review) the risk in relation to the litigation and the underlying technical issue. If it is determined that the case and/or underlying issue warrants the involvement of TCN, the business line must escalate it to the relevant DCTC. (Alternatively, the LSB officer can escalate the issue to the DCTC via the relevant Assistant Commissioner, Litigation).

83. 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 Annexure G of this practice statement for details on the corporate approach to dealing with the risks to the Commissioner arising from court and tribunal decisions.[20]

ATO Special Counsel

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

85. 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 the services of ATO Special Counsel must be referred to the appropriate person in TCN.

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

[20] The business line officer will have a role in drafting the Decision Impact Statement and other documents as discussed in Annexure F of this practice statement.

External legal service providers

Solicitors

87. 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:
  - Freedom of Information
  - 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, Proceeds of Crimes Act 2002* and the FMA Act.
- 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 ADJR or section 39B of the *Judiciary Act 1903* in relation to any decision made under the ITAA 1936 and the ITAA 1997, or the TAA, and
  - other tax related litigation, such as decisions under section 344 of the *Superannuation Industry (Supervision) Act 1993.*

88. 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.

89. The Tax Office's policy in relation to engagement of external solicitors is set out in Annexure A of this practice statement.

90. As the solicitor will have direct dealings with taxpayers or their representatives it is expected that the solicitor will also conduct himself 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.

91. 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.

92. 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.

93. There is a category of legal work which cannot be undertaken by any other external legal services provider but tied legal services providers.[21] This relates to 'tied work' which must be briefed directly to the Australian Government Solicitor (AGS) outside of its membership of any panel of external legal services 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

[21] The Attorney-General may give approval for a legal services provider other than a tied provider to undertake tied work. However, approval would be subject to conditions, for example that any advice prepared by the provider is to be settled in consultation with, and reflecting any comments made by, a tied provider, and that the instructing agency pay the costs of the tied provider to consider and prepare comments about the advice – see Paragraph 3B of Appendix A of the Legal Services Directions.

Category	Tied provider
Public international law work	
(a) International litigation and arbitration (Government to Government)	(a) AGS, AGD,[22] DFAT[23]
(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

Counsel

94. 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.

95. There is a rigorous process for approval for the engagement of counsel. When briefing counsel, staff must follow the guidelines set out in Annexure B of this practice statement.

Alternative dispute practitioners

96. These practitioners may or may not be legal practitioners. See Law Administration Practice Statement PS LA 2007/23 Alternative Dispute Resolution in Tax Office disputes and litigation.

[22] Attorney General's Department.
[23] Department of Foreign Affairs and Trade.

SECTION 3. THE LITIGATION PROCESS – TAX TECHNICAL MATTERS

97. Tax technical litigation includes all litigation undertaken under Part IVC of the TAA. The Part IVC procedures apply where various federal tax and superannuation Acts or Regulations provide that a taxpayer may object against a taxation decision, that is, an assessment, determination, notice or decision. Tax technical litigation also includes declaratory proceedings brought in any court that will directly affect the taxation liability of a taxpayer, and judicial review under the ADJR or under section 39B of the *Judiciary Act 1903* in relation to any decision made under taxation legislation including the TAA. For present purposes, tax technical litigation does not include debt litigation, employment related litigation, or commercial litigation.

98. Although each of these types of actions is subject to its own jurisdictional rules, tax technical litigation will most commonly be conducted in the Administrative Appeals Tribunal (AAT), Federal Court and High Court. The following paragraphs deal with the procedures to be applied in litigation in each of those venues.

99. For matters that are test case funded, the AAT or the Court must be advised that the appeal is being funded by the Commissioner under the Test Case Litigation Program. Details the parties are seeking to have clarified must be provided.

Litigation in the AAT

100. The AAT does not have a general power to review decisions made under Commonwealth legislation. The AAT can only review a decision if an enactment provides that applications may be made to the AAT.[24] In taxation matters the relevant decision will generally be the determination of an objection under section 14ZZ of the TAA, however, some of the legislation administered by the Commissioner provides for an application directly to the AAT.[25]

101. Generally, a taxpayer must lodge an application to the AAT within 60 days of service of the notice of an objection decision (28 days if in the Small Taxation Claims Tribunal for amounts under $5,000). Once an application is filed, the AAT notifies the Commissioner, via LSB, pursuant to subsection 29(11) of the *Administrative Appeals Tribunals Act 1975* (AAT Act) that an application has been made for a review of a decision, including a copy of the application. LSB will advise the relevant business line within 24 hours of receipt of the application, and the litigation team will commence preparing for the proceedings.

102. Annexure C of this practice statement outlines in chronological order the procedures required to be followed by tax officers in AAT matters.

Litigation in the Federal Court

103. Federal Court matters may arise in six main ways:

- a taxpayer may appeal directly to the Federal Court against an appealable objection decision of the Commissioner in accordance with either subparagraph 14ZZ(a)(ii) or paragraph 14ZZ(c) of Part IVC of the TAA

[24] Section 25 of the *Administrative Appeals Tribunal Act 1975*.
[25] For example, a decision to cancel a tax file number – section 202F of the ITAA 1936.

- a taxpayer or the Commissioner may appeal to the Federal Court, on a question of law, from a decision of the AAT in accordance with section 44 of the AAT Act
- the AAT may refer a question of law arising in a proceeding before the AAT to the Federal Court for decision in accordance with section 45 of the AAT Act
- a taxpayer may apply to have a decision of the Commissioner reviewed by the Federal Court in accordance with section 5 of the ADJR[26]
- a taxpayer or the Commissioner may seek an injunction, a declaration or some other kind of relief in accordance with section 39B of the *Judiciary Act 1903*, or
- the Commissioner may be involved in proceedings in the Federal Court for the recovery of outstanding taxation debts owed by taxpayers, either as the plaintiff in first instance proceedings or as the appellant or respondent in proceedings on appeal from a lower court. Debt litigation proceedings also include appeals by taxpayers against Departure Prohibition Orders issued by the Commissioner under Part IVA of the TAA. Departure Prohibition Orders are orders preventing a person from leaving Australia and are issued by the Commissioner against taxpayers who have an outstanding tax liability where it is considered that if they leave Australian jurisdiction, recovery of the outstanding tax liability will be at risk. Procedures for appeals against Departure Prohibition Orders are specifically dealt with in Order 52C of the Federal Court Rules.

104. Annexure D of this practice statement outlines the procedures required to be observed by tax officers involved in Federal Court matters. These procedures arise as a result of obligations in the:

- Federal Court Rules
- *Federal Court of Australia Act 1976*
- Federal Court of Australia Regulations 2004, and
- Federal Court Practice Directions and Practice Notes.

Early involvement of LSB in potential Federal Court litigation

105. The *Tax List Directions* issued by the Federal Court of Australia in April 2008 aimed to improve the conduct and management of tax cases. These *Tax List Directions* impose a strict timetable for Part IVC of the TAA 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.

[26] Section 5 of the ADJR also gives the Federal Magistrates Court jurisdiction to hear applications. Whilst the rules of the Federal Magistrates Court may differ slightly from the Federal Court Rules, tax officers should follow the same internal processes in both Courts.

106. To ensure that the Commissioner complies with the abbreviated timetable contained in the *Tax List Directions*, a Litigation Risk Matrix[27] 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 resolving the ongoing dispute with the taxpayer are exhausted.

107. Where likely litigation cases are identified, the business line will work with the taxpayer to endeavour to resolve the dispute. This may include the business line contacting the ADR Network for assistance. Details on how to contact business line representatives on the ADR Network can be found via the ADR homepage. If the objection decision continues to look like it is headed for litigation, the relevant business line must contact LSB via the relevant LSB Part IVC Manager.

108. For those cases where an appeal appears likely to be filed in the Federal Court, the LSB Part IVC Manager will work with the business line 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.

Litigation in the High Court

109. 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.

110. Section 73 of the *Commonwealth of Australia Constitution Act 1901* (the Constitution) confers the appellate jurisdiction on the High Court. The High Court's 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*. An appeal cannot be brought to the High Court from a judgment of the Federal Court constituted by a single judge[28] 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.[29]

111. A decision to seek Special Leave to appeal to the High Court is an important matter for the organisation and must be approved by the CTC. To ensure that the CTC and relevant DCTC have adequate time to consider the decision to seek Special Leave to appeal and the proposed application, the litigation team in collaboration with the relevant Senior Tax Counsel, Strategic Litigation,[30] must commence planning immediately on receipt of an adverse Full Federal Court decision.

[27] Guidelines on the Litigation Risk Matrix can be found on the intranet on the Online Resource Centre for Law Administration.
[28] Subsection 33(2) of the *Federal Court of Australia Act 1976*.
[29] Subsection 33(3) of the *Federal Court of Australia Act 1976.*
[30] 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.

112. The Tax Office's actions in response to a taxpayer's Special Leave to appeal 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.

113. Annexure E of this practice statement provides a summary of the timeline and process that must be followed in proceedings before the High Court.

Case management

114. Common to all tax technical litigation, regardless of venue, is the management of the Strategic Internal Litigation Committee (SILC) process. A SILC is to be convened for every litigation matter, and meetings should be convened at all critical stages of the proceeding. 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
- Decision SILC
- Post-decision SILC, and
- Appeal SILC.[31]

115. 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 are required to ensure continual good management of the case and that key decisions are made collaboratively. The composition of each SILC can vary depending on the significance of the matter, but will always include the LSB case officer and the business line case officer. Depending on the particular case, it may also include Tax Counsel, another business line officer and CoE officers.

Consideration of ADR

116. During the SILC process, the litigation team must consider whether the matter is suitable for ADR. If suitable, it is essential that parties carefully consider and select a process which is suited to the circumstances and nature of the dispute.

117. A full discussion of the policies and guidelines that tax officers must follow when attempting to resolve or limit disputes by means of ADR is set out in Law Administration Practice Statement PS LA 2007/23 Alternative Dispute Resolution in Tax Office disputes and litigation.

[31] Details of what is required for each of the SILCs should be outlined in the SILC Case Management Plan.

SILC Case Management Plan

118. Every tax litigation matter and complex debt litigation matter must have a SILC Case Management Plan. A SILC Case Management Plan is a document setting out the details and status of a litigation matter, including the litigation strategy and any milestones. The Case Management Plan must be completed, and include all critical information such as a summary of the issues, the ATO view, the significance of the matter, the litigation risk rating and the ongoing costs related to the matter. At the commencement of the proceeding, the LSB officer should provide a current SILC Case Management Plan template to the business line officer who will complete certain parts of the SILC Case Management Plan before returning it electronically to the LSB officer, together with recommendations as to who within the business line should be invited to the SILC.

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

120. Active use of the SILC Case Management Plan will ensure that there is:

- proactive management and regular monitoring of costs, for example, by obtaining cost estimates. The SILC Case Management Plan provides for estimates of costs and actual costs to date
- strategic management of litigation by monitoring the timely progress of cases
- collaborative partnerships between all relevant stakeholders
- limitation of interlocutory disputes where appropriate, and
- increased consideration and use of ADR.

Management of court and tribunal decisions

121. One key aspect of managing litigation includes ensuring that decisions[32] of courts and tribunals are circulated to and considered by the appropriate stakeholders within the requisite timeframes, and that risks arising from the decisions are analysed and strategically managed.

122. LSB officers are responsible for managing court and tribunal decisions in accordance with the rules set out in Annexure F of this practice statement. The guidelines set out in Annexure F of this practice statement also discuss the responsibilities and roles of other relevant stakeholders in the management of decisions and risks arising from them.

123. The approach outlined in Annexure G of this practice statement ensures a corporate approach to dealing with the risks to the Commissioner arising from court and tribunal decisions.[33] It is essential that staff follow the procedures to ensure that these risks are minimised.

[32] 'Decisions' will include interlocutory decisions which have some strategic importance.
[33] There will be instances where litigation will have consequences not only for the Commissioner, but for the community and Government as a whole.

SECTION 4. RISK MANAGEMENT IN TAX OFFICE LITIGATION

124. Once a matter is in litigation, the litigation team must undertake a separate risk assessment to determine the level of the litigation risk[34] associated with the case. This will assist the team to determine and apply the most appropriate litigation strategy.

125. In litigation, risks are managed in line with various corporate strategies and processes which address risks. Corporate Management Practice Statement PS CM 2003/02 (G) Risk and Issues Management was developed to ensure that risk management underpins all Tax Office activities.

Where litigation relates to an existing priority technical issue

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

127. The likelihood of, and response to, litigation should be addressed by the risk owner[35] in consultation with TCN as part of the broader resolution strategy.

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

Engagement of TCN during litigation

129. As litigation provides law clarification and is an avenue for expressing and testing our views of the law to courts and tribunals, it is important that a risk assessment is undertaken by the litigation team to determine whether or not the matter requires the involvement of TCN. TCN may be required where the possible consequences of a court or tribunal decision (adverse or favourable to the Commissioner) give rise to a level of risk that needs to be strategically managed.

[34] 'Litigation risk' refers to the risks that flow from the litigation process itself, including risks of breaching court and tribunal orders, breaching or being perceived to breach the Attorney-General's Directions, adverse comment from the courts and tribunals as well as the risk of an adverse decision and further appeals.

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

130. Once a matter is in litigation, if it appears likely that appeals will follow the outcome of a court or tribunal decision, mitigation strategies should be identified in line with the processes set out in Annexure F of this practice statement.

131. Risks in terms of poor representation, preparation, or inadequate evidence should be avoided by appropriate team based approaches in litigation, such as use of SILCs and case call-overs, as well as through the application of procedures developed to ensure best practices in courts and tribunals. Where the risks cannot be avoided, the case and issue is to be escalated through the call-over process.

132. A more thorough discussion on how to manage risk in tax litigation is set out in Annexure G of this practice statement.

Reduce or eliminate risk through settlement or ADR

133. The Code of Settlement Practice recognises that settlement may be an appropriate way to resolve a matter depending on the circumstances of the case. The litigation team needs to consider:

- whether the cost of litigating (including internal costs) is out of proportion to the possible benefits
- the prospects of success, including collection of the tax, and
- the likely award of costs.

134. These considerations need to be assessed as objectively as possible. Refer to Law Administration Practice Statement PS LA 2007/23 Alternative Dispute Resolution in Tax Office disputes and litigation.

SECTION 5. ADMINISTRATION AND RELATED MATTERS

Costs ordered by the court

135. All legal cost payment issues must be referred to LSB. Legal costs are the costs for professional work and disbursements in relation to legal work or litigation. These include fees, charges, expenses, disbursements and remuneration for work done by a person in the capacity of a barrister or a solicitor. Disbursements are those payments which have been made in pursuance of the professional duty undertaken by the solicitor, which he or she is bound to perform, or which has been sanctioned as professional payments by the general practice and custom of the profession.

136. Costs generally fall into one of five categories:

- fees paid to the instructing solicitor
- fees of counsel
- court fees
- disbursements (for example, stamp duties), and
- witnesses' expenses.

137. The general rule is that 'costs follow the event' – that is a successful party is entitled to recover costs on a 'party and party' basis. However, this is always discretionary so that a court may decide not to allow the successful party to recover costs, or may allow costs to be recovered on a different basis (such as 'solicitor and own client', or such as specifying the amount to be recovered in a particular respect, or such as specifically including or excluding costs in a particular respect). If the court decides not to award costs to the successful party according to the general rule, it may refuse them in part or totally, depending on the circumstances of the case.

138. In any legal proceedings where the Commissioner is a party and a court orders costs but the court does not specify what amount of costs is to be paid, staff must follow the procedures detailed in Annexure H of this practice statement.

GST implications of legal costs

139. When making a payment of legal costs, or formulating a schedule of legal costs to receive payment, either as a result of a court order or an out-of-court settlement by agreement that includes a provision for the payment of legal costs, Tax Office staff must:

- consider any entitlement to an input tax credit of the parties to the original supply of legal services
- apply the legislation, court rules and case law in each jurisdiction to determine the amounts to be paid, and
- consider any jurisdictional differences in court rules regarding the assessment and determination of legal costs and whether or not an entitlement to an input tax credit is to be taken into account when making payment of legal costs.

140. Annexure I of this practice statement provides guidelines to staff on how to determine the GST implications of legal costs.

Payment of accounts

141. Payment of all appropriate accounts from counsel, other external legal services providers or ADR practitioners must be made within 30 days of receipt, 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.

142. Where counsel and other legal services 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.

The ATOlaw Opinions Database

143. The Opinions Database on ATOlaw is a central database that includes legal advice obtained from both internal and external sources. Access to the Opinions Database is limited to LSB staff and TCN. 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.

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

- all relevant legal advice is in an organised and accessible form
- 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
- 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.

145. 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.

146. The legal advice must be provided electronically and in the format required (LSB will inform external providers of the Tax Office's desired format, and will follow-up with the external provider if the advice is not provided in the format required). LSB will draft a summary of the advice, consider whether it is appropriate for it 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.

147. There are occasions where a taxpayer will provide to the Tax Office a legal opinion/advice. Similarly, there will be instances where a panel firm will receive an advice or opinion on the Tax Office's behalf. 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.

148. 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).

149. In some cases, the inclusion of an opinion onto the Opinions Database may be deferred for a period of time due to the sensitivity of the subject matter. Approval to defer the inclusion of an opinion or advice must be sought from an SES officer in LSB.

150. If officers other than those in TCN or LSB require access to the Opinions Database, it must be authorised by an SES officer or an EL2 stream leader in LSB. Access 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 'Opinions Database' in Outlook. The request must include a business case as to why access should be granted.

151. 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 business line
- topics to be researched
- business reason for the request, and
- an endorsement by the requesting officer's manager.

152. 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.

153. LSB is responsible for the administration of the Opinions Database. This ensures that each legal advice is appropriately formatted and sanitised.

ANNEXURE A

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.

STATEMENT

1. This Annexure applies to all staff proposing to:
   - engage the services of internal legal providers in Legal Services Branch (LSB)
   - approve and/or engage the services of external legal service providers,[36] and
   - approve and/or engage the services of alternative dispute resolution (ADR) practitioners.[37]
2. This Annexure does not apply to:
   - Tax Practitioners 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; or
   - criminal prosecutions that require the engagement of the Commonwealth Director of Public Prosecutions by the Tax Office's In-house Prosecutions Service or Serious Non-Compliance.[38]
3. LSB is the central co-ordination point within the Tax Office for providing in-house legal services or obtaining legal services from external providers.
4. Tax officers from the business lines or the Centres of Expertise must ensure that they have the approval of their managers before approaching LSB for in-house legal services, or for the engagement of an external legal service provider.
5. LSB will advise the appropriate areas of the Tax Office immediately when they receive notification of the following proceedings:
   - Federal Court Part IVC Tax Appeals – via the Australian Government Solicitor (See Federal Court Rules Order 52B, subrule 4(4) Commencement of appeals)
   - Administrative Appeals Tribunal Part IVC Tax Appeals – direct notification to LSB by the Administrative Appeals Tribunal

[36] External legal service providers include panel firms of solicitors and counsel.

[37] An ADR practitioner may not necessarily be a legal service provider. However for the purposes of this Annexure, unless otherwise stated, the policy relating to the engagement of external legal service providers will equally apply to ADR practitioners.

[38] This Annexure also does not apply to matters handled by the Tax Office's In-house Prosecution Service that are not referred to the Commonwealth Director of Public Prosecutions. Most of these matters relate to undefended prosecutions for failure to lodge income tax returns, activity statements, or superannuation member contributions statements. Other matters handled by In-house Prosecutions that are not referred to the Commonwealth Director of Public Prosecutions include undefended prosecutions of unregistered tax agents.

- other litigation where the Commissioner is the respondent – direct service by the Applicant on LSB
- subpoena – served directly on LSB or via mail
- Freedom of Information applications – served directly to LSB via mail, and
- maladministration and related monetary claims – served directly to LSB via mail.

6. Where a business line 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.

7. 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 the 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.

8. To engage the services of LSB, the business line 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.

Authorisation to engage external legal service providers – ATOLegals

9. 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.

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

11. 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.

12. 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)[39] must be accompanied by an ATOLegals form.

13. 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.

14. 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.

15. 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.

16. In every instance the advice referred to above is to be captured on the Opinions Database (see paragraph 143 of this practice statement).

[39] Whilst direct briefs need to be captured on ATOLegals, the work form does not need to be sent to counsel as counsel and ADR practitioners will send their invoices directly to the LSB case officer, and not via ATOLegals.

ANNEXURE B

BRIEFING COUNSEL

PURPOSE: To provide details of the process and standards for briefing external counsel

STATEMENT

1. The Tax Office's engagement of counsel is subject to the requirements formulated by the Attorney-General's Department, in particular Appendix D to the Attorney General's Legal Services Directions 2005 (Legal Services Directions), *Engagement of counsel*.

2. Legal Services Branch (LSB) has corporate responsibility for legal services in the Tax Office, and is the central point of reference in respect of all legal work where the Tax Office is using external legal providers.[40] Requests for access to any legal services, including counsel, must go through LSB.[41] Business lines generally have a central point which coordinates all contact with LSB. Business line officers must check their own business line procedures before approaching LSB.

3. In all matters where external counsel is engaged and officers from Tax Counsel Network (TCN) are involved, the relevant Tax Counsel must approve the contents of the brief before it is forwarded to counsel.

4. The business line has the responsibility of collecting sufficient documentary and other material to enable the litigation team[42] to understand the transaction or issue generally, so that counsel can be briefed appropriately. Prior to the brief being prepared, members of the litigation team should collaborate with each other to determine the legal issues surrounding the evidence, in particular whether or not there is sufficient evidence in the matter for the purposes of litigation.

5. Where an external solicitor is engaged in a matter, that external solicitor will prepare the brief to counsel. The LSB officer must ensure that the external solicitor is aware of and adheres to the requirements under the Legal Services Directions.

Litigation matters

6. In direct brief litigation matters (where an external solicitor is not engaged) the LSB officer will prepare the brief to counsel. However, during the litigation process, questions may arise for counsel where an ATO view has not yet been formed, or there are alternative views within the office. In this type of situation, it may be appropriate for Tax Counsel to also be involved. Officers will need to work collaboratively to achieve the best outcome.

[40] External legal providers include the Australian Government Solicitor.
[41] There will be rare cases where this does not occur. Where an alternative arrangement is considered necessary this must have the approval of the Senior Assistant Commissioner, LSB.
[42] This will normally comprise the LSB officer, business line officer, and Tax Counsel or Centre of Expertise representative (where involved).

Technical advice outside of litigation

7. Where a technical or point-of-law opinion is sought from counsel, and the matter has not yet progressed to litigation, it may be more appropriate for an officer outside of LSB (either the business line officer, or if Tax Counsel is involved, the TCN officer) to prepare the brief. However, as the central point of reference to legal work in the Tax Office, LSB will be responsible in all matters for the professional management of the brief. This means that LSB will look after the administrative mechanics of briefing counsel. Where Tax Counsel is not involved, LSB will also ensure that the standard of the brief and requirements as set out in this practice statement have been met.

Basic requirements of a brief

8. It is recognised that every brief is different. There must be some degree of flexibility in the manner in which briefs are compiled, having regard to the special circumstances of any particular matter, but a high standard of professionalism is expected in the content and presentation of any brief prepared on behalf of the Commissioner. This Annexure sets out the basic requirements that the brief must meet, and the process that tax officers must follow in briefing counsel.

9. The basic requirements which must be met for each brief are summarised as follows:

- Where Tax Counsel is not involved, LSB officers must obtain the appropriate approval to brief counsel.
- The approval must be recorded by the LSB officer on ATOLegals and placed on the LSB litigation file.
- On each occasion counsel is briefed, the LSB officer must contact the Office of Legal Services Co-ordination to ascertain the approved Commonwealth Rate.
- Counsel is only to be briefed at the approved Commonwealth Rate.
- Where counsel is briefed to appear at a hearing, the brief must advise counsel:
  - what the tax mischief is, and instruct counsel to communicate the tax mischief to the court or tribunal[43]
  - to communicate the ATO view to the court or tribunal, and
  - to provide written submissions to the LSB officer at least a week prior to the hearing.
- The brief must 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.
- The brief must include a copy of Appendix B to the Legal Services Directions – The Commonwealth's obligation to act as a model litigant, and the brief must instruct counsel to comply with its obligations.

[43] This does not necessarily apply for debt litigation.

The decision to brief counsel

10. The decision for counsel to be briefed may be made at any time during the dispute process. However, where counsel is to be briefed in a litigation matter, it is desirable to do so at the earliest possible time.

11. In a litigation matter, the question of whether counsel should be engaged should be canvassed at the Instruction Strategic Internal Litigation Committee meeting, held within two weeks of notification of the matter between the litigation team. The question of whether the matter should be briefed by an external solicitor or by LSB must also be considered at this time.

12. As a guide, early consideration of engaging counsel should be given in matters which have the following factors:

- a high net wealth or prominent taxpayer
- a history of audits or investigations by the Tax Office
- any inconsistency in the Tax Office position
- the taxpayer is represented by a big accounting or legal firm
- senior counsel is being briefed for the taxpayer, and
- significant volumes of material or a very complicated factual matrix are involved.

13. There are also instances where counsel may be briefed for advice in matters not currently in litigation. Complex matters at the audit or objection stage may benefit from advice from counsel on contentious technical issues or evidence requirements. In these circumstances, business lines must follow their risk management processes and determine as early as possible whether or not it would be appropriate to engage counsel. If the business line decides that counsel should be engaged, the business line officer must check their own business line procedures before contacting LSB to commence the process. The decision on whether or not to engage counsel rests with LSB, unless Tax Counsel is involved. Where Tax Counsel is involved, the decision will rest with Tax Counsel. The process set out in this Annexure will apply in all instances where the decision has been made to engage counsel.

14. If a decision is made that counsel involvement is appropriate, the litigation team should turn its mind to which barrister(s) should be briefed. Where there is, or is to be, an external solicitor involved, the external solicitor must also be consulted before making a final recommendation.

Selection of counsel

15. The Legal Services Directions, under paragraph 4C of Appendix D *Engagement of counsel,* state that:

> All barristers are to be selected for their skills and competency independently of their gender. An agency is to ensure that arbitrary and prejudicial factors do not operate to exclude the engagement of female barristers or to limit the range of barristers being considered for the brief.

16. The Tax Office is always looking to brief new and different counsel, rather than always using the same barristers, in order to build the tax bar with capable new senior and junior counsel. Nurturing new counsel into tax work is an aspect to consider in addition to the consideration of how best to run a particular matter. Engaging a new junior counsel to assist an established senior from the tax bar can often work well in simple but important matters. There will be situations where an experienced tax law junior could work well with a senior with relatively little tax experience. Having two seniors or two juniors may be appropriate to consider in rare matters. All barristers are to be selected for their skills and competency.

17. When choosing barristers, three basic factors should be taken into account, having regard to the nature of the particular matter: seniority, specialisation and experience. Officers should also factor in counsel's past behaviour. For example, if counsel is known to be tardy in meeting deadlines, whether set by the Tax Office or the court or tribunal, then this should be taken into account in determining whether that counsel is appropriate in the matter under consideration. Further, if a counsel is known to give excellent written advice but is not known for court advocacy, then that counsel may not be an appropriate choice for a matter that will be heavily dependant on what happens in court and in cross examination. In the case of new counsel, other factors that need to be taken into account include the barrister's potential, and any recommendations received from respected and more experienced counsel.

18. The LSB officer should discuss the selection of counsel with the litigation team, with particular regard being given to the advice of the external solicitor if engaged. The views of the business line as the risk owner of the underlying technical issue are important and need to be taken into account. However the final decision on selection of counsel will rest with the Law Sub-plan, as it is here that the legal risks and knowledge of counsel can be properly weighed against the relative importance of the particular matter. This means that where Tax Counsel is involved in a matter, Tax Counsel's preference will usually be followed in the selection of counsel. However the LSB officer should obtain approval of the Assistant Commissioners, Litigation on the counsel selected so that LSB can monitor and ensure that counsel already engaged in significant matters are not overloaded by the Tax Office. Disagreements on selection of counsel will be escalated to the relevant Senior Tax Counsel, Strategic Litigation, or a Deputy Chief Tax Counsel, who has the final say.

19. Where Tax Counsel is not involved, the LSB officer must obtain written approval for selection of counsel from one of the following:

- For matters involving indirect taxes:
  - Senior Tax Counsel, Indirect Taxes, or in his/her absence
  - Senior Tax Counsel, Strategic Litigation (North or South), or
  - Assistant Commissioner, Litigation (North or South).
- For all other matters under Part IVC of the *Taxation Administration Act 1953:*
  - Senior Tax Counsel, Strategic Litigation (North or South), or
  - Assistant Commissioner, Litigation (North or South).

- For Debt matters:
  - Senior Tax Counsel, Strategic Litigation (North or South)
  - National Technical Adviser, Debt Litigation
  - Senior Tax Adviser, Debt Litigation
  - Stream Leader
  - Assistant Commissioner, Litigation (North or South), or
  - State Manager.
- For Commercial and General Law matters, and Freedom of Information matters:
  - General Counsel, or
  - Stream Leader.

20. Ideally, a nomination of counsel form should be used for the written approval on the selection of counsel. The submission for approval and the documented approval should be placed on the LSB litigation file. However, it is accepted that sometimes the approval of counsel is made on a more informal process, such as by email (or if approval is provided orally it is then documented) and placed on the file.

21. As a general rule, approval is given only to brief particular counsel. If a particular barrister is not able to accept the brief, approval should be sought to brief an alternative counsel.

22. Approval to brief counsel should also be recorded by way of an ATOLegals approval.

Counsel to comply with their taxation obligations

23. 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.

24. As of 1 March 2006, the new paragraph 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.

25. 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.

Setting a brief fee

26. Appendix D to the Legal Services Directions sets out the maximum rates payable to counsel and the circumstances under which 'out of chambers' and 'cancellation' fees may be paid.

27. Once approval for a particular counsel is given, LSB officers must ensure that counsel is briefed and paid at the approved Commonwealth rate. Before engaging counsel LSB officers are required to contact to ascertain the current approved rate for counsel. This must be done on every occasion counsel is engaged.

28. If counsel does not have an approved rate, the LSB officer should escalate the matter to the relevant LSB business manager or to the Assistant Commissioner, Litigation (North or South) with a view to having one established and approved by the Office of Legal Services Co-ordination. For further details on how to contact the Office of Legal Services Co-ordination refer to LSB Instruction Bulletin 2006/1.

Briefing counsel

29. Once appropriate counsel has been identified and approved, the LSB officer, (or the Tax Office's external solicitor, if involved), should telephone counsel prior to the brief being prepared and sent. This will give the Tax Office and counsel an opportunity for the nature of the matter to be outlined and to ascertain whether the matter is one that is appropriate for the chosen counsel to have. Such a conversation will determine whether counsel has any conflict in appearing for the Tax Office in the matter, in terms of timing or commitment difficulty or an actual conflict of interest in the matter. A timing or commitment conflict might not just involve scheduled hearing dates, but counsel's general availability to prepare all necessary documentation, such as Statements of Facts, Issues and Contentions, summonses, interrogatories, witness statements as well as attend each interlocutory appearance before the relevant court or tribunal.

30. In direct brief matters where an external solicitor is not involved, all members of the litigation team should be consulted before the final brief is issued to counsel. Depending on the nature of the matter, the business line will be more cognisant of the facts and can provide assurance that facts and evidence referred to in the brief are correct. However, it is recognised that in circumstances where time is of the essence, it may not be appropriate to engage in this consultation process. In all direct brief matters where Tax Counsel is involved, Tax Counsel must provide final approval before the brief is issued.

31. In all litigation matters, a copy of the brief should be provided to all members of the litigation team.

32. The brief contains instructions to counsel and informs counsel as to what is being sought from him or her. The quality of counsel's advice will often be reflected in the quality of the brief. It is therefore important that briefs are of a high standard in order to obtain the best use of counsel's time and expertise.

Presentation of the brief

33. Care should be taken in the presentation of the materials in the brief. Materials should be provided in ring binder folders for ease of reference and access to documents. This approach will also accommodate any necessary 'updates' to the brief by way of additional or substitute documents.

34. It is vital to ensure that all documents incorporated in the brief are copied as legibly as possible. Original documents should not be routinely provided to counsel, but rather only provided where counsel has specifically requested the production of the original documents.

35. Every brief must include a cover page. The cover page of the folder should contain the following information:

- the type of brief (for example, Brief to Advise, Brief to Advise and Appear)
- the name of the barrister being briefed, and the name of the barrister's clerk (if any)
- the fee on brief – this is usually expressed as an hourly rate and a maximum daily rate and should be expressed inclusive of GST and inclusive of conferences, consultations, preparation and other necessary work
- the name of counsel's instructor and his or her contact details
- where the matter is a matter that is at litigation – the name of the court or tribunal, the court or tribunal reference, and the names of the parties
- the names of other barristers also briefed in the matter (senior or junior) and relevant contact details, and
- the Tax Office's Australian Business Number.

36. The brief should be indexed, presented in a chronological order and divided by numbered tabs.

Content of the brief

37. The basic rule is that the brief should contain everything that counsel will need to undertake the task for which he or she is briefed. As an illustration, the kind of materials which might need to be included in a brief are:[44]

- instructions to counsel with a comprehensive memorandum as described in paragraph 40 of this Annexure
- a chronology of critical events, the evidence which the Commissioner has in his possession in support of each event, where the documentary evidence was obtained from and in what respects the evidence is lacking or the facts unknown

[44] The contents of the brief may vary as they will be dependent on when counsel is briefed. That is, if counsel is briefed at the beginning of the litigation process, then some documents, such as discovered documents will not be available for inclusion at that time. Once these documents become available, they should be provided to counsel.

- relevant documents filed in the court or tribunal, including the initiating process, any Order 52B documents[45] or 'T' documents[46] and other relevant documents
- affidavits and any witness statements
- expert reports
- other evidence including discovered documents or documents obtained under subpoena that the instructing officer thinks should be included. It might be sufficient to include a copy of the list of documents discovered and provide a copy of those documents which are of interest (cross referenced to the list of documents to identify what is being provided)
- relevant correspondence
- any previous instructions from the Tax Office, and advices received from the counsel briefed, and
- relevant authorities, articles, explanatory materials, rulings and other materials which might assist counsel.

Other information

38. Depending on the type of matter that is being briefed, there may be other kinds of materials which might need to be included. For example:

- Freedom of Information matters: the original Freedom of Information request and any relevant decision document/s
- employment law matters: relevant documents from proceedings before the Industrial Relations Commission or another commission, and
- recovery proceedings:
  - the correct name of the taxpayer and where the name has changed, a copy of the relevant Australian Securities and Investments Commission records setting out the history of the change in names
  - the current status of that taxpayer – if a corporate body, whether it has been or is subject to external administration and if so, what type and when
  - a statement of the objective of the Tax Office
  - a statement of all of the current outstanding tax liabilities of the taxpayer
  - a statement of the current financial position of the taxpayer and whether there are any other debt recovery actions on foot
  - a short chronology of the facts giving rise to the tax debt
  - a chronology of the relevant communications between the Tax Office and the taxpayer since the assessment was issued, and
  - a short advice on evidence directed to the nature of the tax debt and the type of recovery proceedings.

[45] See Annexure D for further information on Order 52B requirements.
[46] See Annexure C for further information on 'T' documents.

39. There will be times when an urgent issue arises in a matter which has voluminous supporting documentation. The time required to collate this material might be insufficient to meet an important court event. A prior discussion with counsel may enable the LSB case officer to only provide essential materials in the brief and all other documents could be provided shortly afterwards.

Instructions to counsel

40. The brief should always begin with instructions to counsel. The function of this part of the brief is to inform counsel about the matter and what is being sought from him or her. As a general rule, the memorandum of instructions should include:

- a clear statement of what counsel is being asked to do and any time constraints, including any deadlines
- how the matter arose and its current status, including any proceedings
- a clear identification of the issue which includes:
  - the name of the taxpayer or taxpayers concerned
  - the years of income concerned
  - the provision(s) of the relevant Act, and
  - a description of the issue raised. If it is for advice, there needs to be a precise identification of the question(s) to be addressed
- the material facts, in chronological order, cross referenced to the evidence
- the relevant legislation,[47] case law, relevant extrinsic materials such as the explanatory memorandum and other materials
- the Tax Office position and detailed references to case law, facts and evidentiary position
- the tax mischief arising from the matter, and
- any desired outcome for the Tax Office (for example law clarification) and any broader implications including policy, commercial, financial, revenue or industry considerations.

The ATO view

41. The instructions should clearly set out the ATO view to counsel.[48] This should be reinforced with a simple explanation supporting the reasoning of that view and linking the position to policy documents and extrinsic materials. In the event that after discussion with counsel there is any doubt as to the correctness of an ATO view, the issue should be escalated to a Deputy Chief Tax Counsel for urgent allocation to Tax Counsel or a Centre of Expertise.

[47] This means the whole of the relevant section or Division of the Act and all relevant interpretation provisions.

[48] There may be limited circumstances where counsel's advice is sought where no ATO view has yet been formed. For example, where there is disagreement at senior level in the Tax Office about the most technically correct view.

42. Where counsel is briefed to appear at a hearing in a Part IVC matter, counsel should be instructed to communicate to the court or tribunal the ATO view and what the tax mischief is in that matter. If counsel perceives any difficulty with the Commissioner's case, early advice is required to ensure that concerns can be urgently dealt with, or escalated. Counsel should also be instructed that they are required to provide draft written submissions in advance of the hearing, preferably at the latest one week prior to the date for filing and serving. This will allow all relevant stakeholders sufficient time to consider the submissions and ensure that counsel is putting forward arguments consistent with the ATO view.

43. Where an external solicitor is engaged, the LSB officer must instruct the solicitor to communicate to counsel the ATO view and what the tax mischief is, and ensure that the court will be similarly advised.

Aspects of Retainer

44. The memorandum of instructions should also refer counsel to the Aspects of Retainer included at the end of the instructions. The Aspects of Retainer must contain the following:

- a reference to the Legal Services Directions, and in particular, Appendix D to those Directions – *Engagement of counsel*
- a condition that, in accepting the brief, counsel is taken to warrant that he or she has not, at any time, been declared bankrupt
- an instruction that counsel is to comply with Appendix B to the Legal Services Directions – *The Commonwealth's obligation to act as a model litigant*
- the following statement:

> 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.
>
> (Note: any concerns raised by counsel should be escalated to the regional Assistant Commissioner, Litigation)

- if the matter is urgent and if there is a specific date by which the brief must be attended to, and
- other matters as appropriate.

45. A copy of Appendix B to the Legal Services Directions – *The Commonwealth's obligation to act as a model litigant* – must be attached to the Aspects of Retainer.

Conferences

46. The LSB officer should continuously monitor the progress of the case and at key points such as prior to filing documents, considering evidence of the taxpayer and in settling the Commissioner's evidence, consideration should be given to calling a face to face conference with counsel to ensure that the case is progressing in line with the Commissioner's instructions. The LSB officer, business line officer and Tax Counsel (where involved) should attend conferences with counsel as a matter of course. Other members of the litigation team may also attend conferences, depending on the purpose and significance of the particular conference, however regard should always be given to the efficient and ethical use of Commonwealth resources.

47. Conferences with counsel should be arranged as required, however conferences should always be held shortly after counsel receives the brief and shortly before a hearing. A key purpose of the initial conference with counsel is to ensure that counsel fully understands the ATO view, and to emphasise that this view needs to be put to the court or tribunal.

48. At the initial conference held shortly after counsel receives the brief, the matter should be discussed generally, issues should be clarified, and a clear plan set out for the future conduct of the matter, such as whether a written advice on evidence or prospects will be required, or otherwise what steps will be required in preparation of the matter. Careful notes should be taken of this conference to ensure that it is clear who is taking responsibility for each action required and when that action is required by.

49. At the conference shortly before the hearing, draft submissions should be reviewed or considered to reinforce the communication of the ATO view to counsel and in turn the court or tribunal.

Decisions

50. Where counsel has appeared at a hearing and a decision is subsequently given, counsel should be provided with a copy of the decision.

51. Where the decision is against the Commissioner, or is adverse in any respect of the findings of the court or tribunal, counsel might be asked at this time to provide advice regarding a possible appeal, or advice in relation to any contentions or cross-appeals that may need to be filed if the taxpayer appeals.

Fee disclosure agreements

52. In some jurisdictions, counsel is required, on receiving a brief, to provide a fee disclosure agreement.

53. The instructing officer should review the fee disclosure agreement to confirm that it is in accordance with the Legal Services Directions.

54. Where particular clauses in counsel's fee disclosure agreement are inconsistent with the Legal Services Directions, counsel should be advised of any requisite modifications to the fee agreement that will make it consistent with the Legal Services Directions.

Memoranda of fees

55. Accounts from counsel or other external legal service providers must be paid within 30 days in accordance with standard Commonwealth Government policy. Counsel will generally conduct Government legal work at a discounted rate and therefore prompt payment of the accounts is critical. Where an external solicitor is involved, counsel's accounts will be recorded on ATOLegals. Where counsel has been directly briefed by the Tax Office, the accounts will be paid through normal accounting for public monies; however they should still be recorded on ATOLegals.

56. It is the responsibility of the instructing officer to ensure that there are no irregularities with counsel's memorandum of fees and to verify that the amounts should be paid.

Counsel's travel costs

57. Under paragraph 13 of Appendix D to the Legal Services Directions, counsel is entitled to be paid reasonable costs for travel and accommodation when travelling interstate on behalf of the Commissioner in the conduct of matters. Costs which will be covered include air fares, accommodation, meals and incidentals. Unless special circumstances exist, counsel is allowed business class travel with accommodation and meals at the SES rates.

58. Where the instructing officer arranges travel and accommodation for counsel, care must be taken to not exceed the aggregate amount.

59. Where counsel arranges travel and accommodation themselves, such costs will be recorded as a disbursement on his or her Memorandum of Fees. Counsel should be advised of the maximum rate that will be paid by way of travel allowance. Where amounts claimed by counsel are in excess of the approved rates, such amounts are not to be paid unless approved by the regional Assistant Commissioner, Litigation and supported by receipts. If possible, travel costs should be negotiated when counsel is first briefed.

ANNEXURE C

TAX TECHNICAL LITIGATION IN THE ADMINISTRATIVE APPEALS TRIBUNAL

PURPOSE: to outline the best practice in carrying on litigation in the Administrative Appeals Tribunal

STATEMENT

1. The procedures set out in this Annexure are a general guide to all tax officers involved in legal proceedings on behalf of the Commissioner in the Administrative Appeals Tribunal (AAT) in tax technical issues which arise generally under Part IVC of the *Taxation Administration Act 1953* (TAA).[49]

2. Tax officers should generally comply with all aspects of this Annexure but should apply common sense in a given situation. When in doubt about any aspect of the management of a case in the AAT, officers should seek guidance from any of the Assistant Commissioners, Litigation within Legal Services Branch (LSB).

3. Those involved in AAT litigation may include LSB officers and officers from the Tax Counsel Network (TCN), the respective business line officers, Centres of Expertise (CoE), and external legal service providers, including counsel. It is important that all of these parties communicate effectively and work collaboratively 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 AAT.

4. The management of AAT litigation by LSB includes an obligation to ensure that all officers, including external solicitors and counsel acting for the Commissioner in relation to the proceedings are aware of and act in accordance with the relevant policies and guidelines.

5. This Annexure outlines in chronological order the procedures required to be observed by officers in AAT matters. The procedures arise as a result of obligations in the:

   - *Administrative Appeals Tribunal Act 1975* (AAT Act)
   - Administrative Appeals Tribunal Regulations 1976
   - Administrative Appeals Tribunal Practice Directions
   - Legal Services Directions 2005
   - Law Administration Practice Statements, and
   - other LSB and Tax Office directives.

6. All legislative references in this Annexure are to the AAT Act unless otherwise indicated.

[49] This includes reviewable decisions under section 344 of the *Superannuation Industry (Supervision) Act 1993*.

Contempt

7. The law of contempt applies to the AAT because of paragraph 63(5)(b), which provides that a person is guilty of contempt of the AAT if a person engages in conduct, and:

> the person's conduct would, if the Tribunal were a court of record, constitute a contempt of that court.[50]

Despite paragraph 63(5)(b), the Commissioner will not be in contempt of the AAT if he uses his powers to obtain material for the purpose of placing it before the AAT. This is because the AAT does not make a judgment for or against a particular party, but stands in the shoes of the Commissioner and so may use any material put before it.[51]

Jurisdiction

8. The AAT does not have a general power to review decisions made under Commonwealth legislation. The AAT can only review a decision if an enactment provides that applications may be made to the AAT.[52] In taxation matters the relevant decision will generally be the determination of an objection under section 14ZZ of the TAA, however, some of the legislation administered by the Commissioner provides for an application directly to the AAT.[53]

9. The AAT is split into several divisions: the relevant one for tax technical matters is the Taxation Appeals Division. When hearing an application for review of certain taxation decisions, generally where the tax in dispute is less than $5,000 or where there has been a refusal by the Commissioner to extend time to lodge an objection, the Taxation Appeals Division is known as the Small Taxation Claims Tribunal (STCT).[54] Applications for the release from tax liability on the ground of serious hardship[55] are also heard in the STCT.

Commencing the process

10. The process is commenced when an application is made to the AAT for review of a decision. The AAT notifies the Commissioner pursuant to subsection 29(11) that an application has been made for a review of a decision, including a copy of the application.

11. LSB must advise the appropriate business line within 24 hours of receiving the application.

[50] See definition of Tribunal at section 3.
[51] *Saunders v. DC of T* 88 ATC 4349; 19 ATR 1289.
[52] Section 25.
[53] For example, a decision to cancel a tax file number – section 202F of the *Income Tax Assessment Act 1936*.
[54] Section 24AC.
[55] Subsection 24AC(1).

12. On receipt of the application, the LSB Business Manager will allocate the matter to an LSB officer. The factors which the LSB Business Manager considers when allocating a case include:

    - whether it is a significant issue
    - whether a particular LSB officer has other similar issues or prior involvement
    - the knowledge base of LSB officers
    - any input from the business line, and
    - the caseload of LSB officers and general resource availability.

13. The business line case officer will prepare the documents that the Commissioner is required to lodge with the AAT pursuant to section 37.

Filing and record keeping

14. Upon receipt of a new AAT matter, the LSB officer allocated the case is responsible for maintaining a paper file that records all actions taken with the litigation. The paper file is to be kept up to date; all relevant documents and correspondence must be attached. The record keeping requirements set out in PS CM 2005/27 Record keeping and the LSB file management protocol must be adhered to at all times by the LSB officer.

15. The business line officer will, at the request of the LSB officer, provide all information and documents relevant to the appeal.

16. To ensure that cases are appropriately managed in the absence of the LSB officer, all current record keeping systems, or other databases must be kept up to date. These systems ensure that reports can be generated, cases can be found, issues can be escalated and corporate and statutory reporting requirements complied with.

17. The LSB officer must record the case in ATOLegals if an external legal service provider is engaged. This system enables electronic billing for our external solicitors. If counsel has been directly briefed without an external solicitor's involvement, a new request in ATOLegals will need to be completed in respect of counsel's engagement, but billing will continue from paper invoices outside the system.

The Strategic Internal Litigation Committee

18. Annexure F of this practice statement briefly discusses the Strategic Internal Litigation Committee (SILC) processes which may be employed in tax litigation and it is not intended that the purpose of each SILC be discussed here in any detail, other than those references to SILCs relevant to AAT proceedings. Importantly, it is noted that due to restrictive timeframes it is not always possible to convene every SILC. The litigation team members should exercise good judgment and consultation to ensure continual management of the case and collaborative decision-making.

19. The composition of the SILC can vary depending on the significance of the matter but will always include an LSB officer. The LSB case officer should liaise with the business line case officer to determine all appropriate attendees. Depending on the particular case, it may include the following people:

    - other business line officers,
    - TCN officer,
    - CoE officer, and
    - the test case secretariat if the case is significant

Section 37 – AAT documents

20. Section 37 documents (commonly referred to as T documents) must be prepared by the business line officer. These will be reviewed and lodged with the AAT by the LSB officer within 28 days of receipt of the section 29 notice[56] or 14 days for STCT matters.[57]

21. The Tax Office should make every effort to meet all timeframes set by the AAT. However, in circumstances where the LSB officer is unable to lodge the section 37 documents within the stipulated time frame they must request a realistic extension of time in writing from the AAT before the expiration of the relevant deadline with an adequate reason clearly explained.

22. In the event that a deadline set by the AAT is not met, the LSB officer must advise their manager as soon as they are aware that the timeframe has been breached. Officers should also ensure that appropriate safeguards are put into place so as to minimise the chances of similar breaches in the future.

23. The steps for preparation of section 37 documents are:

    - The business line officer sends through to the LSB officer the relevant documents including an electronic copy of the Draft Index of the documents within 14 days of receipt of the application for AAT matters and 7 days for STCT matters. The documents required include:[58]
        - the 'Reasons for Decision'
        - the notice of the taxation decision objected against
        - the taxation objection
        - the notice of the objection decision
        - every other document that is in the Commissioner's possession or under the Commissioner's control and is considered by the Commissioner to be necessary to the review of the objection decision concerned, and
        - an index of all the documents lodged under this dot point.

[56] Subsection 37(1).
[57] Section 37 requires that the Respondent file certain documents.
[58] Section 37of the AAT Act as modified by section 14ZZF of the TAA.

- The LSB officer undertakes a quality review of the Draft Index and the section 37 documents. The LSB officer also decides whether the 'Reasons for Decision' given as part of the objection decision can be used or whether a new statement of reasons is required. If the 'Reasons for Decision' is used, it is essential that at a minimum, it clearly and logically sets out the facts, issues and reasons for the decision. If this is not the case, a new statement of reasons is required which sets out in a logical manner the facts, issues and relevant law. Each issue must be dealt with separately. The business line officer will prepare the first draft for review and approval by the LSB officer, who must ensure that the documents are of a professional standard and meet the statutory requirements.

Filing of section 37 documents

24. The LSB officer files the section 37 documents with the AAT and also sends a copy to each party involved.[59] The AAT may request further copies as the matter proceeds to hearing.[60]

25. The LSB officer may file supplementary section 37 documents if all the necessary documents were not included initially.

Instruction SILC

26. The LSB officer should organise an Instruction SILC within 7 days of lodging the section 37 documents. This SILC will include a general discussion on the litigation strategy (such as evidence, settlement possibilities and alternative dispute resolution/mediation). This discussion will also require a risk assessment of the case.

27. The litigation team should consider whether the case is suitable for test case funding and advise the test case secretariat (via the Strategic Litigation Unit mailbox) of any possible test case issues. In cases where test case funding has been granted, the AAT must be advised, either in the Commissioner's written submissions, or by the Commissioner's representative at the hearing, what issues are being test case funded.

28. The litigation team should also consider whether the case is of strategic importance or presents any kind of litigation risk for the Commissioner. If so, the relevant Senior Tax Counsel, Strategic Litigation and the Strategic Litigation Unit (through its mailbox at strategiclitigationunit@ato.gov.au) should be notified of the case.

29. If there is a possibility that the facts of the case expose flaws in the reasoning underlying an ATO view, or if an ATO view has not yet been determined, this committee will be the forum to escalate the issue. If the underlying issue is not already being managed as a Priority Technical Issue,[61] the SILC is the forum to consider whether the matter should be considered as strategic litigation.

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[59] Subsection 37(1AE).
[60] Subsection 37(1AA).
[61] For further information on Priority Technical Issues refer to Law Administration Practice Statement PS LA 2003/10.

30. For matters in the AAT, the Instruction SILC will include a discussion on who should be the appropriate advocate before the AAT. Depending on the nature and significance of the case, it may be appropriate to engage counsel either directly or through an external legal service provider to assist in the case. Generally, in less complex matters it would be appropriate for the LSB officer to conduct the case as the advocate.

Contacting the taxpayer and/or their representative

31. After the Instruction SILC, the litigation team will have a better understanding of the appropriate litigation strategy to be adopted, such as the engagement of external legal service providers and any settlement possibilities. The LSB officer should contact the taxpayer and/or their representatives once they have an understanding of the case, to introduce themself and to have a general discussion of the matter. This will allow the taxpayer and/or their representatives to find out who will be responsible for the matter and who to contact if necessary, but it also provides an opportunity for the parties to clarify and possibly refine the issues before appearing at the first conference or directions hearing.

Engaging external legal providers

32. As a result of decisions made at the Instruction SILC it may be necessary to engage external legal providers. It may be decided that counsel is required to appear for the Commissioner due to the complexity of the matter. Whether counsel is engaged directly by the LSB officer or via an external solicitor will depend on the particular circumstances of the case.

33. Discussions regarding engagement of external solicitors and counsel are contained in Annexures A and B of this practice statement respectively.

AAT conferences

34. Conferences are a key part of the AAT's processes and are designed to assist the AAT achieve the dual purpose of attempting to obtain an agreed resolution where possible and ensuring that appropriate steps are taken to prepare for the hearing of those matters which are not otherwise resolved.

35. The AAT has issued a General Practice Direction and an STCT Practice Direction dealing with the conference process and matters leading up to hearings.

36. Conferences are part of the AAT's alternative dispute resolution (ADR) processes which also include mediation, neutral evaluation, case appraisal and conciliation.[62] It is the standard practice of the AAT to initially refer all matters to a conference. At the first conference or at anytime thereafter the AAT may, after consultation with the parties, decide to refer the matter to one of the other ADR processes.[63]

[62] Section 34A.

[63] The AAT has issued guidelines on the general principles it will consider in deciding whether to refer the matter to one of the other ADR processes, for example mediation.

37. The parties must act in good faith in relation to the conduct of any ADR process.[64] Evidence of anything said or done during an ADR process is not admissible in any subsequent hearing unless the parties agree that the evidence is admissible.[65]

38. If the AAT indicates that it is considering referring a matter to one of the ADR processes mentioned in paragraph 36 of this Annexure (outside of the normal conference process) the LSB officer should escalate the issue to the Part IVC Business Manager.

39. AAT conferences are generally attended by the LSB officer, and the external solicitor if involved. The LSB officer must advise all interested parties not in attendance as to the outcome of the conference.

Prior to the first conference

40. The LSB officer must file with the AAT and serve on the Applicant a Statement of Issues[66] at least one day prior to the first conference. The statement should be brief and set out the issues that the Commissioner considers are in dispute. These should be drafted in specific not general terms.

First conference

41. For non-STCT matters, the first conference, which is usually by telephone although it can be in person, takes place approximately 6-10 weeks after the taxpayer lodges an application, and will usually be conducted by a Conference Registrar.[67]

42. At the first conference both parties will discuss the issues in dispute including whether further evidence is required and explore the possibility of settlement.

43. The LSB officer should be prepared to explain the Commissioner's view of the matter and in appropriate cases, ask the taxpayer for further evidentiary material that may:

    - assist the AAT in reaching a decision, or
    - persuade the Commissioner of the strength of their argument.

44. The Conference Registrar may set a timetable for the parties, including filing a Statement of Facts, Issues and Contentions and setting a date for a second conference. If it is clear that the matter is not going to settle then the Conference Registrar may set a complete timetable for the preparation of the matter for hearing and no further conferences will be held.

45. For STCT matters the process is comparable although shorter. The first conference will be held approximately 4 weeks after the taxpayer lodges an application. There will only be one conference unless there is a real prospect that a second conference will facilitate settlement of the matter. If the matter does not settle through the conference process, then the AAT will usually set the matter down for hearing within 6 weeks.

[64] Subsection 34A(5).
[65] Section 34E.
[66] This is not required in STCT matters.
[67] Although it rarely occurs the conference can be conducted by a member of the AAT.

Prior to the second conference

46. Unless there have been directions giving a different timeframe, the Applicant is to file a Statement of Facts, Issues and Contentions at least 14 days prior to the second conference and the Commissioner is to file a Statement in reply at least 7 days prior to the second conference. The AAT's General Practice Direction also requires that both parties' evidence be filed at this time. Although this may occur it is usually the case that a timetable for filing evidence is agreed to by the parties which may extend beyond the second conference.

47. The LSB officer is responsible for drafting the Statement of Facts, Issues and Contentions in reply and should ensure that it clearly and concisely sets out the issues, the facts upon which the Commissioner seeks to rely and any contentions to be drawn from those facts.

48. Alternatively, a Statement of Agreed Facts can be filed on behalf of both parties if the parties agree that the matter raises no factual or evidentiary issues. A Statement of Agreed Facts should only be used after careful consideration of all the particular facts. The litigation team must consider whether such a Statement would change the nature of the contentions and allow interpretations of the law to be canvassed. A Statement of Agreed Facts has the advantage of saving time and allowing the parties to focus on the issues in contention. However, it should only be used where the team is confident that there are no ambiguities in relation to the facts.

49. Where counsel is engaged, either directly or via an external solicitor, then depending on the nature of the case both the external solicitor and counsel may be involved in drafting and settling the Statement of Facts, Issues and Contentions or Statement of Agreed Facts. Final approval of the document rests with LSB or Tax Counsel if they are involved and the business line should always be consulted.

Second conference

50. The second conference is usually held 12-16 weeks after the first conference.

51. During the second conference the parties discuss the merits of each case which have been detailed in the parties' respective Statement of Facts, Issues and Contentions, consider any additional evidence which has been filed and explore the possibility of settlement.

52. If the matter does not settle and it is considered that further conferences will not progress the matter then the Conference Registrar will make any further directions required for preparation of the matter for hearing and direct the parties to file Hearing Certificates.

53. The LSB officer will complete and file the Hearing Certificate with the AAT as soon as possible which confirms that in the Tax Office's view, the matter is ready for hearing or will be ready for hearing in accordance with the timetable or directions that have been made. The Hearing Certificate also indicates which witnesses will be called, which of the Applicant's witnesses will be cross-examined, an estimate of the length of the hearing and any unsuitable dates.

Hearing

54. When the LSB officer is appearing as advocate they will usually file written submissions to assist the AAT and make it easier to explain the ATO view. If the matter is a simple one it may not be necessary to file written submissions. The LSB officer should draft the submissions in collaboration with the relevant stakeholders and these should be cleared by the LSB Business Manager or any other officer nominated by the LSB Business Manager before they are filed. Submissions, whether in writing or provided orally from the bar table, should always be consistent with any articulated ATO view.

55. Where counsel is briefed, the LSB officer will ensure that a conference or conferences are arranged with counsel (and the Tax Office's external solicitor, if involved) in anticipation of the hearing to ensure that the case is properly prepared. Allocation of responsibility for any specific tasks should be clearly outlined to ensure that the Commissioner's case runs as smoothly as possible.

56. If counsel is briefed, the LSB officer is to attend the hearing with the Tax Office's external solicitors (if instructed on the matter) so that any necessary instructions can be provided in a timely manner. Depending on the nature of the case, it may also be necessary for the business line officer and Tax Counsel to attend, however the efficient and ethical use of Commonwealth resources should be considered. Prior to the hearing, the LSB officer should be contacted if tax officers unrelated to the case are interested in attending the hearing.

57. Where counsel is appearing for the Commissioner, they will prepare the submissions and finalise them after comments from all relevant stakeholders. The LSB officer should ensure that counsel's first draft of submissions is provided to the LSB officer in sufficient time for relevant stakeholders to provide comment before the final submissions are filed and served. Where an external solicitor is involved they will be the conduit to counsel.

58. At the conclusion of the hearing, the LSB officer is to advise all interested parties not in attendance whether the decision has been reserved or handed down.

Decision handed down

59. The AAT will usually notify the LSB officer when a decision is to be handed down with approximately one or two days notice. When a decision is handed down, the LSB officer should forward a copy of the decision to the business line case officer, Tax Counsel and any other interested parties.

60. The decision management process is to follow the requirements set out in Annexure F of this practice statement.

Appeal

61. An appeal against a decision must be lodged in the Federal Court (and in some limited circumstances to the Full Federal Court) within 28 days of the AAT decision being handed down. For appeals in the Federal Court, refer to Annexure D of this practice statement.

Other matters

Summons

62. Where additional evidence is required the LSB officer may request the AAT to issue a summons to a person to appear at a hearing to:[68]

    - give evidence, or
    - give evidence and produce books, documents or things in their possession, custody or control.

63. In respect of a summons to produce documents, the AAT will generally have the summons returnable at a return of summons hearing held once a month.

Directions hearings

64. The LSB officer can request the AAT to hold a directions hearing before a member of the AAT if specific directions are required in a matter,[69] for example if the Applicant is not complying with the AAT General Practice Direction or directions made by a Conference Registrar in respect of the filing of evidence or other statements.

65. The written request should set out the reason for which the directions hearing is sought.

Adjournments

66. The AAT has a practice of not setting a matter down for hearing until it is satisfied that it is ready for hearing or that a fixed timetable is in place to ensure that it will be ready before the hearing date. Accordingly, once a matter has been listed for hearing before the AAT an adjournment will not be granted unless the party requesting the adjournment can satisfy the AAT that it should be granted.

67. The matters that the AAT will take into account in deciding an application for adjournment are set out in the AAT's Listing and Adjournment Practice Direction.

68. Before any LSB officer makes an application for adjournment it should be discussed with the Part IVC Business Manager.

Settlement

69. If both parties agree to terms of settlement then the LSB officer is to lodge the agreement under section 42C,[70] signed by both parties to the settlement. The LSB officer must consider in every case whether the section 42C agreement made by the parties relates to a settlement for the purposes of the Code of Settlement Practice.[71]

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[68] Subsection 40(1A).
[69] Subsection 33(1A).
[70] Or an agreement under section 34D if the parties have agreed in the course of an alternative dispute resolution process.
[71] Where the agreement represents a genuine change of view by the Commissioner as to the facts or the application of the law there would not ordinarily be a settlement for the purposes of the Code of Settlement Practice.

70. Although the possibility of settlement would have already been canvassed at the Instruction SILC, the possibility of settlement may arise at any stage throughout the proceedings.

71. The litigation team should refer to PS LA 2007/5 Settlements and follow the guidelines if it appears that settlement is likely to occur.

72. If the section 42C[72] agreement sets out the terms of an agreement representing a genuine change of view by the Commissioner and not a settlement for the purposes of the Code of Settlement Practice, it can be signed by the LSB officer with carriage of the case, whether or not the officer is authorised to conclude settlements. LSB officers should always confer with their manager to confirm that the agreement represents a genuine change of view and not a settlement.

73. Once a matter is in litigation, the decision whether a case should be settled or conceded rests with Tax Counsel, or where Tax Counsel is not involved, LSB. It is expected that in most cases a consensus will be reached between the relevant stakeholders.

74. If the agreement falls under the Code of Settlement Practice, and there is agreement on all issues, the LSB officer or Tax Counsel will endorse the settlement submissions prepared by the business line. Where there is disagreement between the LSB officer or Tax Counsel and the business line officer on an issue concerning settlement, the matter will be escalated to the Assistant Commissioner, Litigation. Where there is agreement about the resolution of the case, any settlement deed will be signed off by the relevant business line Senior Executive Service (SES) officer. If the issue is escalated for a final view within the Law Sub-plan, the SES who is the final decision maker in the Law sub-plan will sign the Deed.

75. Where Tax Counsel is involved in the matter, they will make any decisions relating to settlement. If the Tax Counsel is at the SES level, they should sign the relevant deed. However, if the Tax Counsel involved is not at the SES level, then it should be escalated to the relevant SES officer in TCN.

Discontinuance or dismissal

76. The Applicant may withdraw the application by writing to the AAT advising of the withdrawal.

77. The AAT may also dismiss an application where the Applicant fails to appear, to proceed with the application or to comply with the directions of the AAT. The AAT may also dismiss the application if the Applicant is unable to show that the decision is reviewable or if it is satisfied that the application is frivolous or vexatious.

[72] Or section 34D agreement.

ANNEXURE D

TAX TECHNICAL LITIGATION IN THE FEDERAL COURT

PURPOSE: To outline the best practice in carrying on tax technical litigation in the Federal Court

STATEMENT

1. The procedures set out in this Annexure are a general guide for all tax officers involved in legal proceedings on behalf of the Commissioner in the Federal Court in tax technical issues which arise generally under Part IVC of the *Taxation Administration Act 1953* (TAA) and certain judicial review matters.[73]

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

3. Those involved in Federal Court litigation include LSB officers and officers from the Tax Counsel Network, the respective business line officers, CoE, and external legal service providers, including counsel. It is of vital importance that all of these parties communicate effectively and work collaboratively 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 Federal Court.

4. This Annexure outlines the procedures required to be observed by officers involved in Federal Court matters. These procedures arise as a result of obligations in the:

   - Federal Court Rules
   - *Federal Court of Australia Act 1976*
   - Federal Court of Australia Regulations 2004
   - Federal Court Practice Directions and Practice Notes
   - Legal Services Directions 2005
   - Law Administration Practice Statements, and
   - other LSB and Tax Office directives.

5. References in this Annexure to various Federal 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.

6. This Annexure is structured under three broad categories:

   - types of Federal Court matters
     - direct appeals to the Federal Court
     - appeal to the Federal Court from the Administrative Appeals Tribunal (AAT)
     - a question of law referred by the AAT

[73] This includes reviewable decisions under section 344 of the *Superannuation Industry (Supervision) Act 1993*.

- decisions reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR)
- section 39B of the *Judiciary Act 1903*

- usual process for direct appeals, and
- the Full Federal Court.

Caution about coercive powers

7. If court proceedings are pending or in process, use of the Commissioner's powers to issue notices to obtain information and evidence could amount to contempt of court. It is important to seek advice from LSB before using statutory powers in relation to a taxpayer who has a matter before a court, even if the purpose of access is not related to the litigation.

Types of Federal Court matters

8. Federal Court matters may arise in six main ways:

- a taxpayer may appeal directly to the Federal Court against an appealable objection decision of the Commissioner in accordance with either subparagraph 14ZZ(a)(ii) or paragraph 14ZZ(c) of Part IVC of the TAA
- a taxpayer or the Commissioner may appeal to the Federal Court, on a question of law, from a decision of the AAT in accordance with section 44 of the Administrative Appeals Tribunal Act 1975 (AAT Act)
- the AAT may refer a question of law arising in a proceeding before the AAT to the Federal Court for decision in accordance with section 45 of the AAT Act
- a taxpayer may apply to have a decision of the Commissioner reviewed by the Federal Court in accordance with section 5 of the ADJR
- a taxpayer or the Commissioner may seek an injunction, a declaration or some other kind of relief in accordance with section 39B of the *Judiciary Act 1903*, or
- the Commissioner may be involved in proceedings in the Federal Court for the recovery of outstanding taxation debts owed by taxpayers, either as the plaintiff in first instance proceedings or as the appellant or respondent in proceedings on appeal from a lower court. Debt litigation proceedings also include appeals by taxpayers against Departure Prohibition Orders issued by the Commissioner under Part IVA of the TAA. Departure Prohibition Orders are orders preventing a person from leaving Australia and are issued by the Commissioner against taxpayers who have an outstanding tax liability where it is considered that if they leave Australian jurisdiction, recovery of the outstanding tax liability will be at risk. Procedures for appeals against Departure Prohibition Orders are specifically dealt with in Order 52C of the Federal Court Rules. Procedures in debt litigation proceedings involving the Commissioner are not dealt with in this Annexure.

Direct appeals to the Federal Court

9. This type of appeal arises as a result of a taxpayer appealing directly to the Federal Court in accordance with either subparagraph 14ZZ(a)(ii) or paragraph 14ZZ(c) of Part IVC of the TAA. These are commonly referred as 'Part IVC matters'. The Commissioner is always the respondent in these types of proceedings.

10. Most of the cases involving the Commissioner as a respondent in the Federal Court will be as a result of these types of proceedings.

11. The Federal Court's Tax List Directions (Tax List Directions) aim to improve the conduct and management of tax cases. The new Directions impose a strict timetable for direct appeals filed in the Federal Court.

Appeal to the Federal Court from the AAT

12. Federal Court proceedings may also arise from an appeal by either of the parties, on a question of law, from a decision of the AAT in accordance with section 44 of the AAT Act. The Commissioner may be either the appellant or respondent in this type of proceeding.

13. Unlike a direct appeal lodged in the Federal Court at first instance, a decision of the AAT may only be appealed to the Federal Court on a question of law: subsection 44(1) of the AAT Act. It is therefore not enough to show that the decision is arguably incorrect; it is necessary to identify questions of law upon which to appeal. There is a significant body of case law on the distinction between questions of law and questions of fact.[74]

14. As the AAT determines the facts, its decision will not be set aside unless it is shown that the facts before it could not support the finding that was made. The evidence in the appeal proceedings will be the evidence found by the AAT at first instance.

15. Order 53 of the Federal Court Rules (FCR) is the relevant order for the purpose of appeals from a decision of the AAT.

16. As required by paragraph 44(2A)(a) of the AAT Act, an appeal from a decision of the AAT must be instituted within 28 days of when the decision is given to the potential Applicant or within such further time as the Federal Court allows.

17. If the Commissioner is the Applicant, the Commissioner must, pursuant to Order 53, rule 2 of the FCR, file a Notice of Appeal with the Federal Court Registry in the form of Form 55A within 28 days of when the AAT's decision is provided to the Commissioner.

18. Order 53, subrule 3(2) of the FCR requires that the Notice of Appeal must state:

- the decision of the AAT from which the appeal is brought, the members constituting the AAT and the date when the decision was made
- the question or questions of law to be raised on the appeal

[74] See for example *Kuswardana v. Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186 at 194; *Azzopardi v. Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156; *Collector of Customs v. Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280; *Hope v. Bathurst City Council* (1980) 144 CLR 1 at 7; *Collector of Customs v. Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395; *Vetter v. Lake Macquarie City Council* (2001) 202 CLR 439 at [24]-[27]; and *Ergon Energy Corporation Ltd v. Commissioner of Taxation* [2006] FCAFC 125 at [46]-[51].

- the order sought, and
- briefly, but specifically, the grounds relied upon in support of the order sought.

19. In accordance with Order 53, subrule 6(2) of the FCR, the Applicant must serve a copy of the Notice of Appeal on the other parties to the Tribunal proceedings and upon the AAT Registry within 7 days of filing the Notice of Appeal.

20. An extension of time to appeal to the Federal Court may be allowed if the procedure in Order 53, rule 7 of the FCR is followed.

21. When the Commissioner is the one to appeal, the Notice of Appeal should be cleared by the relevant Tax Counsel or, if Tax Counsel is not involved, by the relevant Assistant Commissioner, Litigation or a Senior Tax Counsel, Strategic Litigation.[75] Appeal periods should not be missed due to the unavailability of senior level staff. Decisions made should always be subject to the best advice available and decisions that need to be made urgently to meet court timeframes should be reviewed as soon as possible after the appeal has been filed. The Senior Tax Counsel, Strategic Litigation should also be consulted on whether funding should be offered to the taxpayer under the Test Case Litigation Program in relation to the appeal.

22. When the taxpayer is the one to appeal, consideration must be given as to whether a cross-appeal or a notice of contention is warranted.[76]

23. Paragraph 44(3)(a) of the AAT Act provides that the Federal Court may exercise its jurisdiction to hear an appeal from the FCR as a Full Court.
Paragraph 44(3)(b) of the AAT Act prescribes that the appeal should be heard by the Full Court of the Federal Court if the AAT's decision was given by a presidential member and the Chief Justice of the Federal Court, after consulting the President of the AAT, considers it appropriate that the appeal should be considered by the Full Court. Paragraph 44(3)(c) of the AAT Act also prescribes that the appeal should be heard by the Full Court of the Federal Court where the decision of the AAT was made by a member who was a judge.

24. Other than as outlined above and the specific differences between Order 53 and Order 52B of the FCR, the procedure to be followed in proceedings arising from an appeal by either party to a decision of the AAT is the same as the procedure to be followed in proceedings arising from a direct appeal.

Question of law referred by the AAT

25. The AAT itself may also refer a question of law to the Federal Court in accordance with section 45 of the AAT Act and section 26 of the *Federal Court of Australia Act 1976*. As prescribed by subsection 45(2) of the AAT Act a question of law referred under section 45 will be heard by the Full Court of the Federal Court.

26. Order 50 of the FCR sets out the rules to be adhered to in Federal Court proceedings arising out of such a reference.

[75] There are three Senior Tax Counsel responsible for strategic litigation, two with responsibility for income tax issues (Northern and Southern regions) and one with responsibility for indirect tax issues.
[76] Order 53, rule 13 of the FCR.

27. Pursuant to Order 50, rule 1 of the FCR, the question to be reserved or to be referred must be in the form of a special case and must:

- be divided into consecutively numbered paragraphs
- state the facts concisely, and
- annex all documents necessary to enable the Federal Court to decide the questions raised by the special case.

28. In accordance with Order 50, rules 2 and 4 of the FCR, the special case shall be prepared in draft by:

- if the question is referred at the request of a party, that party, or
- if the question is referred by the AAT of its own motion, the party who made the decision (in the case of tax matters this will be the Commissioner).

29. Whichever party it may be, the party drafting the special case must consult the other parties concerned and include an address for service of each of the parties concerned. The special case must then be settled by the AAT and transmitted with four additional copies to the Federal Court Registry by the AAT.

30. Order 50, rule 3 of the FCR stipulates that the Federal Court Registrar will set down the proceeding for a directions hearing and notify each party of the date appointed for the directions hearing.

31. Aside from the different procedures required by Order 50 of the FCR compared with Order 52B, tax officers involved in a Federal Court proceeding arising out of a reference of a question of law from the AAT should follow the procedure outlined below in relation to direct appeals.

Decisions reviewed under the ADJR

32. Another type of Federal Court proceeding is the type that arises from a taxpayer applying to have a decision of the Commissioner reviewed by the Federal Court (or the Federal Magistrates Court) in accordance with sections 5, 6 or 7 of the ADJR. The Commissioner will almost always be the respondent in this type of Federal Court proceeding.

33. A taxpayer can apply to the Federal Court for an order of review if they are aggrieved by:

- a decision to which the ADJR applies[77]
- the conduct of the person relevant to the making of the decision to which the ADJR applies,[78] or
- the failure to make a decision to which the ADJR applies.[79]

[77] Subsection 5(1) of the ADJR.
[78] Subsection 6(1) of the ADJR.
[79] Section 7 of the ADJR.

34. Section 7 of the ADJR deals with a failure to make a decision due to an unreasonable delay or a failure to perform a duty. Under sections 5 and 6 of the ADJR, the application may rely on one or more of the grounds set out in those sections. Expressed briefly, they are:

- breach of natural justice
- lawful procedures not observed
- decision maker lacked jurisdiction
- decision not authorised by enactment
- improper exercise of power
- error of law
- fraud
- no evidence to support the decision, and
- decision otherwise contrary to law.

35. Improper exercise of power is defined in the legislation[80] and, expressed briefly, it includes:

- considering irrelevant matters
- failing to consider relevant matters
- using power for reasons other than those conferred
- acting in bad faith
- exercising a personal discretionary power at the behest of another
- applying policy without regard to the merits of the case
- unreasonableness
- uncertainty, and
- abuse of power.

36. An application made under section 5 of the ADJR is often preceded by a request by the Applicant for a statement of reasons from the Commissioner under section 13 of the ADJR. The statement must set out the findings on material questions of fact, refer to the evidence or other material to which those findings were based, and give reasons for the decision.[81] However, it is not necessary for an Applicant to request a statement of reasons under section 13 in order to be entitled to apply for a review under section 5.

37. If a request for a statement of reasons under section 13 of the ADJR is made, this request will normally be dealt with prior to the litigation process commencing. Subsection 13(2) of the ADJR requires the decision maker to prepare and furnish the statement to the person who made the request within 28 days after receiving the request. Where it appears that the matter is likely to proceed to litigation or that the matter may involve some strategic risk to the Commissioner, it is preferable that counsel be engaged early, prior to settling the Commissioner's response to the section 13 request.

[80] Subsections 5(2) and 6(2) of the ADJR.
[81] Subsection 13(1) of the ADJR.

38. The manner of making an application under the ADJR is prescribed by section 11 of the ADJR. Paragraph 11(1)(a) and subsection 11(2) state that the manner of the application is prescribed by the FCR or Federal Magistrates Court Rules.

39. The period within which an application for an order of review under the ADJR must be made is set out in subsection 11(3) of the ADJR. Generally however for most reviews under section 5 of the ADJR, the application should be lodged with the Registry of the court concerned within 28 days of the decision and the reasons for that decision being furnished to the Applicant.

40. Order 54 of the FCR sets out the rules with which the parties must comply in ADJR appeals to the Federal Court.

41. Pursuant to Order 54, rule 3 of the FCR upon the filing of an application or as soon afterwards as practicable, the Applicant must file and serve (within 5 days of filing) upon the other parties such of the following documents, as are in his or her possession:

- a statement of the terms of the decision, and
- a statement given to the Applicant pursuant to section 13 of the ADJR, or any other statement provided by or on behalf of the person who made the decision purporting to set out findings of facts or a reference to the evidence or other material on which those findings were based or the reasons for making the decision.

42. If the Commissioner wishes to object to the competency of the application, Order 54, rule 4 of the FCR requires the Commissioner to file and serve upon the other parties to the proceeding a notice of objection to competency, in accordance with Form 57 of the FCR, stating briefly the grounds of his objection within 14 days after service upon him of the application.

43. Aside from the differences between Order 54 and Order 52B, and to the extent relevant, tax officers involved in an ADJR proceeding in the Federal Court should follow the procedures outlined below under direct appeals to the Federal Court.

Section 39B of the *Judiciary Act 1903*

44. A taxpayer or the Commissioner may seek an injunction, a declaration or some other kind of relief in accordance with section 39B of the *Judiciary Act 1903*. The Commissioner may either be the Applicant or the Respondent in these types of Federal Court proceedings. The Commissioner may seek an injunction or a declaration, or a taxpayer may seek a writ of *mandamus* or prohibition or an injunction against the Commissioner.

45. Since the introduction of the *A New Tax System (Goods and Services Tax) Act 1999,* due to the fact that the Commissioner is not required to make an assessment to establish a GST liability, it can happen that taxpayers seek declarations from the court in relation to particular technical issues relating to their GST liability, prior to the issue of an assessment[82] and in substitution for commencing proceedings under Part IVC of the TAA to determine the issue in dispute.[83]

46. A common circumstance in which a taxpayer will begin proceedings in the Federal Court pursuant to section 39B of the *Judiciary Act 1903* is when the taxpayer seeks to launch a collateral attack on the validity of an assessment outside the parameters of Part IVC of the TAA – for example, that it was issued in bad faith or was a tentative assessment.

47. Another common use of proceedings commenced pursuant to section 39B of the *Judiciary Act 1903* is when a party seeks discovery of documents over which a disputed claim for legal professional privilege has been made.

48. Order 54A of the FCR sets out the specific rules relating to these types of Federal Court proceedings. These rules deal mainly with the form of the application required.

49. Once again, however, aside from the differences between Order 54A and Order 52B of the FCR, the procedure to be followed in these types of matters is the same as outlined in paragraphs 50 to 53 of this Annexure in respect of direct appeals.

Process for direct appeals to the Federal Court

50. Order 52B of the FCR is the relevant order to be adhered to for direct appeals to the Federal Court.

51. The Tax List Directions issued by the Federal Court, which operate concomitantly with existing FCR, provide a national framework for the management of tax cases. A full copy of the Federal Court Tax List Directions may be obtained from the Federal Court website.[84]

52. The Tax List Directions require the parties to attend a Scheduling Conference (usually listed 45 days after filing and service of the appeal), the purpose of which is to:

- narrow the issues
- present an initial witness list
- establish a pre-trial schedule for all interlocutory steps needed to being the matter to trial
- address matters raised by the Pro-Forma Questionnaire, and
- fix a trial date.

[82] An assessment will only be made if one is requested by the taxpayer or as a result of audit action.
[83] This will not strictly be the case in every instance. Taxpayers may sometimes want a declaration from the Federal Court that an ongoing supply is GST-free. Due to the restrictions in section 105-65 of Schedule 1 to the TAA in getting refunds on overpaid GST on past sales, taxpayers are more concerned with using the declaration for future sales, whereas Part IVC of the TAA relates to past tax periods (although appeal decisions can have implications for the future).
[84] http://www.fedcourt.gov.au

53. Under the Tax List Directions, the Commissioner must:

- file and serve his Appeal Statement together with the Order 52B rule 5 of the FCR documents on or before the 28th day after filing and service of the appeal, and
- file and serve his response to the Pro-Forma Questionnaire (see the Attachment to this Annexure) on or before the 40th day after filing and service of the appeal.

Early warning

54. A Litigation Risk Matrix[85] has been developed to identify cases at the objection stage which are likely to proceed to the litigation stage. When these cases are identified the relevant business line through their Litigation Co-ordinator will contact the appropriate LSB Part IVC Business Manager and an assessment will be made as to the likelihood of the appeal being filed in the Federal Court. In appropriate cases LSB will work with the business line to prepare the case for litigation, with a main focus on preparation of a draft Appeal Statement and management of documents and evidence prior to filing of an application.

55. Procedures are also implemented in LSB for the Research Librarian in LSB to conduct searches of the Federal Court's eSearch facility on a daily basis to ascertain whether any applications have been filed. Where an application is discovered, the LSB Research Librarian will notify the relevant Part IVC Business Manager to ensure appropriate action is taken.

56. The following procedures are set out in a timeline from commencement of the appeal (Day 1) to the Scheduling Conference (Day 45).

Procedures leading to the Scheduling Conference

Day 1

57. Pursuant to Order 52B, subrule 4(4) of the FCR, the Applicant must serve a sealed copy of the application with AGS in the State or Territory in which the application was filed.

58. Upon being served with the application, the AGS will notify the LSB that an application has been filed and served and will provide a copy of the application as a matter of priority by email through established email boxes. At this time the LSB business manager must also allocate the case to an LSB officer. The factors which the LSB manager considers when allocating a case include:

- whether it is a significant issue
- whether a particular LSB officer has other similar issues or prior involvement
- the knowledge base of LSB officers
- any input from the business line, and
- the caseload of LSB officers and general resource availability.

[85] Guidelines on the Litigation Risk Matrix can be found on the intranet on the Online Resource Centre for Law Administration.

59. The LSB officer to whom the case is allocated must inform the relevant business line officer and/or Tax Counsel Network officer and/or Centre of Expertise officer and request that all documents be forwarded to LSB.

Days 2 and 3

60. Upon receipt of a new Federal Court matter, the LSB officer allocated the case is responsible for maintaining a paper file that records all actions taken with the litigation. The paper file is to be kept up to date; all relevant documents and correspondence must be attached. The record keeping requirements set out in PS CM 2005/27 Record keeping and the LSB file management protocol must be adhered to at all times by the LSB officer. LSB Instruction Bulletin 2008/2 also provides a checklist which must be annexed to the file.

61. The business line officer will forward all documents to LSB within 48 hours of being notified of an application.

62. The Part IVC Business Manager in consultation with the relevant LSB Assistant Commissioner will decide whether a panel firm will be engaged and select the panel firm during this period. This will allow additional time for conflict of interest issues to be resolved and also to start considering the issues, and the reasons for the objection decision with a view to preparing the Appeal Statement.

63. The LSB case officer needs to ensure that the Appeal Statement is drafted as soon as practicable. Where there is no pre-litigation draft Appeal Statement, it is usually practicable to engage junior counsel to draft the Appeal Statement with assistance of the LSB case officer and panel firm solicitor. Since the Appeal Statement must be filed within 28 days of service there is not time for LSB and/or the panel firm to prepare the first draft and then engage counsel, this should be done simultaneously. In addition to complying with the requirements of Order 52B, subrule 5(2) of the FCR, the Appeal Statement should avoid undue formality and state, in summary form:

- the basic elements of the party's case or defence
- where applicable, the relief sought
- the issues the party believes are likely to arise
- the principal matters of fact upon which the part intends to rely, and
- the party's contentions (including the legal grounds for any relief claimed) and the leading authorities supporting those contentions.

64. The LSB officer should start organising the first Strategic Internal Litigation Committee (SILC) and liaise with all relevant stakeholders within the Tax Office to ensure availability for attendance.

Days 4 to 6

65. The first SILC is required to be held within the first 4 to 6 days of the application being served. If counsel has not yet been determined then this should occur at this SILC. The selection and retention of counsel is to be done in accordance with the procedures set out in Annexure B of this practice statement. Any issues which have arisen which may delay the completion of the Appeal Statement should be raised and discussed at the first SILC with a view to resolving these issues and ensuring that the Appeal Statement is completed by the relevant time.

66. Consideration should be made at the first SILC as to whether it would be appropriate to conduct an alternative dispute resolution process and if so whether a mediation should be conducted by the court or whether there is a specific reason why a mediation or another alternative dispute resolution process should be conducted outside the Federal Court framework.

67. The LSB officer is to commence enquiries necessary to enable the completion of the Pro-Forma Questionnaire. These enquiries should include but are not limited to:

- liaising with the business line to query the status of the debt and whether the business line is aware of cases with the same issues at the objection stage which are likely to be litigated
- a search of LSB's Case Management System (Mind Your Matters)
- an email from the relevant Part IVC Business Manager to other Business Managers querying whether there are any related matters, either by common issue or common taxpayer
- liaising with the test case secretariat to enquire whether the matter is a test case, or if an application has been forwarded for test case funding, and
- liaising with the relevant LSB Assistant Commissioner as to whether the case needs to be fast-tracked.

Days 7 to 9

68. As soon as possible after the first SILC, and within the first 7 to 9 days of the application being received, the remaining Order 52B of the FCR documents are to be allocated to the selected external legal service provider.

69. The LSB officer should initiate and set a date for the first Conference with counsel and ensure that all relevant Tax Office stakeholders, together with representatives from the panel firm are available to attend.

70. Insofar as practicable, the first draft of the Appeal Statement should be completed and able to be discussed at the first Conference. Where there are any practical difficulties which may delay this, these difficulties should be raised with the relevant Business Manager.

Days 10 to 12

71. The first conference is to be held as soon as is practicable following service of the application, and within the first 10 to 12 days.

72. Attendants at the first conference are required to:

- review and discuss any issues raised by the first draft of the Appeal Statement
- settle relevant instructions
- outline a case management plan, and
- discuss other requirements as relevant to the case at hand.

Days 13 to 21

73. The LSB officer and the panel firm are to commence preparation of:

- the draft Response to the Pro-Forma Questionnaire, and
- other Order 52B of the FCR documents.

74. The LSB officer should commence preparation for the Scheduling Conference, in consultation with the panel firm and counsel. Matters to be discussed include, but are not limited to:

- the issues raised in the case, with a view to narrowing those issues and facts which appear to be in dispute
- any affidavit evidence required in support of the Commissioner's position
- whether any witnesses (including expert witnesses) may need to be called at trial. Where the Commissioner intends to call witnesses, an initial list of witnesses, which briefly outlines each witness's expected evidence, must be prepared and brought to the Scheduling Conference. Each party has an ongoing obligation to update their witness list with intended additions or removals of witnesses, as necessary
- discovery to be made in the case. Unless expanded or limited by the Tax List Coordinating Judge at the Scheduling Conference, discovery shall be confined to documents in the following categories:
  - documents on which a party intends to rely
  - documents that materially affect the party's own case adversely
  - documents that materially affect another party's case adversely, and
  - documents that materially support another party's case,
- alternative dispute resolution should again be considered.

Days 22 to 27

75. The Draft Appeal Statement together with other Order 52B of the FCR documents are to be made available to the Tax Office to be settled by the 22nd day. These documents should be disseminated to relevant Tax Office stakeholders and any comments or revisions are to be made within this timeframe.

76. The LSB officer should continue to plan for the Scheduling Conference and should provide an update to the attendees regarding progress in relation to this matter.

77. The LSB officer is required to convene a final case conference and ensure that all relevant Tax Office and external stakeholders are available to attend. The attendants at the final case conference are required to:

- finalise the Appeal Statement, and
- finalise other Order 52B of the FCR documents.

78. If the date of the Scheduling Conference has not been advised to other stakeholders, the LSB officer should take the opportunity at the final case conference to advise of the time and date of the Scheduling Conference.

Day 28 (critical date)

79. The Commissioner's Appeal Statement *must* be filed and served together with other Order 52B of the FCR documents no later than Day 28.

80. A draft response to the Pro-Forma Questionnaire should be made available by Day 28. The LSB officer is to disseminate the draft response to Tax Office stakeholders for feedback.

Days 29 to 39

81. The Pro-Forma Questionnaire is to be settled and finalised. Any comments and revisions are to be made within this period.

82. The LSB officer is to continue to prepare for the Scheduling Conference. It will be necessary to determine those stakeholders who will be required to be present at the Scheduling Conference. The Tax Office is conscious of ensuring that representation at the Scheduling Conference should be restricted to active instructors in the case, not just those with an interest in the matter. There has been comment in the past of too many people being in attendance. The LSB officer should confirm availability of these attendees.

Day 40 (critical date)

83. Both parties *must* file and serve their completed Pro-Forma Questionnaires by no later than Day 40.

Days 41 to 45

84. The LSB officer, in consultation with the panel firm and counsel, should continue and finalise preparations for the Scheduling Conference. The Commissioner's representatives should be in a position to:

- Address any matters raised by the Pro-Forma Questionnaire with a particular view to any matters which the Commissioner considers will or may affect the work of the Court either generally or in relation to the particular case being undertaken efficiently and expeditiously.
- Advise when the matter may be ready for hearing, together with the necessary interlocutory steps leading up to trial. Insofar as possible, the Commissioner's representatives are to endeavour to avoid interlocutory disputes.

- Decide whether this case is appropriate for mediation. If mediation is not appropriate, the reasons for this are to be raised at the Scheduling Conference.

85. The LSB officer should re-confirm all attendees' availability to attend the Scheduling Conference. Where any attendee whose presence is required cannot attend, alternative arrangements must be made.

86. The LSB officer should disseminate all relevant information to attendees at the Scheduling Conference and ensure that all attendees are fully apprised of the case.

After the Scheduling Conference

87. Following the Scheduling Conference, the LSB officer is required to complete the table referred to in paragraph 33 of LSB Instruction Bulletin 2008/2 and to forward it by email to Strategic Litigation Unit Mailbox. This is to enable the collection and collation of information regarding the conduct of the Scheduling Conference to enable the Tax Office to determine the effectiveness of the process and to ensure that it is adhering to its obligations under the Tax List Directions.

Interlocutory proceedings

88. Occasionally one of the parties to a proceeding will file an interlocutory motion.

89. Paragraph 8.1(a) of the Tax List Directions states:

> Unless otherwise directed, interlocutory applications, whether or not made by motion must be in writing and must be accompanied by a written brief (not exceeding five pages) setting forth a concise statement of the facts (if necessary verified by affidavit) and supporting arguments, with a citation of the authorities upon which the moving party relies. The opposing party must file a responsive brief (not exceeding five pages) and such supporting documents as are appropriate within five days after service of the moving party's brief. The moving party may file a short rebuttal brief within two days after service of the opposing party's response brief.

90. Paragraph 8.2 of the Tax List Directions states:

> The general rule for interlocutory applications is that they are to be determined upon written briefs. A party may request an oral hearing but it is intended that the process for determination with written briefs will usually make an oral hearing unnecessary.

91. If the Federal Court makes a decision on an interlocutory motion that is adverse to the Commissioner, it may be appropriate for the Commissioner to consider seeking leave to appeal against the interlocutory decision. Either party may seek leave to appeal against an interlocutory decision within 7 days of the decision or within such further time as the Federal Court may allow. The process for appealing against an interlocutory decision is set out in Order 52, rule 10 of the FCR. Annexure F of this practice statement provides details on who the appropriate decision maker is in relation to whether or not the Commissioner should appeal a decision, including interlocutory decisions.

92. The tests to be applied in determining whether leave to appeal from an interlocutory decision should be granted are broadly two-fold. First, the Federal Court must be satisfied whether, in all the circumstances, the decision is attended with sufficient doubt to warrant it being reconsidered by the Full Court. The second is whether substantial injustice would result if leave were refused, supposing the decision to be wrong. These tests, however, are not isolated from each other and they may bear upon each other and involve a fine balancing of considerations.[86]

Discovery

93. Discovery is an important part of the litigation process, and is often the most expensive interlocutory process undertaken. It functions to reduce 'surprise' in litigation, define the issues, and potentially equalise the position of the parties in respect to the trial or hearing. A decision for the Commissioner to seek discovery should be undertaken carefully, in the interests of justice and having the litigation conducted appropriately and effectively. Responding to discovery ordered against the Commissioner should be undertaken diligently.

94. Pursuant to Order 15, rule 1 of the FCR, either party to a proceeding may, after the directions hearing and with leave from the Federal Court, require the other party to give discovery of documents by filing and serving a notice of discovery.

95. In accordance with Order 15, subrule 2(3) of the FCR, the party giving discovery, after having conducted a reasonable search (paragraph 6.3 of the Tax List Directions), is required to disclose the following categories of documents the party is aware of (paragraph 6.1 of the Tax List Directions):

- documents on which the party relies
- documents that adversely affect the party's own case
- documents that adversely affect another party's case, and
- documents that support another party's case.

96. However, as explained in Federal Court Practice Note No. 14, the Federal Court will not order general discovery as a matter of course. Discovery will only be ordered if necessary, and the Court will mould the order to suit the case. In determining whether to order discovery and the scope of the order, the Federal Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit. Commonly, discovery in larger taxation appeals is defined by categories of documents.

97. In responding to an order or seeking discovery, great care should be undertaken and advice should be sought from the Tax Office's external solicitor and if necessary its counsel about discovery requirements. Before any list is filed or affidavit is sworn or affirmed, the LSB officer must discuss with senior LSB officers any doubts or queries as to a document's relevance or privileged status, any doubts about legal advice received or any concerns about the diligence of any area of the Tax Office to properly and fully disclose documents.

[86] The Commissioner of Taxation for the *Commonwealth of Australia v. Woodside Energy Limited* [2006] FCA 1375, paragraph 6.

98. In responding to an order, the LSB officer should take the role of ensuring any necessary searches are undertaken in compliance with the order. This will involve working closely with the Tax Office's external solicitor in determining what documents fall within the request, and ensuing that the various areas of the Tax Office undertake searches as required and produce all relevant documents. It will be a matter for agreement with the Tax Office's external solicitor as to who will swear any affidavit in relation to discovery, but this role would usually fall to the LSB officer. Any officer preparing a list or affidavit of documents must be personally satisfied as to the completeness of the discovery. This means if doubts as to the completeness of the discovery are held, then further investigation must be undertaken.

99. The Tax Office's external solicitor may form an independent opinion about the documents that the Tax Office is likely to have and which should be included in the affidavit of discovery, and will advise the LSB officer accordingly. The solicitor should advise whether the discovery process has been appropriately carried out. The solicitor will form an independent opinion and advise as to what the affidavit should contain.

100. When discovery is provided, a list of the documents discovered (formally or informally) must be retained to ensure appropriate recording of the documents provided, together with a complete copy of all documents discovered. If a document is edited to remove reference to a privileged name or communication, a copy of the document as discovered must be retained, in addition to the original document.

101. When a notice of discovery is served on the Commissioner, the Commissioner must ensure that all of the requirements set out in Order 15 of the FCR are satisfied, particularly rule 6, which sets out the contents and form of the list of documents required. Also note that once the Commissioner has been ordered to give discovery, the Commissioner is under a continuing obligation under Order 15, rule 7A of the FCR to discover any document not previously discovered and which would otherwise be necessary to comply with the requirement or order.

102. Federal Court Practice Note No. 17 encourages the use of information technology during the discovery process. The options for the use of information technology should be considered in collaboration by the litigation team, including external solicitors and counsel. Options for document management systems for tax litigation are evolving and the present position should be discussed with the local business manager in LSB or the Assistant Commissioner, Litigation.

103. Paragraph 6.5 of the Tax List Directions states:

> Before filing any application relating to a discovery dispute, the parties must meet and confer and attempt to resolve the dispute in good faith. If the parties are unable to resolve the dispute, any application to the Court must include a certificate by the moving party's lawyer that the 'meet and confer' requirement was completed, though unsuccessful. Failure to so certify will result in the application being immediately refused.

Interrogatories

104. Another form of discovery, which is uncommon in taxation appeals, is by way of interrogatories. In accordance with Order 16 of the FCR, either party may be granted leave by the Court to file and serve a notice requiring a party to answer interrogatories relating to any matter in question between the interrogating party and the party served. Interrogatories allow a party to obtain admissions as to facts which will support the case of the party interrogating.

105. Paragraph 7.1 of the Tax List Directions makes it clear that interrogatories will not be permitted other than in exceptional circumstances.

Particulars

106. The Court may order a party to file and serve particulars.[87]

107. The basic function of particulars is to inform both parties as to the case to be met at the hearing and to sharply define the issues. They prevent the opponent from being taken by surprise and allow the opponent to know what evidence is to be collected.

108. The Commissioner should seek particulars if the nature of the Applicant's case is not clear. If the Applicant seeks particulars from the Commissioner the Commissioner should assist by providing as much further detail as is reasonable in the circumstances.

109. Paragraph 7.2 of the Tax List Directions states:

> Requests for Particulars will not be permitted except in exceptional circumstances, it being expected that such questions will have been discussed at the Scheduling Conference.

Subpoenas

110. The rules relating to subpoenas are found in Order 27 of the FCR. The Commissioner must adhere to these requirements when issuing subpoenas. Usually the external solicitor will be responsible for issuing subpoenas.

111. It may be helpful to use a subpoena to fill any gaps or to overcome any other problems with the current evidence available. Decisions about subpoenas should be made with the advice of the Tax Office's counsel and external solicitor(s).

112. LSB officers have a responsibility to raise questions about subpoenas during the evidence stage to make sure that necessary subpoenas are issued at the appropriate time. Conversely LSB officers should also challenge counsel when a proposal to seek leave to issue subpoenas does not appear necessary or the documents called for are unduly wide in scope. These matters should be discussed with Tax Counsel, if involved, and our solicitor if necessary.

[87] The power to so order has been referred to as an implied power; see *WR Carpenter Holdings Pty Ltd v. FC of T* [2006] FCA 1252.

113. Subpoenas to produce documents are normally only issued on third parties that are not a party to the proceedings. Where documents are required from a party to the proceedings, for example to make available for inspection a document referred to in a pleading or affidavit, a notice to produce will usually be issued pursuant to Order 15, rule 10 of the FCR. If the notice to produce is not complied with the party who served the notice may seek to enforce compliance by way of Order 15, rule 11.

Affidavits

114. In accordance with Order 52A, rule 5 of the FCR all evidence shall be by affidavit in tax matters unless otherwise ordered by the Federal Court or judge.[88]

115. Affidavits filed in support of the Commissioner's case should always be prepared with the advice of counsel, the Tax Office solicitor or an LSB officer before being sworn. The content should be relevant and be the honest testimony of the deponent. The Tax Office's counsel, solicitor and the LSB officer will provide guidance on the legal requirements of the affidavit and admissibility of the evidence proposed to be given in the affidavit.

116. Once again it is imperative that the Commissioner files and serves all evidence within the timetable (or revised timetable) directed by the Federal Court.

117. Where an expert witness is required to give evidence for the Commissioner, those involved in the litigation matter should be familiar with the Federal Court Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia, and ensure that a copy of these guidelines are provided to the expert witness. In essence expert witnesses should ensure that their report or affidavit:

- is clearly expressed and not argumentative in tone
- is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge
- identifies with precision the factual premises upon which the opinion is based
- explains the process of reasoning by which the expert reached the opinion expressed in the report
- is confined to the area or areas of the expert's specialised knowledge, and
- identifies any pre-existing relationship between the author of the report, or his or her firm, company et cetera, and a party to the litigation (for example, a treating medical practitioner, or a firm's accountant).

118. It is generally a sensible practice to discuss the expert's formative views in a conference with counsel before asking for a draft report. This will ensure that the evidence will be of forensic use to the Federal Court but also to ensure that the report is properly focussed on the requirements of the Federal Court Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia. It should be remembered that if an expert's report is ultimately filed as evidence, the earlier drafts and briefing materials are generally discoverable.

[88] With reference to the FCR, Order 52A, rule 5 is made applicable to applications made under Order 52B by Order 52B, rule 3.

Submissions

119. Prior to the hearing and after the parties have filed their evidence, the court will usually set down dates for the parties to file their respective written submissions on the case. The LSB officer should ensure that counsel's first draft of submissions is provided in sufficient time for relevant Tax Office stakeholders to provide comment (preferably one week) before the final submissions are filed and served.

List of authorities and legislation

120. Federal Court Practice Note No. 19 requires the respondent in a Federal Court matter to file and serve, no later than two days before the hearing, a list of authorities and legislation. The LSB officer must work with the Tax Office's external legal providers to ensure that the requirements set out in Federal Court Practice Note No. 19 are met.

Hearing

121. The LSB officer will ensure that a conference or conferences are arranged with counsel and the Tax Office's external solicitor in anticipation of the hearing to ensure that the case is properly prepared. Allocation of responsibility for any specific tasks should be clearly outlined to ensure that the Commissioner's case runs as smoothly as possible.

122. The LSB officer is to attend the hearing with the Tax Office's external legal service providers so that any necessary instructions can be provided in a timely manner. Depending on the nature of the case, it may also be necessary for the business line officer and Tax Counsel to attend. However, the efficient and ethical use of Commonwealth resources should be considered. Prior to the hearing, the LSB officer should be contacted if tax officers unrelated to the case are interested in attending the court hearing.

123. At the conclusion of the hearing the LSB officer is to advise all interested parties not in attendance whether the decision has been reserved or handed down.

Decision handed down

124. The Federal Court will usually notify the Tax Office's external legal service provider when a decision is to be handed down approximately one or two days beforehand. This information will then be passed to the LSB officer. When a decision is handed down, the LSB officer should forward a copy of the decision to the business line case officer, Tax Counsel and any other interested parties.

125. The decision management process is discussed in Annexure F of this practice statement.

Settlement

126. Although the possibility of settlement would have already been canvassed at the Instruction SILC, the possibility of settlement may arise at any stage throughout the proceedings.

127. The litigation team must refer to PS LA 2007/5 Settlements, and follow the guidelines if it appears that settlement is likely to occur.

128. Once a matter is in litigation, the decision whether a case should be settled or conceded lies with Tax Counsel, or where Tax Counsel is not involved, Legal Services. All settlement submissions prepared by the business line must be endorsed, if acceptable, by the relevant Tax Counsel or the LSB officer. For matters involving the remission of general interest charge for late payment, advice should be sought from the Debt business line and endorsed, if acceptable, by the relevant Tax Counsel or LSB officer. Where there is disagreement between the LSB officer and business line officer on an issue concerning settlement the matter will be escalated to the Assistant Commissioner, Litigation. Where there is agreement about the resolution of the case, any settlement Deed will be signed off by the relevant business line Senior Executive Service (SES) officer. If the issue is escalated for a final view within the Law Sub-Plan, due to a disagreement between the business line and LSB, the SES who is the final decision maker in the Law Sub-Plan will sign the appropriate deed.

129. Where Tax Counsel is involved in the matter, they will make any decisions relating to settlement. If the Tax Counsel is at the SES level, they should sign the relevant Deed. However, if the Tax Counsel involved is not at the SES level, then it should be escalated to the relevant Deputy Chief Tax Counsel.

The Full Federal Court

130. In all but exceptional cases, the Full Federal Court is the final court of appeal in taxation matters. Great care should therefore be taken in the management of Full Federal Court cases. Generally speaking most Full Federal Court Cases will have Tax Counsel appointed to ensure that the ATO view is appropriately communicated to the Court. The LSB officer should ensure that, unless advised otherwise by the Senior Assistant Commissioner, Strategic Litigation, the case is recorded on the Significant Litigation Report.

131. Where it is the taxpayer that has appealed, the LSB officer should ensure that the Strategic Litigation Unit mailbox is advised. The Assistant Commissioner, Litigation and the relevant Senior Tax Counsel, Strategic Litigation should also be advised to ensure that the case is appropriately resourced.

132. Pursuant to sections 24 and 25 of the *Federal Court of Australia Act 1976*, the Full Court of the Federal Court has jurisdiction to hear and determine appeals from a single judge of the Federal Court. Either party may appeal to the Full Court of the Federal Court against a decision of a single judge of the Federal Court.

133. A Full Court of the Federal Court is constituted as set out in section 14 of the *Federal Court of Australia Act 1976*. Subsection 14(2) of the *Federal Court of Australia Act 1976* provides that a Full Court is constituted by three judges sitting together or by two judges sitting together subject to the extent permitted in subsection 14(3), which allows for the situation where one of the judges dies, resigns or otherwise becomes unavailable during the hearing.

134. The rules pertaining to appeals to the Full Court of the Federal Court are found in Order 52 of the FCR. Order 52, rule 12 states that an appeal is instituted by filing a Notice of Appeal in accordance with Form 55 of the FCR. The Notice of Appeal must, as required by Order 52, rule 13, state the following:

- whether the whole or part only, and what part, of the judgment is appealed from
- briefly, but specifically, the grounds relied upon in support of the appeal, and
- what judgment the appellant seeks in lieu of that appealed from.

135. The following are the main steps in appealing to the Full Federal Court from a decision of a single judge of the Federal Court.

When	Action
	Decision of a single judge is delivered.
Within 21 days of the final judgment Order 52, rule 15	Appellant files a Notice of Appeal (Form 55)
At the time of filing the appeal	The registry will set a date with a Registrar to decide what documents will be in the appeal books
	The appellant serves a sealed copy of the Notice of Appeal on the other parties
Within 21 days of service of the Notice of Appeal	The respondent may file a cross-appeal
At least seven days before the appointment to settle the Appeal Book index	A Draft Index of documents to be included in the Appeal Book is filed and served by the appellant
	Appointment to settle (that is, finalise the content of) the Appeal Book index
On the date set by the Court	Appellant files and serves the Appeal Books
If required	A callover may be set by the Court where the parties tell the Court: • that the Appeal Books have been prepared, filed and served • names of any Counsel representing the parties • availability of Counsel for hearing • expected duration of the hearing, and • any other relevant matters.
	The Court sets a hearing date
Usually five working days before the hearing of the appeal	Five copies of an outline of submissions and list of authorities, are to be filed and served by the appellant
Usually two working days before the hearing of the appeal	Respondent(s) file and serve their outline of submissions and lists of authorities
Usually one clear working day before the hearing of the appeal	Appellant files and serves any submissions in reply
	Appeal hearing

136. Order 52, rule 15 of the FCR prescribes the timing for filing and serving the Notice of Appeal. In essence this must be done within 21 days of one of the following:[89]

- the date when the judgment appealed from was pronounced
- the date when leave to appeal was granted, or
- any later date fixed for that purpose by the court appealed from.

The Full Court may allow an extension of time upon application within the 21 day period.[90] In addition the Full Court may allow a Notice of Appeal to be filed at any time if it has special reasons to do so, also upon an application to do so.[91]

[89] Order 52, paragraph 15(1)(a) of the FCR.
[90] Order 52, paragraph 15(1)(b) of the FCR.
[91] Order 52, subrules 15(2) and (3) of the FCR.

TAXATION LIST – PRO FORMA QUESTIONNAIRE

BACKGROUND

Proceeding No.

Name of Applicant / Respondent

Name of Solicitor and Counsel

Summarise the administrative history of the dispute (eg was there an audit and, if so, how long was the audit)

DETAILS OF TAX DISPUTE

Year(s) in dispute

Amount of Primary Tax in dispute ($)

Amount of Penalties, SIC or Interest in dispute ($)

Has tax debt been paid? If so, when was the debt paid. If not, what arrangements (if any) are in place for the payment of the tax debt.

RELATED TAX MATTERS?

Are there tax appeals filed or to be filed in the Federal Court or the AAT involving:

(1) the same taxpayer and the same / related issues; or

(2) a different taxpayer and the same / related issues?

If so, outline the stage these matter(s) have reached?

TEST CASE / FAST TRACK

Is the application a test case?

If so, how many other taxpayers and / or how much revenue is affected by the result of the test case?

Should the application be fast tracked and, if so, why?

DATED: _____ _____

(Signed, party or party's solicitor)

ANNEXURE E

TAX TECHNICAL LITIGATION IN THE HIGH COURT

PURPOSE: To outline the best practice in carrying on tax technical litigation in the High Court

STATEMENT

1. The procedures set out in this Annexure are a general guide for all tax 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.[92]

2. Tax officers should generally comply with all aspects of this Annexure but also need to 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 Legal Services Branch (LSB), a Senior Tax Counsel, Strategic Litigation or if necessary a Deputy Chief Tax Counsel (DCTC).

3. Those involved in High Court litigation include LSB officers and officers from the Tax Counsel Network, the respective business line 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 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.

4. This Annexure outlines in chronological order the procedures required to be observed by tax officers involved in High Court matters.

5. References in this Annexure 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.

Special leave to appeal to the High Court

6. 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.

7. 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*. An appeal cannot be brought to the High Court from a judgment of the Federal Court constituted by a single judge[93] 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.[94]

[92] This includes reviewable decisions under section 344 of the *Superannuation Industry (Supervision) Act 1993*.
[93] Subsection 33(2) of the *Federal Court of Australia Act 1976*.
[94] Subsection 33(3) of the *Federal Court of Australia Act 1976*.

8. 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,[95] must commence planning immediately on receipt of an adverse Full Federal Court decision.

9. When a decision to seek Special Leave is made, the test case secretariat must be advised immediately (via the Strategic Litigation Unit mailbox). This is necessary to enable a decision to be made, in accordance with the policy under the Test Case Litigation Program, about whether the issues in the case justify the making of an offer to meet the costs of the special leave application and the appeal, if leave is granted.

10. 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.

11. In all cases involving an application for special leave to appeal, the LSB officer must ensure that, unless advised otherwise by the Senior Assistant Commissioner, Strategic Litigation, the case is recorded on the Significant Litigation Report.

12. A 'Pre-decision Strategic Internal Litigation Committee' 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 Strategic Internal Litigation Committee 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 relevant Senior Tax Counsel, Strategic Litigation 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.

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

14. 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)
    - High Court of Australia Practice Direction No. 3 of 1996
    - High Court of Australia (Fees) Regulations 2004

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

[95] There are three Senior Tax Counsel involved in strategic litigation, two with responsibility for income tax issues (Northern and Southern region) and one with responsibility for indirect tax issues.

15. 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 Rule 41.02 (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. (Rule 41.05.1) A draft Notice of Appeal is to be filed and served with the Applicant's Summary of Argument. (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. (Rule 41.06.1)
Within 7 days of service of Respondent's Summary	Applicant may file and serve a reply. (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.

16. 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.

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

18. 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 2004 are to be followed strictly.

19. Summaries of Argument are to be in a specific form. The Applicant's Summary is to be consistent with Form 18 (High Court Rules 2004 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.

20. 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.

21. A draft Notice of Appeal is to be filed and served with the Applicant's Summary of Argument (Form 24 Rule 41.05.3 of the High Court Rules 2004).

22. 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:

(a) 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

(b) 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.

23. In relation to subparagraph (b) in paragraph 23 of this Annexure, it is important to note that in Special Leave applications, evidence that goes to the public importance of the case, including the likely revenue effect, can be adduced (sworn by a person in an appropriate position) in support of a Special Leave application. In fact, these should be considered by the litigation team when the Commissioner is seeking Special Leave.

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 Senior Tax Counsel, Strategic Litigation and 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 the Tax Office is 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 (High Court Rules 2004 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 of Argument 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 (High Court Rules 2004 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.*[96]

[96] 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.[97]

30. Tax Counsel and the LSB officer will attend Special Leave application hearings and will be available to provide assistance to the Tax Office's 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.

When	Action
	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 Rule 42.03 (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) A Notice to Appeal shall: • state the name of the court or the name of the judge together with the date of judgment being appealed • state the date on which leave or special leave was granted or state the date when a certificate to appeal was granted • set out particulars of terms where leave or special leave has been granted

[97] High Court of Australia Practice Direction No. 3 of 1996.

When	Action
	• state whether the whole, or part, of the judgment below is appealed from • set out the grounds of appeal, and • 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 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 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 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) or Alternatively, the Respondent may file a Notice of Cross Appeal (Rules 42.08.1, 42.08.2 – Form 26, 42.08.4) or The Respondent may file a Notice of Contention (Rule 42.08.5 – Form 27)
Within 14 days of instituting an appeal 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)
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)

When	Action
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) 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 the Tax Office's 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. The procedures set out in Annexure G of this practice statement 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.

37. In all cases involving an appeal to the High Court, the LSB officer must ensure that, unless advised otherwise by the Senior Assistant Commissioner, Strategic Litigation, the case is recorded on the Significant Litigation Report.

ANNEXURE F

MANAGEMENT OF DECISIONS OF COURTS AND TRIBUNALS

PURPOSE: To advise procedures for managing all court and tribunal decisions and risks arising from those decisions

STATEMENT

1. Legal Services Branch (LSB) is responsible for managing the litigation process and conducting litigation for the Commissioner. One key aspect of managing litigation includes ensuring that decisions[98] of courts and tribunals[99] are circulated to and considered by the appropriate stakeholders within the timeframes set out below and that risks arising from the decisions are analysed and strategically managed.

2. LSB officers are responsible for managing court and tribunal decisions in accordance with this practice statement. Officers from other areas such as Tax Counsel Network (TCN), Centres of Expertise (CoE), and the relevant business line will also have a role to play in the management of decisions and risks arising from them.

3. The approach outlined in this Annexure will ensure a corporate approach to dealing with the risks to the Commissioner arising from court and tribunal decisions.[100] It is essential that staff follow the procedures set out in this Annexure to ensure that these risks are minimised.

4. The procedures set out in this Annexure require a high degree of collaboration between all stakeholders.

   - LSB will:
     - provide advice to key Tax Office stakeholders about the progress of litigation including advice that a decision is about to be handed down
     - provide within specified timeframes to key Tax Office stakeholders copies of the decision and the Decision Summary, and, where they are necessary, opinions of TCN and external counsel, the Adverse Decision Report and the Decision Impact Statement (DIS)
     - confer with key stakeholders at Strategic Internal Litigation Committees (SILCs)[101] which will be convened at critical stages of the progress of the litigation, and

[98] 'Decisions' will include interlocutory decisions which have some strategic importance.
[99] Includes the Administrative Appeals Tribunal, Small Taxation Claims Tribunal and Australian Industrial Relations Commission.
[100] There will be instances where litigation will have consequences not only for the Commissioner, but for the community and Government as a whole.
[101] SILCs are convened by the LSB officer for all Court and Tribunal matters. Other attendees in the SILC will vary depending on the business line involved and the strategic importance of the case, but are likely to include relevant officers from the business line and CoE, and TCN. The first SILC is held within two weeks of the commencement of litigation, and subsequent SILCs are mandated at each critical stage of litigation.

- ensure that a strategy to manage any risks arising from the decision is agreed by the litigation team, and that responsibility for carrying out each task in the strategy has been allocated and recorded.

- The relevant business line will:
  - manage the mitigation strategies, including the media strategies for the litigation and the adverse implications of the decision
  - escalate emerging priority technical issues (PTIs) to TCN or the CoE as soon as they become aware of the issue, and
  - if necessary, in collaboration with Law Sub-plan stakeholders, provide timely advice about the progress and potential implications of strategically important litigation[102] to the ATO Executive, the Treasurer, the Assistant Treasurer and/or Treasury.
- If TCN is involved, the relevant Tax Counsel will:
  - be involved in preparing recommendations to appeal (or not to appeal) adverse decisions of courts and tribunals
  - assist with the development of any media and mitigation strategy, and
  - approve the draft DIS before it is escalated for final approval and publication.

  The relevant decision maker (paragraph 9 of this Annexure explains who this is depending on the type of decision) will have sufficient information to enable a defensible decision to be made about whether or not to appeal against a decision of the court or tribunal.

5. Litigation managed and conducted for the Commissioner includes:
   - taxation decisions contested under Part IVC of the *Taxation Administration Act 1953* (Part IVC litigation)
   - declaratory proceedings, interlocutory proceedings, and reviews of administrative decisions (*Administrative Decisions and Judicial Review Act* 1977 (ADJR) cases), and
   - debt, Freedom of Information (FOI) and commercial and general litigation.
6. Where any part of the process for managing decisions differs for a particular kind of litigation this is specified and set out separately.

[102] Refer to Attachment 1 of this Annexure for indicators of 'strategic litigation'.

ANNEXURE F

Chronology of management of decisions

7. Procedures relevant to the following events are set out in this Annexure:

Step	Relevant paragraphs	Procedure	Primary Responsibility	Timeframe
a.	13 to 15	Advice to Government Ministers and Treasury relating to strategically important decisions.	Business line (in consultation with the CoE and/or TCN where involved)	As soon as it becomes apparent that litigation could have adverse consequences for the intended operation of the law.
b.	16 to 17	Media strategy	Business line (in consultation with LSB and TCN where involved)	As soon as it becomes apparent that litigation may attract media interest.
c.	19	Post-hearing SILC	LSB officer	Within 14 days of the hearing.
d.	20 to 21	Notification of decisions to be handed down	LSB officer	Immediately after being notified that a decision will be handed down.
e.	22 to 23	Pre-decision SILC	LSB officer	As soon as practicable after notification that the decision is imminent.
f.	24 to 27	Circulation of decisions	LSB officer	On the day the decision is received.
g.	28 to 33	Decision SILC	LSB officer	***Adverse decision*** – within one business day of the decision being handed down. ***Substantive decision*** in favour of the Commissioner – within 28 days of the decision being handed down or sooner if the decision is strategically important. ***Interlocutory decision*** of some strategic importance in favour of the Commissioner – the next business day after the decision is handed down.
h.	34 to 36	Decision Summaries	LSB officer	***Strategically important decision*** – within 2 business days of the decision being handed down. ***Interlocutory decision*** – within 2 business days of the decision being handed down. ***Other decisions*** – within 7 days of the decision being handed down.

i.	37 to 44	Post-decision SILC	LSB officer	***Adverse decision*** – within 5 business days of the decision being handed down. ***If taxpayer appeals*** – within 5 business days of receiving notice that the taxpayer has appealed. ***Favourable decision*** where the taxpayer has not appealed – within 28 days of the decision being handed down or sooner if the decision is strategically important.
j.	45 to 58	Adverse Decision Report	LSB officer	***Interlocutory decision*** – within 2 business days of the decision being handed down. ***Other decisions*** – within 7 days of the decision being handed down.
k.	59 to 63	Finalisation of Adverse Decision Report and circulation	LSB officer and the LSB Stream Leader	As soon as a decision on whether or not to appeal is made.
l.	64 to 66	Appeal SILC	LSB officer	***Adverse or strategically important decision*** – no later than 7 days before appeal or cross-appeal period expires.
m.	67 to 89	Decision Impact Statements published onto the external Tax Office website	LSB officer	As soon as possible but no later than 8 weeks after the decision is handed down.

Senior Assistant Commissioner (Strategic Litigation) and the Senior Tax Counsel (Strategic Litigation)

8. Strategic Litigation is collectively managed by the Senior Assistant Commissioner, Strategic Litigation and nominated Senior Tax Counsel, who have the title of Senior Tax Counsel, Strategic Litigation. The Senior Assistant Commissioner is responsible for ensuring that strategic litigation is managed effectively, and is argued consistently with precedential ATO views, and he/she also acts as a technical leader for strategic litigation,. The Senior Tax Counsels act as technical leaders and advisers on both strategic and non-strategic litigation cases. The Senior Assistant Commissioner and the Senior Tax Counsel, Strategic Litigation support the Chief Tax Counsel (CTC) and Deputy Chief Tax Counsels (DCTCs) in litigation and legal advice matters. The Senior Tax Counsels may either directly undertake the conduct of, or closely monitor, strategic litigation cases, with or without other Tax Counsel involvement.

Decision makers

9. Generally speaking, final decisions on whether or not to appeal can be made by officers at the levels set out below, unless the Commissioner, a Second Commissioner or the CTC indicates the desire to make the final decision. The level at which the decision is made reflects the importance of the decision.

Decision	Final Decision Maker
All decisions to seek special leave to appeal to the High Court from a decision of the Full Federal Court or a Full Court/Court of Appeal of a State/Territory Supreme Court.	CTC
1. All Court or Tribunal decisions where: • Tax Counsel has been involved • the case is linked to an existing PTI • the decision is contrary to a publicly expressed ATO view of the law, or • there is disagreement between the SES officers in the relevant business line and LSB. 2. Declaratory relief in Federal or State Courts (other than in debt, employment law or FOI cases). 3. Actions under section 39B of the *Judiciary Act 1903* or section 75 of the Constitution. 4. Intervention is contemplated in a matter where the Commissioner is not otherwise a party to the litigation.[103]	DCTC
1. Court and Tribunal decisions arising from Part IVC litigation that turn on their facts and have no precedential impact on the law. (This includes release applications, but does not include FOI cases.) 2. Court and Tribunal decisions where Tax Counsel has not been involved. 3. ADJR cases (other than cases involving access issues, FOI, non-tax law issues or employment matters).	Relevant Senior Tax Counsel (Strategic Litigation) If there is disagreement between the STCs the matter should be escalated to the relevant DCTC.
Debt cases	Decisions to appeal: relevant Senior Tax Counsel, Strategic Litigation Decisions not to appeal: relevant Assistant Commissioner, Litigation If there is disagreement between the relevant Senior Tax Counsel, Strategic Litigation and the relevant Assistant Commissioner, Litigation, the matter should be escalated to a DCTC.

[103] In civil disputes, and where the case does not raise a constitutional issue, the Commissioner can intervene either as a party to the proceedings who has been formally joined or as an amicus curiae. 'Amicus curiae' translated from the Latin means 'friend of the court' and is a person, or bystander, who intervenes in proceedings to put submissions to a court not as a party but to assist the court on a point of fact or law.

1. ADJR cases involving access issues, FOI, and non-tax law issues including employment matters. 2. Non-tax law issues, including civil disputes and employment law decisions. 3. All FOI decisions.	ATO General Counsel However, as some of these issues will sometimes be relevant and cross over to other streams, a co-ordinated approach should be adopted where all the relevant stakeholders in the decision making process are consulted.

Risk mitigation strategies

10. Throughout the course of litigation, and before and after the hearing, the litigation team[104] needs to consider the risk mitigation strategy in relation to the case. This will include the development of an action plan that ensures that appropriate corporate consideration is given to the case and the implementation of that plan. This plan will vary from one case to another however, at a minimum, the team should decide who will be responsible for advising the key people in the Tax Office and external parties about the consequences of the decision once it is handed down. This action alone enables risks to be better identified and in a more timely way. The risk mitigation strategies should be discussed at the various SILCs held at each critical stage of litigation.

11. Two key elements of the risk mitigation strategy are the consideration of the consequences of the litigation on the intended operation of the law, and any media strategy that may need to be put in place. In terms of the potential policy implications, the team should decide whether or not to advise Treasury at an early stage of litigation, so that Treasury can monitor the case and prepare for the potential consequences of a decision that is contrary to the underlying policy of the legislation.

12. Where litigation might have a 'whole of Government' impact, the litigation team should decide whether the Office of Legal Services Co-ordination in the Attorney-General's Department is notified and briefed on the case.

Advice to Government Ministers and Treasury relating to strategically important decisions

13. In relation to litigation, formal advice should be provided to Treasury in situations where it is necessary to bring to their attention issues that are significant, are expected to affect the reputation of the Tax Office or Government, have an impact on the revenue, or require a consideration of a change to the law. In this situation, the business line (assisted by the Tax Counsel on the litigation team) should contact Treasury at the earliest opportunity. This type of advice must be cleared by the appropriate National Program Manager or DCTC, who must then notify the First Assistant Commissioner, Governance & Government Relations prior to the issue of the advice.

[104] 'Litigation team' will include the LSB case officer and the business line case officer and may also include Tax Counsel, another business line officer, a representative from the relevant CoE, a solicitor (Australian Government Solicitor or an external service provider on the Panel of service providers) and external counsel. Where there are international taxation issues involved, a representative from International Strategy and Operations should also be part of the litigation team.

14. If issues arising from a decision or anticipated decision give rise to a need to provide advice to Treasury or Government, the relevant business line has primary responsibility to prepare the advice consistently with Tax Office corporate policies. LSB and TCN will provide assistance in the preparation of this advice.

15. On a monthly basis, the Senior Assistant Commissioner, Strategic Litigation will provide the Commissioners, CTC, DCTCs and National Program Managers with a report of strategically important litigation and the decisions regarded as the most significant to the Tax Office.

Media strategy

16. The LSB officer must inform relevant SES officers in LSB and the business line, the relevant Senior Tax Counsel, Strategic Litigation and the Strategic Litigation Unit mailbox, of any court hearing or judgment likely to attract media attention, giving these officers as much notice as possible. The Media Unit must then be informed and briefed by the most appropriate senior officer involved. This will usually be an Assistant Commissioner in LSB.

17. Except for media comments provided by the Commissioner, a Second Commissioner, CTC or DCTC, all other media responses relating to court or tribunal decisions must be cleared by the relevant Senior Tax Counsel, Strategic Litigation.

Collaborative approach to decision management

18. The LSB officers managing the litigation should convene a SILC at every critical stage of Part IVC and strategically important litigation. LSB officers are responsible for maintaining a corporate record of the SILC discussions. The SILCs discussed below focus on the possible consequences of a court or tribunal decision.

Post-hearing SILC

19. A post-hearing SILC should be convened as soon as possible, but must be held within 14 days of the hearing. The purpose of having a post-hearing SILC is that immediately following the hearing, the litigation team should be in the best position to reflect on the conduct of the case and be in a position to anticipate the likely outcomes of the case. Thus, it is an opportune time for the litigation team to consider or reconsider a decision mitigation strategy.

Notification of decisions to be handed down

20. When the LSB officer receives notification from a court or tribunal that a decision will be handed down, they should provide immediate advice of this to the persons listed in Attachment 2 of this Annexure.

21. The Senior Assistant Commissioner, Strategic Litigation, or the General Counsel will ensure that early advice of the pending decision in all court cases and important tribunal cases will be provided to the Commissioner, Second Commissioners, the CTC, the DCTCs and where appropriate, the Government.

Pre-decision SILC

22. Where there is sufficient notice that a decision is imminent, a pre-decision SILC should be held prior to the decision being handed down. A meeting at this time will allow the litigation team to review and put into place a strategy to address and mitigate any potential risks arising from the decision; or to review an existing mitigation strategy (which may have been considered and drafted following the post-hearing SILC in anticipation of a potentially adverse or partially adverse decision).

23. The litigation team should agree at this time (or at the Decision SILC if there was not sufficient time to organise a pre-decision SILC) who is responsible for delivering aspects of the strategy. Where the case is of strategic importance, the relevant Senior Tax Counsel, Strategic Litigation should be involved in the development of this strategy.

Circulation of decisions

24. Where a decision is of strategic importance the LSB officer must provide a copy of the decision to appropriate stakeholders on the day the decision is received. Similarly, adverse or partly adverse decisions must also be distributed to relevant stakeholders on the day the decision is received. Stakeholders for this purpose must include the persons listed in Attachment 2 of this Annexure.

25. The business line officer will also need to consider the circulation of the decision and how widely the decision should be distributed within their business line, such as the business line's risk and intelligence team.

26. The litigation team will also need to consider if there are any cross business line implications, and accordingly circulate the decision to all potential stakeholders. For example, in Part IVC matters, it may be necessary to notify the Debt business line to commence recovery action or pay claims that may have been held pending the litigation outcome.

27. For all other decisions, the LSB officer must provide a copy of the decision to the relevant stakeholders listed in Attachment 2 of this Annexure no later than 3 days after the decision is received.

Decision SILC

28. A Decision SILC must be convened:

    - within one business day of any adverse or partially adverse decision
    - within one business day of a decision of strategic importance, or
    - within 7 days of a decision favourable to the Commissioner where the decision appears less strategically important.

29. Ordinarily the Decision SILC is convened to discuss the decision generally, and to commence work on the issues that need to be addressed in the Decision Summary and any Adverse Decision Report. It also provides an opportunity to discuss the need to obtain opinions from counsel and other stakeholders.

30. Where a decision, including an interlocutory decision, has unexpected and significant consequences, the LSB officer must immediately notify the LSB Regional Business Manager, the relevant Senior Tax Counsel, Strategic Litigation and the Strategic Litigation Unit mailbox.

31. The SILC members will carefully consider the implications of the decision, and ensure that the perceived policy implications (if any) are explained in the Decision Summary and, where they are necessary, the Adverse Decision Report and the DIS. If a technical issue in the decision is linked to a Priority Technical Issue (PTI),[105] the issue and risk owners will be responsible for managing the effect the decision has on resolving the underlying issue. This may, for example, involve reviewing any existing precedential ATO view or liaising with Treasury on the implications for the legislation.

32. A detailed consideration of the decision to determine whether any risks flow from it must always occur. This is of particular importance where the decision is adverse. However, risks may also arise in a decision in favour of the Commissioner, for example, if it is based on reasons which were not relied on by the Commissioner and which are not consistent with the Commissioner's rulings. Detailed consideration of these risks and allocation of responsibility for each risk or task arising must be made at the post-decision SILC.

33. The SILC members should also consider what actions if any, are necessary to protect the Commissioner's position in the event that the taxpayer lodges an appeal, for example, whether or not a cross appeal should be filed. As soon as the LSB officer is notified that a taxpayer has appealed the decision, they must notify the relevant Senior Tax Counsel, Strategic Litigation and the Assistant Commissioners, Litigation. They should also copy or send an email to the Strategic Litigation Unit mailbox at strategiclitigationunit@ato.gov.au to this effect.

Decision Summaries

34. The purpose of a Decision Summary is to summarise the facts, issues and outcomes of the decision. It should highlight issues and observations of strategic importance made by the judge or tribunal member in the course of reaching the decision. The LSB officer must write the Decision Summary in a concise style which allows the reader to easily grasp the importance of the case and the primary issues. It should not be necessary for the Decision Summary to be more than two or three pages except in the most complex of cases. The LSB officer must also take care to identify any policy implications of the decision. However, where a decision is adverse, the policy implications can be canvassed in the Adverse Decision Report.

35. Where a decision is of strategic importance the LSB officer must prepare and email to their LSB Stream Leader[106] and the Strategic Litigation Unit mailbox the Decision Summary within two business days of the decision being handed down. In interlocutory matters where the relevant appeal period is seven days or less, the LSB officer must also send the Decision Summary within two business days. For all other decisions, the Decision Summary must be sent within seven days.

[105] Refer to Law Administration Practice Statement PS LA 2003/10 for further information on PTIs.
[106] For Part IVC of the *Taxation Administration Act 1953* matters, this will be the responsibility of the Business Managers.

36. LSB Stream Leaders[107] are responsible for emailing a copy of the Decision Summary as soon as it becomes available to the relevant stakeholders set out in Attachment 2 of this Annexure and to Information Management Systems, ATOlaw at NAT.ATOBSS@ato.gov.au.

Post-decision SILC

37. A Post-decision SILC must be convened:

- within five business days of an adverse or partially adverse decision being handed down
- within five business days of receiving notice that a taxpayer has lodged an appeal
- within five days of a decision in favour of the Commissioner being handed down where there are policy implications arising from the decision, or
- within 28 days of a decision in favour of the Commissioner being handed down where the taxpayer does not lodge an appeal against the decision and there are no policy implications arising from the decision.

38. In every case consideration must be given to whether, as a result of the decision:

- there are any flow on effects in relation to the taxpayer
- any wider risks arise for the Tax Office – where a risk arises a strategy must be developed to manage the risk
- any legislative deficiencies are identified
- any new public rulings should issue,
- any existing document setting out the Commissioner's view of the law for the community should be reviewed and, where necessary, amended or withdrawn. This may include public rulings, taxation determinations, or major publications, such as *TaxPack*. Where a precedential ATO view, such as an ATO Interpretative Decision, a publication or a taxation ruling is to be reviewed, the relevant CoE must be contacted and made aware of the issues, and
- if the matter was test case funded, whether the desired law clarification was achieved in relation to the test case issues.

39. To enable full considerations of the factors listed in paragraph 38 of this Annexure, it will usually be necessary to obtain advice/opinions from counsel and other stakeholders.

40. The Post-decision SILC must identify each necessary action arising from the decision and allocate responsibility for it. The Adverse Decision Report will then set out each of the identified risks and the person responsible for managing that risk. The person responsible for managing the risk will maintain that responsibility after the litigation is finalised, unless and until any formal escalation process alters the responsibility. The SILC will also finalise any recommendations to be made in the Adverse Decision Report.

[107] For Part IVC of the *Taxation Administration Act 1953* matters, this will be the responsibility of the Business Managers.

41. Any technical issues arising from the decision which do not align with an existing precedential ATO view, and is not linked to a PTI, must be referred to the business line for risk assessment using the matrix referred to in Corporate Management Practice Statement PS CM 2003/2 Risk and Issues Management. (For example where a decision calls into question a position taken in a public ruling.) Where a new PTI is identified, the issue and associated risks must be dealt with in accordance with Law Administration Practice Statements PS LA 2003/10 Management of Priority Technical Issues.

42. If the taxpayer has appealed or may appeal, consideration must be given to whether there is a need to cross-appeal, and whether there is any need to file a notice of contention in relation to findings of facts or conclusions of law adverse to the Commissioner.

43. The Post-decision SILC must review the conduct of the litigation and the actions of the litigation team, including external parties such as the Australian Government Solicitor, Panel firms and counsel. The LSB officer must provide feedback to the relevant officers where any concerns have arisen in relation to the litigation. Similarly, other members of the litigation team should provide feedback on the LSB officer's performance and effectiveness during the course of the litigation. Where the concern relates to the actions of an external party these must be referred to the relevant Assistant Commissioner, Litigation. This should also be an opportunity for the litigation team to provide positive feedback and learnings, such as recommendations to the relevant Senior Tax Counsel, Strategic Litigation and the relevant Assistant Commissioner, Litigation on engaging the same counsel for similar types of matters.

44. The Post-decision SILC should also consider any non-technical issues arising from the conduct of the case. The LSB officer must feed back to the business line (through their litigation co-ordinators or steering committees) any non-technical issues which are relevant to their operations that might improve the quality and efficiency of the Tax Office's litigation process. Similarly, the business line or other members of the litigation team should feed back to LSB any non-technical issues that might improve the quality of LSB's role in the litigation process.

Adverse Decision Reports

45. Where a decision is wholly or partly adverse, the LSB officer is to prepare and send an Adverse Decision Report to the relevant LSB stream leader[108] and the Strategic Litigation Unit mailbox within 7 days of the decision being handed down. In interlocutory matters where the relevant appeal period is seven days or less, the LSB officer must send the Adverse Decision Report within two business days.

46. The purpose of the Adverse Decision Report is to provide a corporate record of the consideration of the decision about whether an appeal should be made to a decision of a court or tribunal. The final report must be a robust technical analysis and commentary of the perceived correctness of the decision, from the standpoint of the various stakeholders. The Adverse Decision Report assists the relevant Senior Tax Counsel, Strategic Litigation or Assistant Commissioner, Litigation in making a final recommendation or decision about whether or not the decision should be appealed.

[108] For Part IVC of the *Taxation Administration Act 1953* matters, the responsibilities of the LSB stream leader relating to Adverse Decision Reports will fall on the Business Managers.

47. So that the implications of the decision can be properly considered the Adverse Decision Report must set out:

- an analysis and commentary on the correctness of the decision. The report should provide sufficient detail of the facts and issues involved to assist the reader to understand the analysis, but should never be simply a further summary of facts, issues and outcomes of the case (that is the role of the Decision Summary)
- an analysis of any basis on which an appeal is justified:
  - for an adverse decision of the Tribunal, whether a question of law involved in the decision is sufficiently significant to justify an appeal to the Federal Court
  - for an adverse decision of the Federal Court or a state Supreme Court, the errors that would justify an appeal to the Full Court
  - for an adverse decision of the Full Federal Court or state Court of Appeal, whether there is a question of sufficient public importance that would give the Commissioner reasonable prospects of securing the grant of Special Leave by the High Court, or
  - if it is considered that an appeal is justified, identification of the question of law and/or grounds or appeal that should be relied on.
- whether any action needs to be taken to draw the case to the attention of Treasury, to vary Tax Office compliance approaches or to remedy any deficiencies in the conduct of litigation
- whether the decision is inconsistent with a published Tax Office view of the law
- where appropriate, commentary on the conduct of the litigation that led to the adverse decision, such as any difficulties with evidence, witnesses, or any interlocutory decisions of the Court that may have adversely influenced the outcome, and
- the views and perspectives of the various stakeholders, including where appropriate the business line, Tax Counsel, external solicitor and counsel. These may be provided under separate headings or may be incorporated in the body of the report, where there is consensus. Although a consensus view and recommendation is ideal, each stakeholder must be prepared to provide their own, objective and professionally expressed views in the Adverse Decision Report about the decision.

48. Adverse Decision Reports on cases that turn only on the facts should usually be brief. They must be set out in sufficient detail to satisfy the decision maker that all the implications of the decision have been considered. Care must be taken where cases which in themselves appear to be decided on a purely factual basis may, when considered with other similar cases, represent an emerging view that is inconsistent with the way the Tax Office undertakes its administrative decision making. The impact of a series of decisions may need to be addressed by reviewing and if necessary updating the relevant views set out in public rulings, manuals and practice statements. Decisions relating to the way the penalties regime is administered may be particularly relevant in this regard.

49. Apart from relying on the recommendation of the relevant Senior Tax Counsel, Strategic Litigation, or the Assistant Commissioner, Litigation, the decision maker may also have regard to the detailed comments in the report and may add to them. The decision maker is responsible not only for making the decision on whether an appeal is to be filed but also for ensuring allocation of responsibility for any necessary strategy to address risks arising from the decision. It is for this latter reason that the unique perspectives of each stakeholder will be of use in determining the strategies necessary to manage the outcomes of the decision.

50. The LSB officer should make every effort to obtain stakeholder views for the Adverse Decision Report quickly. However, sometimes not all comments will be available within 7 days. Where the report is not finalised within 7 days, a draft report must be published on ATOLaw until such time as the finalised report is available to be published. The LSB officer must ensure that 'Draft' is clearly indicated on the Adverse Decision Report. The word 'Draft' should appear directly underneath the heading of 'Adverse Decision Report'.

51. When all views are available the LSB case officer must add them to the report. When the report is finalised, the LSB officer must ensure that the 'Draft' is removed.

52. For the purposes of proper record keeping, all communication regarding the Adverse Decision Report should be copied to the Strategic Litigation Unit mailbox. This should include the final Adverse Decision Report as well as all relevant comments from appropriate stakeholders.

Involvement of Tax Counsel in the Adverse Decision Report

53. Tax Counsel involved in the conduct of the litigation must be involved in preparing recommendations to appeal (or not appeal) adverse decisions of the tribunals and courts.

54. A decision that has unexpected significant consequences for the intended operation of the law must be brought to the attention of the relevant Part IVC Stream leader or the relevant Senior Tax Counsel, Strategic Litigation at the earliest opportunity, and in appropriate cases urgent Tax Counsel involvement in the Decision SILC will be sought through the appropriate DCTC. An appeal against adverse Small Taxation Claims Tribunal decisions or debt recovery decisions will not ordinarily be of interest to Tax Counsel unless an important principle is at issue or emerges from the decision.

55. Adverse Decision Reports on Administrative Appeals Tribunal and Federal Court decisions and other strategically important decisions must reflect the recommendations and/or comments of the Tax Counsel involved and the relevant Senior Tax Counsel, Strategic Litigation before a decision on whether or not to appeal is made.

56. Where the advice of external counsel is to be obtained on the prospects of successfully appealing a decision, the LSB officer must inform the Tax Counsel (and/or the National Debt Adviser for strategic debt litigation matters) as soon as any oral or written advice is received from counsel. They should also be invited to any conference arranged to discuss prospects on appeal.

57. Tax Counsel will either endorse the recommendation made by the LSB officer by asking the LSB officer to reflect their concurrence with the recommendation or will add separately identified comments about whether or not an appeal should be lodged.

58. To achieve the completion of the Adverse Decision Report within the specified timeframe, the LSB case officer and Tax Counsel or Senior National Debt Adviser must work closely together so that views are not formed at the last moment. Adverse Decision Reports must not be delayed if the views of Tax Counsel or the Senior National Debt Adviser cannot be obtained within the time available. The Adverse Decision Report must be forwarded within the specified timeframe and Tax Counsel/ Senior National Debt Adviser's views will be sent separately if necessary.

Finalisation of Adverse Decision Report and circulation

59. The finalised Adverse Decision Report is the corporate record of the decision making process and must always include as a final step the decision on whether an appeal is to be lodged and the name of the person who made the final decision. Whilst it is preferable that a common view is formed about an appeal, if that is not possible, it is necessary that all views are expressed in the document. This will ensure that the final decision maker has the benefit of the competing views and will assist the decision maker to make an informed decision about whether or not an appeal should be lodged.

60. The LSB officer must send the finalised Adverse Decision Report to the relevant LSB stream leader. The LSB stream leader will review the report and ensure it is correct, before forwarding it on to relevant stakeholders listed in Attachment 2 of this Annexure. The relevant Senior Tax Counsel, Strategic Litigation will forward the Adverse Decision Report to the appropriate decision maker with a recommendation on whether or not an appeal is to be made.

61. Once the appropriate decision-maker has decided whether or not to appeal, the Adverse Decision Report must be cleared by the relevant Senior Tax Counsel, Strategic Litigation.

62. The LSB Stream Leader will be responsible for emailing a copy of the finalised report to Information Management Systems, ATOLaw at NAT ATOBSS. LSB Stream Leaders are also responsible for emailing the finalised Adverse Decision Report to all officers in the relevant LSB stream/s.

63. The business line officer will need to consider the circulation of the finalised report and how widely it should be distributed within their business line, such as the business line's risk and intelligence team. The report should be distributed to the relevant Assistant Commissioner responsible for the associated risks.

Appeal SILC

64. Where there is an adverse or partly adverse decision in a strategically important case, an Appeal SILC must be convened by the LSB officer no later than one week before the appeal period or cross appeal period expires. Timing of the SILC must allow sufficient time for notices of appeal to be prepared and settled by counsel once the decision has been made to appeal.

65. Tax Office stakeholders and counsel at the SILC will assess the Commissioner's prospects of a decision in favour of the Commissioner on appeal as well as all other relevant matters.

66. Relevant matters for consideration will include:

- whether the matter on which the Commissioner may decide to appeal involves a question of law
- what action is necessary to protect the Commissioner's position in the event that an appeal is lodged for example, not implementing the decision pending the appeal,[109]
- whether further evidence should be filed in the Federal Court in an appeal from a decision of the Administrative Appeals Tribunal,[110] and
- whether, in the event of an appeal against a decision of the Administrative Appeals Tribunal, test case funding should be offered to the taxpayer by agreeing to a costs order being made against the Commissioner, or whether, in any other appeal, it would be appropriate to invite the taxpayer to formally apply for funding under the Test Case Litigation Program. The Test Case Litigation Program secretariat must be advised (via the Strategic Litigation Unit mailbox) of any cases where test case funding may be appropriate.

Decision Impact Statements

Purpose

67. In all adverse published decisions and other significant court and tribunal decisions, a DIS must be published.

68. A DIS is a succinct statement of the Commissioner's response to adverse and other significant decisions. It should be published as soon as possible but not later than eight weeks after the final court or tribunal decision has been handed down. Where it is not logistically possible to do so within eight weeks (some may require longer consideration and consultation where the possible application to other cases is uncertain), an interim statement must be prepared within eight weeks of the decision.

69. To ensure that the requirement for publication within eight weeks of the decision is met under normal circumstances, the LSB officer must prepare a draft of the DIS within one week of the appeal period expiring. The Adverse Decision Report (or the Decision Summary in the case of a significant decision that is not adverse) generally will be of assistance in drafting the DIS.

70. The purpose of publishing a DIS is to communicate to the community the Tax Office view on the implications of a particular court or tribunal decision for the Tax Office. A DIS will not usually be published until all appeals have been dealt with and there is a final decision. Court and tribunal decisions are published on the ATOLegals database, with a link to the DIS.

[109] There is some discussion of this issue in Taxation Ruling IT 2250 regarding the issuing of assessments when the Commissioner appeals against an adverse decision.

[110] From 16 May 2005 subsection 44(8) of the *Administrative Appeals Tribunal Act 1975* allows the Federal Court to receive further evidence on appeal from the AAT for the purposes of making findings of fact under subsection 44(7).

71. Where a DIS indicates that some action needs to be taken (for example a public ruling, law administration practice statement, or ATO interpretative decision needs to be reviewed, amended, replaced or withdrawn), the litigation team will establish a timetable for undertaking that work prior to the publication of the DIS. If it is necessary to amend or withdraw a precedential ATO view document (for example a public ruling or an ATO interpretative decision), or a law administration practice statement, it will be necessary to initiate the usual process immediately (for example an addendum to a public ruling), in accordance with the established practice for that process.

72. The PTI & Public Rulings Branch will be advised of the publication of every DIS which indicates that a public ruling or law administration practice statement is being reviewed, amended, replaced, or withdrawn. It is still the responsibility of TCN or CoE to update these documents.

73. A DIS generally should not contain advice, unless there are exceptional circumstances.[111] A DIS is not a public ruling for the purposes of Part 5-5 of the *Taxation Administration Act 1953*.[112]

74. [Omitted.]

75. A DIS must not be used as a proxy for altering precedential ATO view documents.

Preparation

76. The Assistant Commissioners, Litigation are responsible for ensuring that the LSB case officer prepares a draft DIS in appropriate cases, and that each DIS is escalated for clearance at the appropriate level before being published.

77. It will be necessary to identify whether the DIS is 'current' or 'resolved'. A 'current' DIS is one where we need to update an advice or guidance product, or there is some other form of administrative action that needs to be taken. A 'resolved' DIS is one where no further action is needed to be taken by the Tax Office as a consequence of the decision (other than giving effect to it for that particular taxpayer).

78. The DIS will contain the following information:

- details of the case including venue and date of decision
- a brief summary of the relevant facts
- a summary of the issues decided by the court or tribunal
- whether or not there are any implications in regard to current advice or guidance products. A list of all precedential ATO view documents which may be affected and are being reviewed as a result of the decision must be included in the DIS. If there is any uncertainty surrounding a court or tribunal decision, the DIS may need to explain how the Commissioner will administer the law pending any review of a published ruling

[111] Law Administration Practice Statement PS LA 2008/3 Provision of advice and guidance by the Tax Office explains the level of protection available to taxpayers who rely on advice and guidance provided by the Tax Office.
[112] [Omitted.]

- whether or not the Tax Office view is likely to change as a result of the decision.

79. A DIS must not contain any taxpayer information that has not been obtained from the public record (for example from the transcript of proceedings, or reasons for judgment). Information included in the DIS must not be acquired from Tax Office records, even if it is publicly available. It will be necessary to acquire all taxpayer information from a public source (for example a publisher of law reports, or the registry of the relevant court or tribunal).

Escalation

80. The LSB officer, in consultation with the business line and Tax Counsel (where involved), will be responsible for preparing a draft of the DIS. Brevity is a key concept. It is not necessary to restate all of the facts or to repeat Tax Office arguments in a DIS.[113]

81. The business line is responsible for the mitigation strategy following the finalisation of litigation. The business line, in consultation with Tax Counsel, will need to advise LSB whether the DIS needs to include comment on how the decision will be applied to other similar cases.

82. The draft DIS, in a form suitable for publication, is to be escalated by the LSB officer to the relevant Tax Counsel to settle. Where a Tax Counsel is not involved in the case, the DIS must be escalated to the relevant Senior Tax Counsel, Strategic Litigation to be settled.

83. Every DIS must be sent under a covering Minute to the Minister, for information, four business days prior to it being published. Tax Counsel is responsible for the preparation of the Minute, but where Tax Counsel is not involved in the case the relevant Senior Tax Counsel, Strategic Litigation is responsible for the preparation of the Minute.

Non-significant decisions

84. If the case which is the subject of the DIS has not been escalated as a significant litigation case, the relevant Senior Tax Counsel, Strategic Litigation can approve both the final DIS and the Minute to the Minister.

Significant decisions

85. If the case which is the subject of the DIS has been escalated as a significant litigation case, the DIS and the Minute to the Minister must be escalated to the relevant DCTC for approval.

86. These escalation processes apply equally to the publication of updated current and resolved DISs.

[113] See paragraphs 35-39 of Law Administration Practice Statement 2008/12 Public advice and guidance products: selection, development, publication and review processes for corporate requirements in the development of the content of the DIS.

Publication

87. Once the DIS and the Minute to the Minister have been approved by the relevant Band 1 or Band 2 Senior Executive Service officer, they must be sent to the Strategic Litigation Unit mailbox to enable the DIS to be checked for style and format. The strategic litigation team will review the documents, send the Minute to Governance & Government Relations for issue, and arrange for the DIS to be published.

88. This streamlines the publication process and mitigates the risk that an unauthorised version of the DIS is published. The ATOlaw publishing team will accept instructions to publish DIS only from the Strategic Litigation Unit. This will also ensure that there is sufficient time for pre-publication tasks to be co-ordinated by the Director of ATOlaw.

89. The Strategic Litigation Unit maintains a register of all decisions requiring a DIS. This enables the team to monitor the timeliness of DIS.

Contact Officer

90. DIS form part of the Tax Office's externally accessible Legal Database (ATOLegals database). A DIS requires a contact officer at least for the initial eight weeks from the time the DIS is published. The contact officer will usually be the Tax Counsel involved in the case. Where Tax Counsel is not involved, the relevant Senior Tax Counsel, Strategic Litigation will usually be listed as the contact officer.

91. The contact officer will be responsible for providing any necessary updates once a DIS is posted on the web site, such as the status of the review of relevant public rulings. The updated DIS must follow the same escalation and publication process as outlined in paragraphs 80 to 89 of this Annexure. A judgment call will need to be made by the Senior Assistant Commissioner, Strategic Litigation as to whether or not the updated DIS is sufficiently significant to warrant also being sent to the Minister's office. In these circumstances, the revised DIS must be sent to the Minister's office four business days prior to it being published.

92. As point of first contact for at least a period of eight weeks, the relevant Tax Counsel must either respond to any external representations themselves or ensure that the representations are referred to the relevant business line or CoE. Tax Counsel will be expected to manage responses to representations made by interested taxpayers, industry groups and the media, and to ensure that, if there are any consequences for precedential ATO views or the law not previously identified that they are actioned, or referred to an appropriate area for action. It is expected that in a majority of cases, it will be appropriate for these representations to be referred to the relevant business line or CoE. There may be reason to extend the eight week period while mitigation strategies are being implemented, such as the revision of public rulings. The contact officer is responsible for issuing an updated DIS, as necessary, ensuring that a 'current' DIS is ultimately published as 'resolved' by managing the proposed administrative treatment.

93. Unless there is reason to extend the existing arrangements beyond eight weeks, the DIS must reflect a generic CoE mailbox (ato.coenmt@ato.gov.au) for external communication after the expiration of the eight week period. This mailbox will be managed by the CoE National Management Team. This will provide an opportunity for the community to advise the Tax Office of any precedential view

warranting review as a consequence of the decision that has not already been identified. The National Management Team will ensure that the relevant CoE and business line are involved, as necessary, and that processes relating to risk assessment, prioritisation and escalation are appropriately followed.

Precedential ATO view

94. A DIS may set out a precedential ATO view. The statement discretely sets out the Tax Office view of the decision and explains the implications on current public rulings. In more complex decisions, the DIS will be unable to set out a final ATO view and will require consideration to be undertaken through the review or development of a public ruling.

95. In accordance with Law Administration Practice Statement PS LA 2003/3 Precedential ATO view, staff must apply the precedential ATO view as set out in the DIS when preparing private rulings and conducting audits.

96. The DIS will indicate whether a pre-existing precedential view document will need to be reviewed, amended, replaced or withdrawn. As indicated earlier, a 'resolved' DIS will be issued to identify the document(s) that reflects a changed precedential view. In these instances, tax officers are required to follow the revised ATO precedential view. Where there is a pre-existing precedential ATO view document it will be electronically flagged and contain cross-reference links to alert staff to the relevant DIS which contains the reconsidered view.

Challenging a final court decision

97. In administering the law there will be rare instances where the Tax Office will maintain a position that is contrary to an existing court or tribunal decision. A decision to not follow a prior decision of a Court that was not appealed will rest with the CTC or Second Commissioner, Law, and the decision should be made as soon as possible. In such cases, the CTC or Second Commissioner, Law must:

- have obtained credible and robust legal advice that the decision is wrong in law
- as soon as possible, put those affected on notice of this view
- seek to have the matter tested as soon as possible, and
- offer test case funding in an appropriate case that will test the Commissioner's position.

98. This position is consistent with advice received from the Commonwealth Solicitor-General.[114]

99. The Full Federal Court case of *Commissioner of Taxation v. Indooroopilly Children Services (Qld.) Pty. Ltd*.[115] criticised the Commissioner's course of action in not following prior single justice decisions or promptly initiating other court proceedings. Following on from the comments by the Federal Court the Commissioner obtained further advice from the Commonwealth Solicitor-General

[114] Legal advice available at http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion1.pdf; http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion2.pdf.
[115] [2007] FCAFC 16.

and other legal counsel on whether the Tax Office must always follow a single instance decision of a judge. This further advice[116] confirmed earlier advice that the ATO is not required to follow a single judge decision if, on the basis of credible and robust legal advice,[117] there are good arguments that, as a matter of law, the decision is incorrect and prompt action is being taken to clarify the position. In the rare circumstances where the Commissioner does not appeal a decision which is considered incorrect, the ATO will seek to take prompt action to test the issue. Timeliness in bringing an appropriate test case is critical.

100. The requirement to have credible and robust legal advice that a decision is wrong in law is intended to ensure that any such decision will withstand public scrutiny. The advice received by the Tax Office said:

> The requirement to have legal advice that a decision is wrong before a decision is challenged was principally intended to ensure that such decision would be defensible from the perspective of good public administration. Clearly, it is not appropriate for the ATO to seek to challenge a particular interpretation of the tax laws adopted by a court or tribunal just because, as a matter of policy, it considers it wrong or undesirable. If that is the basis for concern then the appropriate approach is to change the tax law. However, if the basis of the ATO's attack on an earlier decision is that as a matter of law it is wrong, then our earlier advice indicated that it was proper for the ATO to seek an appropriate vehicle in which to test that issue.

101. The nature of the legal advice that is required will vary depending on the nature of the tribunal or court whose decision is to be challenged. The level or extent of legal advice required to challenge a tribunal decision is likely to be quite different from that appropriate where a challenge is made to an appellate court's decision. Depending on the circumstances of the case, the legal advice can be sought from external counsel, solicitor or from internal Tax Office sources.

102. There is no inherent reason why internal Tax Office legal advice may not suffice depending on the circumstances of the case and the source of the legal advice from within the Tax Office. What matters is that the legal advice is credible and can withstand public scrutiny. That is, the advice should have the hallmarks of independence.

103. It is important in this regard to distinguish between the administrative policy decision to pursue a challenge to a legal decision and the provision of legal advice to support that decision. The policy decision will need to be made by the Second Commissioner, Law or CTC. In making the policy decision, legal advice supporting a challenge is an important element but not the only element to be considered. The legal advice is concerned only with whether there are reasonable legal arguments for a particular interpretation which justify a challenge to a previous decision that, for good reasons, was not appealed from at the time. The policy decision needs to consider broader issues. For this reason, it will usually be undesirable for the legal advice to be given by the person making the policy decision.

104. In many ways the decision to challenge an earlier decision is not that dissimilar to the decision that might have been taken when the original decision was handed down as to whether an appeal should be pursued. The Attorney-General's Legal Services Directions require that an appeal not be pursued unless an agency

[116] http://law.ato.gov.au/pdf/DIS_Indooroopilly_opinion3.pdf.
[117] Legal advice provided by Acting Solicitor-General Henry Burmester QC on 16 January 2006 advises that internal ATO legal advice provided by an appropriate officer would constitute sufficiently robust and credible advice for this purpose.

believes that it has reasonable prospects for success or that the appeal is otherwise justified in the public interest. The same requirement needs to be met where an earlier decision is to be challenged in another case. The legal advice obtained for this purpose needs to be sufficiently robust and credible to ensure the decision can be seen as consistent with the same principles so as to determine whether an appeal is justified.

105. Once legal advice has been received, and the decision has been made to challenge an earlier court or tribunal decision, the litigation team should consult each other to decide on the most appropriate way to communicate the Tax Office view to the public. It may be appropriate, for example, for a DIS to be prepared and published on the Tax Office's external website.

106. When the Tax Office has an appropriate case to test the same issue, the LSB officer must contact the Test Case Litigation Program (via the Strategic Litigation Unit mailbox) so that appropriate funding can be arranged

.

INDICATORS FOR STRATEGIC LITIGATION CASES

General

A. Cases which relate to existing PTIs.

B. Cases where test case funding has been granted.

C. Cases where the revenue at risk is significant.

D. Appeals to the Full Federal Court or state Court of Appeal or the full bench of the Industrial Relations Commission.

E. All cases coming before the High Court.

F. Any case involving an issue which provides a strong possibility that special leave may be sought from the High Court.

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

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

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

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

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

Debt cases

L. Any matter where the conclusive status of Tax Office documents is under challenge.

M. Cases where the Commissioner's right to rank as a creditor is challenged.

Other cases

N. Where there is a fundamental challenge to the operation of a certified agreement of the Tax Office.

O. Actions against a tax officer for malicious prosecution or misfeasance in public office.

P. Cases where the operation of tax law secrecy provisions is seriously challenged.

Q. Cases where the validity of the use of the Commissioner's access powers is questioned, including cases where extensive reliance is placed on legal professional privilege to resist access.

DOCUMENT DISTRIBUTION

- Senior Assistant Commissioner (Strategic Litigation)
- Senior Tax Counsel (Strategic Litigation)
- Assistant Commissioners, Litigation (North or South)
- the business line case officer
- the business line litigation co-ordinator
- any other Tax Counsel involved in the case
- strategiclitigationunit@ato.gov.au

And as appropriate to:

- other LSB Stream Leaders (for example Part IVC, Debt, FOI, Commercial & General, Government Law & Practice)
- ATO General Counsel (debt, commercial and general, administrative law and FOI issues), or
- Senior National Debt Adviser.

ANNEXURE G

RISK MANAGEMENT IN LITIGATION

PURPOSE: To advise staff of the risk management processes and structures in tax litigation

STATEMENT

1. Risk management in litigation reflects how the Tax Office culture, processes and structures are directed towards the effective management of potential opportunities and adverse consequences that might arise from litigation.

2. As risk management in the Tax Office is part of an integrated planning, performance management and reporting framework, it is a necessary prerequisite to the development of strategies and the allocation of resources.

3. Litigation is itself a risk to many diverse aspects of Tax Office business. It can be a risk to the timely completion of audits, the timely collection of revenue and is a risk in the capacity of the Tax Office as an employer, for example in occupational health and safety claims. This Annexure does not deal with the risks that might arise in the conduct of the diverse aspects of the daily business of the Tax Office from unexpected litigation. Nor does it deal with risks associated with the Tax Office's In-house Prosecutions area, or the referral of matters for prosecution to other agencies.

4. This Annexure focuses on how risks are managed once litigation has commenced and how the severity of adverse implications of decisions is mitigated as a part of litigation management. It highlights some of the essential elements of the risk management framework in the Tax Office as they apply to the specific risks associated with litigation.

5. This Annexure is separated into two sections. The first deals with the identification and rating of the different risks in litigation. This includes a detailed description of each risk. The second part of the Annexure focuses on the risk treatments, and how the Tax Office manages each risk that has been identified.

Identified risks in litigation

6. Identifying the risks once a matter reaches litigation is necessary to determine the appropriate litigation strategy. During the litigation process, continued risk analysis should be carried out through the various processes including case selection, Strategic Internal Litigation Committees (SILCs) and case call-overs.

7. If the taxpayer commences the proceeding, such as in tax technical litigation via Part IVC of the *Taxation Administration Act 1953,* risk assessment occurs as part of the initial SILC process to determine the litigation strategy. The SILC process has a number of critical decision making points, and the litigation risk should be reconsidered at each of those points to ensure that appropriate strategies are in place to meet the potential consequences of any changed risk profile. The SILC process also recommends whether the technical issue involved in the litigation is of such significance that it warrants Tax Counsel Network (TCN) involvement. For the allocation of an appropriate TCN, the SILC case management plan needs to be approved by the business line Senior Executive Service and/or the Legal Services Branch (LSB) Assistant Commissioner, Litigation and referred to the appropriate Deputy Chief Tax Counsel.

8. If the Commissioner commences proceedings (for instance debt recovery proceedings) risk assessment occurs initially as part of the case selection process and then again in initiating the litigation process. Risk assessment in debt cases for example is covered by Chapter 3 of the ATO Receivables Policy. If the taxpayer files a defence, the litigation risk needs to be reassessed. In significant debt matters this occurs through the debt litigation call-over process, which would include consideration as to whether Tax Counsel should be involved in the matter.

9. Risk management is a vital tool to ensure that strategies and resources are applied according to the priority of the cases, and that those strategies and resources will have a high probability of producing the optimal outcome in the litigation.

10. Risks to business outcomes from the conduct of litigation include:

- legal risks
- revenue risks
- operational risks
- compliance risks, and
- reputational risks.

11. Risks include the failure to take appropriate advantage of opportunities. In this sense there is a strategic risk in failing to optimise the benefits that might accrue from a strategic approach to litigation in delivering business outcomes.

Determining the level of litigation risk

12. Once a matter is in litigation, the litigation team must undertake its own risk assessment (separate from the Priority Technical Issues (PTI) process) to determine the level of the litigation risk associated with the case. This will assist the team to determine and apply the most appropriate litigation strategy.

13. In litigation, risks are managed in line with various corporate strategies and processes which address risks. Corporate Management Practice Statement PS CM 2003/02 (G) Risk and Issues Management was developed to ensure that risk management underpins all Tax Office activities.

14. The litigation team will rate the identified risks according to the consequences if they were to eventuate, and the likelihood of their occurrence. Where the consequence cannot be ameliorated, and the risk is rated ‘high’ or above, every effort should be made to reduce the likelihood of occurrence, and to mitigate the consequences.

Legal risks

15. In the context of this Annexure 'legal risk' refers to risks arising from the uncertainty in the interpretation of legislation administered by the Commissioner, and in a commercial sense uncertainty or ambiguity in contracts entered into. Legal risks also include the specific risks that flow from the litigation process itself, including risks of breaching court and tribunal orders, breaching or being perceived to breach the Attorney-General's Legal Service Directions, adverse comment from the courts and tribunals as well as the risk of increased litigation. The exposure arising from legal risks ranges from one-off decisions with minor consequences to substantial consequences for the law and Commonwealth revenue.

16. As litigation provides law clarification and is an avenue for expressing and testing the ATO view of the law to courts and tribunals, legal risk management will require an assessment as to whether TCN should be allocated to the matter. TCN will normally be involved where the possible consequences of a court or tribunal decision (adverse or favourable to the Commissioner) are assessed as giving rise to a level of risk that needs to be strategically managed.

17. TCN should also be involved in the litigation where the technical issue in the matter is the subject of an existing PTI. Where the litigation is an integral part of an already established PTI, the litigation case will be linked to the PTI case and the relevant TCN officer will remain involved as part of the litigation team.

18. In terms of litigation risks, if it appears likely that appeals will follow the outcome of a court or tribunal decision, mitigation strategies should be identified in line with the processes set out in Annexure F of this practice statement.

19. Risks in terms of poor representation, preparation, or inadequate evidence should be avoided by appropriate team based approaches in litigation, such as use of SILCs and case call-overs, as well as through the application of procedures developed to ensure best practices in courts and tribunals. Where the risks cannot be avoided, the case and issue are to be escalated through the call-over process.

Revenue risks

20. All litigation carries with it a risk of monetary loss. In Tax Office litigation, the revenue at risk may depend in part upon whether the dispute is factual and therefore limited in its application to the circumstances of the particular taxpayer, or whether it may have wider revenue consequences in terms of legal principle that may have widespread effect.

21. Revenue risks in litigation can be monitored at the organisational level of total disputed debt, or total tax in dispute in tax technical litigation. Overall trends in these areas may be indicative of systemic changes in taxpayer behaviour, or changes in Tax Office administrative practices. Revenue risks are usually monitored at the individual case level or at the issue level, where groups of cases carry like issues.[118] The level of revenue at risk in a particular case may highlight a reason to escalate the matter for TCN involvement. Where the amount in dispute is small, it may suggest that careful consideration should be given to whether the case is suitable for settlement.

[118] Such as the revenue risk attached to a PTI where there may be many cases linked to the issue.

22. The business line case officer is responsible for determining the revenue risk for the case or issue. This occurs as part of the SILC or call-over process.

23. The tax revenue directly at risk in any particular tax matter is generally easily assessed by reference to the value of the assessments or transaction in dispute. The actual expected costs of litigation should also be factored into the anticipated costs. In some instances the costs of litigation may be greater than the tax revenue. The LSB officer and the Tax Office external solicitor, if involved, should be able to provide a best estimate of the anticipated litigation costs.

24. The broader revenue implications of litigation are not always immediately obvious. Each business line (as risk owner) has its own processes for determining the revenue implications of litigation. If the litigation has an impact within one market segment or business line, the reporting team within the business line may be able to quantify the revenue risk using an *ad hoc* report from the data warehouse.

25. The Debt business line can assist with quantification of revenue risks across disputed debt categories. If the revenue implications cut across market segments or business lines, assistance may be sought from the Revenue Analysis Branch in National Office to help quantify the revenue risk.

26. Revenue risk is to be recorded in relevant Tax Office databases, such as the LSB case management system (Mind Your Matters), and for individual cases on the SILC, case call-over, and Significant Litigation templates, as necessary.

Operational risks

27. Operational risks have been described as 'the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events'.[119]

28. The risks to be identified under this heading are diverse, including the capability and availability of the individuals involved in the litigation team to carry out their duties competently, and the capabilities of internal and external systems to support the litigation in unusual and unforseen circumstances. Operational risks can be as obscure as bad weather stopping a key witness from attending court.

29. Operational risks in litigation are more specifically dealt with under the headings of legal and compliance risks.

Compliance risks

30. Compliance risk is an acknowledgment that a number of key factors can influence taxpayer behaviour in complying with the law. It is the current and prospective risk to revenue arising from community non-conformance with laws, regulations, precedential ATO views (such as public rulings), or standards of conduct normally expected of the community. Compliance risk also arises in situations where the law or ATO view expressed in precedential products may be ambiguous or untested. In this sense compliance risk is closely aligned with legal risk. The risk exposes the Commonwealth to loss of revenue. A case in litigation that potentially exposes a defect in the law can have widespread consequences for compliance by the community and confidence in the system.

[119] 'International Convergence of Capital Measurement and Capital Standards', Basel Committee on Banking Supervision (2004).

Reputational risks

31. Reputational risk refers to the negative experiences or perceptions that may arise during or as a result of litigation that may affect the Tax Office's standing with Government, the judiciary, other departments, the Tax Office's external advisers, or the community.

Risk treatments

Risk reduction

32. Having appropriate governance measures in all aspects of the Tax Office's business in the collection of Commonwealth revenue, as an employer and in commercial dealings reduces the risks of litigation itself and the risks that may flow from litigation. The following measures aim to reduce the risks to the Commissioner:

- clearly established and comprehensive delegations and authorisations for all staff in the performance of duties, statutory functions and spending of money
- responsibility for risk oversight and management attributed in the corporate governance framework across the Tax Office. Appropriate planning in each sub-plan of the office covers business outcomes, risk identification, performance objectives and reporting and financial controls
- budgets and reporting systems across the business lines of the Tax Office enabling the evaluation of trends and identification of emerging or increased risks. Escalation processes are a part of these reporting systems
- Tax Office values and behaviours as relevantly summarised in this Annexure ensure transparency, consistency and fairness in its dealings and protect the interests of Government and the community, and
- clearly established views of the law through precedential decisions and a credible public rulings system accessible to the community provide certainty about the Tax Office's view of the law, as well as confidence in the system due to the knowledge that treatment of all taxpayers is fair and consistent.

33. The SILC process is an avenue for regular review of the risks associated with litigation. These meetings and the biannual strategic litigation call-overs ensure that mitigation strategies can be created incrementally and at the earliest time. This has proven to reduce the severity of risks.

Reduce or eliminate risk through settlement

34. The Code of Settlement Practice recognises that settlement may be an appropriate way to resolve a matter depending on the circumstances of the case. The litigation team needs to consider:

- whether the cost of litigating (including internal costs) is out of proportion to the possible benefits
- the prospects of success, including collection of the tax, and
- the likely award of costs.

35. These considerations need to be assessed as objectively as possible. As a general rule the Tax Office will not compromise, nor make concessions where its view of the law on a particular issue is established.

Risk retention

36. Risks do not need to be entirely eliminated. As with any aspect of Tax Office business, risks are an inevitable part of the litigation process. Risks may be identified and quantified and recognition given that adverse outcomes are possible and may not be capable of being avoided or mitigated. A decision of a court or tribunal disclosing a defect in the law may have significant retrospective revenue consequences.

37. The cost of litigation will sometimes heavily outweigh the revenue or claim at stake in a particular matter however, the cost may be justified in the interests of law clarification and in ensuring that taxpayers are treated consistently and fairly.

38. Although some risk is retained in all litigation pursued, the consequences of the risk can usually be managed or mitigated, if identified.

Risk management

39. In all areas of Tax Office business including litigation, tax officers need to ensure that the Tax Office has identified the highest risk exposures and has taken steps to properly manage these (as well as managing or monitoring other lower risks to make sure they do not get worse).

40. The environment for management of risk is enhanced by clearly defined management roles and responsibilities in the conduct of litigation.

41. In taxation disputes the business lines have the primary role of ensuring compliance with the laws for their taxpayer client base. Business lines have the primary role of identifying the risks associated with a case and managing those risks, and where possible mitigating the adverse consequences of the risks.

42. Identified risks are rated according to the consequences if they were to eventuate, and the likelihood of their occurrence. It is therefore important to make sure that:

- there are formal processes in place to analyse risks
- there are either standard or tailored risk treatments, which may range from periodic monitoring by the executive, through to large-scale strategies as appropriate to the level of risk, and
- processes are in place to regularly monitor at the Senior Executive Service level high to severe risks and the proposed mitigation strategy.

Review of risks in the course of litigation

43. An important aspect of risk management is regular review to ensure that risk assessments remain constant. Two key strategies undertaken in LSB which support the business line role as risk owners are call-overs and SILCs.

Call-overs

44. All new Part IVC appeals are considered within the LSB call-over process.[120] These call-overs are convened by the local LSB business manager and attended by the LSB case officer and the Assistant Commissioner, Litigation. The purpose of these call-overs is to monitor the progress of new and existing cases, and to identify and manage emerging risks.

45. By considering the risks arising from the litigation of a matter, it may be decided at the call-over that the technical issue requires strategic management and warrants TCN involvement. An appropriate TCN officer will be allocated when the approved SILC case management plan is referred to the relevant Deputy Chief Tax Counsel via the business line Senior Executive Counsel or the Assistant Commissioner, Litigation.

46. All strategic litigation will be reviewed more thoroughly at the national Strategic Litigation call-overs, held every six months. They are normally attended by the LSB officer, Tax Counsel and business line representatives. The technical issues in these cases are often discussed in some detail. The call-over panel includes the Senior Assistant Commissioner, Strategic Litigation, one or more Senior Tax Counsel, Strategic Litigation, the Assistant Commissioners, Litigation, and the relevant LSB business manager.

Strategic Internal Litigation Committees

47. A SILC is convened at every critical stage of Part IVC of the *Taxation Administration Act 1953* and other strategically important litigation by LSB officers managing the litigation.[121] The consensus group for SILCs will include the LSB case officer and the business line case officer. Other attendees invited to participate in the SILC will vary depending on the business line involved and the strategic importance of the issues involved, but are likely to include any Tax Counsel assisting in the case and relevant officers from the business line and Centre of Expertise. The first SILC is held within two weeks of the commencement of litigation, and subsequent SILCs are mandated at each critical stage of the litigation. Each of these SILCs has a particular purpose in managing the litigation itself, evaluating emerging risks and developing mitigation strategies for the possible consequences of a court or tribunal decision.

[120] These are normally conducted on a monthly basis.

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

Risk mitigation strategies

48. Through the course of litigation, particularly before and after the hearing, the litigation team[122] needs to consider the mitigation strategy in relation to the case. This will vary from one case to another, however, at the very least consideration should be given to whoever will be taking responsibility for advising the key people in the organisation and externals about the consequences of the decision once it is handed down.

49. Two key elements of the mitigation strategy in terms of strategic litigation are the consideration of the consequences of the litigation on the legislation and any media strategy that needs to be put in place. In terms of the legislative consequences, consideration should be given to an early relationship with Treasury who will monitor the litigation and prepare for the potential consequences of a decision that is contrary to the underlying policy of the legislation.

50. Consideration also needs be given to downstream or consequential impacts and ensuring that they are addressed in the strategy to resolve the technical issue, for example, any necessary changes to public rulings and/or ATO Interpretative Decisions, or to the law.

51. Annexure F of this practice statement sets out the requirements for SILCs to be undertaken during the course of litigation. These are designed to ensure that risks are identified and managed throughout the course of litigation and after it is completed. At the initial stages consideration will be given to whoever needs to be on the litigation team.

52. SILCs also ensure that internal Tax Office processes and procedures should be followed. This, in part, is to ensure decisions (for example, settlement) and issues (for example, technical view/line of argument) are made or addressed by the appropriate person.

53. The litigation risks should be reconsidered at these points, covering various aspects of the case.

54. Following completion of a litigation case, a review should be undertaken as part of a SILC that examines the conduct of the litigation. The strengths and weaknesses in Tax Office practices and procedures should be considered and fed back to the original decision makers through the SILC process with the business lines.

55. The impacts of the decision should be considered in line with Annexure F of this practice statement.

[122] 'Litigation team' will include the LSB case officer and the business line case officer and may also include Tax Counsel, another business line officer, a Centre of Expertise representative, a panel firm solicitor and external counsel.

Legal risks

Part IVC litigation[123]

56. Legal risks in cases which involve tax technical issues are primarily managed through the call-over and SILC process.

57. Due to the inherent legal risks arising from litigation, all litigation arising in the Administrative Appeals Tribunal, the Federal Court, High Court and State and Territory Supreme Courts and Courts of Appeal are risk assessed to determine whether or not the litigation gives rise to a technical issue requiring TCN assistance. Generally, litigation that involves a factual dispute will not warrant TCN involvement. Business lines, with the assistance of LSB are required to risk assess all Part IVC of the *Taxation Administration Act 1953* litigation.

58. Unexpected challenges can also arise in the course of litigation to well established Tax Office positions as well as to core tax principles not previously identified under the PTI process. In these circumstances, escalation via the business line SES and/or the Assistant Commissioner, Litigation is required to ensure that TCN resources are added to the litigation team.

59. A challenge to a precedential ATO view is as important as the earlier resolution of the ATO view on that issue.

60. At the preliminary SILC, the business line representative and the LSB officer will discuss the management of any new appeal and risk assess the underlying issues of the case to determine whether the issues warrant TCN involvement.

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

Non-Part IVC litigation

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

63. Other litigation in tribunals or lower State and Territory courts may warrant escalation, depending on the level of risk associated with the particular case.

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

64. In view of the high volume and factual nature of litigation arising in debt, lodgment, registration, and in-house prosecutions, formal risk assessment is only conducted on those cases where complex or unique features exist.[124] Where risk assessment is warranted, the relevant business line staff and the LSB officer, if involved, will collaboratively risk assess the litigation and then determine whether the issue should be escalated to TCN.

65. In all other non-Part IVC of the *Taxation Administration Act 1953* litigation identified as having underlying issues that may require escalation, LSB officers should work with business line staff to identify the underlying risk and clarify responsibility for dealing with related issues (for example, handling media queries, dealing with clients and their advisers, quantifying revenue exposure and so on). Responsibility for these latter tasks will usually rest with the business line risk owner.

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

Revenue risks

67. At the commencement of litigation, the amount of revenue at risk needs to be determined.

68. High to extreme risk litigation should be subject to rigorous mitigation strategies in the course of litigation. These cases should be called over regularly and, where necessary, details reported to the Debt business line as well as the ATO Executive by the relevant Assistant Commissioner, Litigation.

69. In circumstances where the cost of litigation well exceeds the revenue at stake, consideration should be given to the Code of Settlement Practice which provides guidelines on the settlement of taxation disputes in relation to all taxpayers. It provides guidance as to the situations in which settlement could be considered and outlines the processes which should be followed. It highlights that settlement may be an appropriate way to resolve a matter if the cost of litigating (including internal Tax Office costs) is out of proportion to the possible benefits, having regard to the prospects of success (including collection of the tax), and likely award of costs, assessed as objectively as possible.

70. In debt litigation the ATO Receivables Policy identifies the circumstances in which staff should obtain advice prior to commencing legal proceedings in terms of not only general risk strategies but also the risks of legal proceedings such as *Mareva* injunctions.[125]

[124] Examples of factors to consider in the risk assessment process can be found in the list of indicators for strategic litigation at Attachment 1 of Annexure F.

[125] A '*Mareva* injunction' is a form of injunction that is used to restrain a defendant or their agents from removing assets from the jurisdiction, or otherwise disposing of or dealing with those assets pending further orders by the court (usually until judgment is obtained against the defendant). The purpose of a *Mareva* injunction is to prevent the defendant from disposing of assets which would otherwise frustrate the enforcement of judgment subsequently obtained by a plaintiff.

71. If a debt is determined to be irrecoverable at law or uneconomic to pursue then it can be written off in accordance with the *Financial Management and Accountability Act 1997.* This 'cost benefit analysis' is undertaken when debt litigation is commenced. However, this might not be appropriate where there is an overriding public interest reason to pursue the litigation despite the fact that the cost of litigation will exceed the likely recovery. For instance this may occur where it is necessary to pursue insolvency proceedings to prevent further escalation of a debt and/or to appoint an insolvency practitioner to investigate disposal of assets which were designed to defeat creditors.

Compliance risks

72. Litigation can resolve some of the factors that influence taxpayer behaviour. In this sense, compliance risk can be identified as both an opportunity and a threat. The finality that comes from a judicial decision will provide ultimate certainty about the meaning of the law. A real risk not often considered during litigation is the risk of failing to seize law clarification opportunities. Ensuring that a case is well run and all of the necessary issues are ventilated will aid in providing greater certainty about the law for the community.

73. On receipt of a litigation matter (in addition to the formal requirements) the background to the litigation and the process/actions followed by the original decision maker should be subject to review. Any concerns regarding the pre-litigation action or an assessment made that the case involves broader issues should be raised with the relevant technical area. Engagement of the relevant Tax Office staff is essential at the early stages of the litigation process.

74. Assessments of the broader impact of the litigation should be made (for example, covering internal processes and procedures, Tax Office policy, legislative deficiencies) and development of an appropriate action strategy should be made on a regular on-going basis. This should be incorporated as part of the 'Risk Mitigation Strategy'. The requirement to obtain additional internal technical expertise (for example, TCN or Centre of Expertise) should also be considered.

Reputational risks

75. Managing the Tax Office's reputation requires efficient communication and long-term solid relationships inside and outside of the Office. When the Tax Office has a high reputation with Government and the community, the potential benefits that follow include:

- greater confidence in the tax system
- trust in the Tax Office's publicly stated views of the law
- reduced threats of dispute and litigation
- reduced public and Government scrutiny, and
- greater latitude when inadvertent errors are made.

76. With increased media scrutiny, the Tax Office enhances its reputation through having greater transparency in all of its dealings, including interaction with its stakeholders at every opportunity. The Tax Office's actions and conduct must be consistent with its values and the commitments it make through the Taxpayers' Charter. From its employment practices, relationships with contractors, to its administration of the tax system and delivering to Government, its conduct should constantly aspire to be best practice.

77. In litigation the Tax Office strives to be a model litigant. The standards set out in the Attorney-General's Legal Services Directions, which it adhere to in the course of litigation, are communicated to its legal advisers and taxpayers.

78. The Tax Office needs to maintain strong relationships with the courts and tribunals either through direct liaison or through its external solicitors.

79. The business lines are primarily responsible for escalating issues that may be a severe risk to the Tax Office's reputation during the course of litigation to the ATO Executive.

80. LSB has a primary responsibility to ensure that litigation is conducted by the Commissioner consistently with the Tax Office's standards of conduct. LSB will ensure that the Tax Office self-reports to the Office of Legal Services Coordination in the Attorney-General's Department when breaches or possible breaches of the Legal Services Directions occur.

81. Media issues are to be managed in line with the Tax Office's media policy. This enables the Tax Office to maximise opportunities to ensure accurate reporting to the community, while minimising the risks inherent in media exposure. It needs to provide a professional level of service to the media. Positive media exposure can significantly enhance its ability to meet corporate objectives such as increasing compliance levels and maintaining the community's confidence in its operations.

82. The media policy and protocol exist to maintain the consistency of Tax Office communications. Any media interest in any case that is before the courts must be dealt with carefully and should be managed between the media unit and the relevant Senior Tax Counsel, Strategic Litigation and/or Assistant Commissioner, Litigation.

COSTS AWARDED BY THE COURTS

PURPOSE: To advise staff on the processes when courts award costs

1. In all legal proceedings where the Commissioner is a party and a court orders costs but does not specify what amount of costs are to be paid, then staff must follow the procedures detailed in this Annexure.

STATEMENT

2. There are various areas in the Tax Office that may have direct involvement in dealing with legal costs orders, including:
   - Legal Services Branch (LSB)
   - business line officers involved in litigation
   - business line officers involved in negotiating settlement of disputes
   - Debt business line, and
   - In-house Prosecutions.
3. There are also areas of the Tax Office that provide advice in litigation and settlement matters such as:
   - Tax Counsel Network
   - business line technical advisors, and
   - Centres of Expertise.
4. All staff in areas mentioned in paragraphs 2 and 3 of this Annexure should be aware of and understand the policy and procedures set out in this Annexure. Where other Tax Office employees encounter legal cost payment issues, they must contact LSB in their respective region for advice on the application of the Tax Office policy and procedures.
5. Legal costs are the costs for professional work and disbursements in relation to legal work or litigation. These include fees, charges, expenses, disbursements and remuneration for work done by a person in the capacity of a barrister or a solicitor. Disbursements are those payments which have been made in pursuance of the professional duty undertaken by the solicitor, which he or she is bound to perform, or which has been sanctioned as professional payments by the general practice and custom of the profession.
6. Costs generally fall into one of five categories:
   (a) fees paid to the instructing solicitor
   (b) fees of counsel
   (c) court fees
   (d) disbursements (for example stamp duties), and
   (e) witnesses expenses.
7. The general rule is that ‘costs follow the event’ – that is a successful party is entitled to recover costs. However, this is always discretionary so that a court may decide not to allow the successful party to recover costs. If the court decides not to award costs to the successful party it may refuse them in part or totally, depending on the circumstances of the case.

Costs awarded against the Commissioner

8. When a contracted legal service provider has acted on behalf of the Commissioner, they will provide their advice on whether the costs being sought by the other party against the Commissioner are, in their view, reasonable. If the costs are considered to be unreasonable, the LSB case officer, after consultation with the business line, may instruct the contracted legal service provider to act on the Commissioner's behalf in challenging and resolving the costs dispute.

9. If a contracted legal service provider does not act on behalf of the Commissioner, LSB will advise as to whether the costs are reasonable and appropriate.

10. When costs are awarded against the Commissioner, the other party (the receiving party) must forward details of the legal expenses it has incurred and is claiming for payment prior to the Tax Office making a payment for those legal costs.

11. Before Tax Office staff make a payment for legal costs, they must obtain a schedule of costs:

    (a) detailing the legal fees and disbursements that the receiving party's solicitor has incurred on behalf of his or her client and is claiming as costs against the other party in accordance with the applicable court rules and any court order(s) made with respect to costs,

    (b) with sufficient detail to identify:

    - how the amounts were determined and whether the legal costs are legal fees or disbursements
    - whether GST has been applied, and
    - if GST applied, whether the other party was entitled to claim an input tax credit and if so, to what extent.

12. If the schedule of costs does not give sufficient detail, the receiving party's solicitor should be contacted and further details requested in respect of the GST application and payment. In some cases, it may be appropriate to request the invoices with respect to the legal fees and disbursements to verify the payments.

13. The payment of legal costs should then be made when the:

    - legal costs claimed are reasonable given the nature and complexity of the matter, and
    - GST amount is properly accounted for as provided in Annexure I for reimbursing the GST component in circumstances where the receiving party is entitled to an input tax credit.[126]

[126] Annexure I deals in detail with the GST implications on the recovery of legal costs (professional fees and disbursements) awarded by the court or settled by agreement between the parties.

When the Commissioner is awarded costs

14. When the Commissioner is awarded legal costs, a schedule of legal expenses incurred is to be prepared to enable determination of the amount of legal costs to be paid by the other party. This will ordinarily be done by the Commissioner's solicitor when the Commissioner is represented by an external solicitor. When the Commissioner is represented by an employee, schedules will need to be prepared by LSB.

15. Before LSB staff formulate a schedule for legal costs to receive payment, they must obtain a schedule of costs:

- detailing the legal fees and disbursements that the Commissioner's solicitor has incurred on behalf of the Commissioner and is claiming as costs against the other party according to the applicable court rules and any court order(s) made with respect to costs,
- with sufficient detail to identify:
  - how the amounts were determined and whether the legal costs are legal fees or disbursements
  - whether GST applied, and
  - if GST applied, whether the other party was entitled to claim an input tax credit and if so, to what extent.

16. The claim for payment of legal costs should then be made when the:

- legal costs claimed are reasonable given the nature and complexity of the matter, and
- GST amount is properly accounted for as provided in Annexure I for reimbursing the GST component in circumstances that the receiving party is entitled to an input tax credit.

17. There are also less complex proceedings where there may be no need to prepare a schedule of legal expenses, but nevertheless, the same policy applies. For example, where a default judgment is obtained on a Summons or Statement of Claim issued for a tax liability, the only legal expenses likely to be incurred by the Tax Office would be filing fees (where no GST is applied) and service fees (which is a disbursement and will have GST applied). In this situation the Tax Office should seek from the court an order for costs for the filing fee and the service fee exclusive of the GST amount.

Costs can be negotiated between the parties

18. A negotiated settlement of legal costs of a matter generally occurs on settlement of a dispute and can occur prior to, during or after litigation. In any negotiated settlement of the legal cost issues, the party to receive the payment must prepare a schedule of legal expenses incurred to that point.

19. Before Tax Office staff make a payment for legal costs or formulate a schedule for legal costs to receive payment, they must ascertain a schedule of costs:

- detailing the legal fees and disbursements that the receiving party's solicitor has incurred on behalf of his or her client and is claiming as costs against the other party according to the applicable court rules and any court order(s) made with respect to costs

- with sufficient detail to identify:
  - how the amounts were determined and whether the legal costs are legal fees or disbursements
  - whether GST applied, and
  - if GST applied, whether the other party was entitled to claim an input tax credit and if so, to what extent.

20. If the schedule of costs does not give sufficient detail, the receiving party's solicitor should be queried and further details requested in respect of the GST application and payment. In some cases, it may be appropriate, to request the invoices with respect to the legal fees and disbursements to verify the payments.

21. The payment of legal costs should then be made when the:

- legal costs claimed are reasonable given the nature and complexity of the matter, and
- GST amount is properly accounted for as provided in Annexure I for reimbursing the GST component in circumstances that the receiving party is entitled to an input tax credit.

22. A settlement under the Code of Settlement Practice may include settlement of the legal costs. The same principles apply to a settlement of legal costs under the Code of Settlement as any settlement outside the Code of Settlement Practice. Any costs settled under a Code of Settlement Practice must be identified as either being inclusive or exclusive of GST.

23. Responsibility for the legal budget rests with LSB. The LSB case officer will discuss any agreement as to costs with the relevant business line in accordance with the relevant business line service agreement. In considering whether the costs are unreasonable, regard should be had to the matters outlined in paragraph 29 of this Annexure.

Engaging a cost consultant

24. In certain circumstances it would be appropriate to engage a cost consultant for advice.

25. A cost consultant assists a party to determine the level and type of appropriate legal costs to be claimed in their particular case, either for the costs being claimed by the Commissioner, or for costs being claimed against the Commissioner. If the consultant is engaged by the Tax Office directly (that is, not via an external legal provider), it is regarded as a complex procurement. Tax Office employees wanting to engage consultancy services must contact Corporate Procurement, who undertake, manage and supervise all complex procurements (see PS CM 2005/19 spending of public money – consultancy services). In addition to giving the usual undertakings under the secrecy provisions, the cost consultant should also be advised of the need to act in accordance with the Taxpayers' Charter and the model litigant obligation at all times if they represent the Tax Office in the course of their consultancy. The cost consultant should be advised to consider the GST implications of the costs issues and to refer to GST Rulings GSTR 2001/4 Goods and Services Tax: GST consequences of court orders and out-of-court settlements and GSTR 2000/37 Goods and services tax: agency relationships and the application of the law, and Annexure I of this practice statement.

Assessment or taxation of costs

26. In the absence of agreement being reached on the amount, the costs will be assessed or taxed in accordance with the rules of the particular court. Proceeding to the process of taxation can be time consuming and expensive. An alternative approach is to engage an independent costs assessor as a means of arbitrating a costs dispute. The decision to use a cost assessor or have the costs taxed should be considered having regard to the degree of disparity in what is being sought and the amount that is considered reasonable by the litigator. Use of a cost assessor must be approved by the appropriate LSB manager and will also require the involvement of Corporate Procurement Branch.

27. Having costs assessed or taxed are expensive procedures and should not be undertaken without due consideration.

28. Where the Tax Office has queried costs and it would appear that an amount will not be agreed through negotiation, then the matter should be escalated to the relevant LSB manager as soon as possible for advice.

Matters to be considered by a cost assessor or on taxation

29. A cost assessor is bound by the relevant legal professional legislation and court rules which apply in the particular jurisdiction. A cost assessor determines what is fair and reasonable, and the assessor will have regard to the following matters:

- the skill, labour and responsibility displayed on the part of the barrister or solicitor responsible for the matter
- the complexity, novelty or difficulty of the matter
- the quality of the work done and whether the level of expertise was appropriate to the nature of the work done
- the place and circumstances where the legal services were provided
- the timeframe within which the work was required to be done, and
- the outcome of the matter.

Some costs may be disallowed or partly disallowed, for example:

- costs incurred before the issue of the originating process and after judgment is obtained
- charges incurred for convenience only of the legal provider
- costs beyond what is necessary for the proper conduct and understanding of the case
- unnecessary costs, for example more than one attendance to issue a subpoena or instruct a process server
- extra work due to lack of knowledge
- over-preparation of a case
- extraneous matters included in Counsel's brief
- repetitive observations or undue verbosity in the Counsel's brief, or
- redundant photocopies.

Split orders

30. The courts may order that costs be split between two parties, that is, two or more defendants. When this situation occurs the negotiations can be difficult. Engaging a cost assessor may be appropriate for the negotiations depending on the amount of costs involved.

Where the Commissioner is joined with another party

31. There will be some matters where the Commissioner is joined in a matter with a third party. In these instances any negotiation undertaken to settle costs on behalf of the Commissioner either for the costs being claimed by the Commissioner or for costs being claimed against the Commissioner must be strictly to settle the Commissioner's share of the costs only. Negotiations will not be undertaken for or on behalf of the third party.

32. Where the Commissioner intends to query the costs claimed against the Commissioner and the third party jointly, it is appropriate that the third party be advised that the Commissioner intends to query the costs and the third party should be given an opportunity to negotiate jointly or agree to use a cost consultant who will act on behalf of both parties. The third party needs to be advised that the Commissioner acts in accordance with the Taxpayers' Charter and the model litigant obligation at all times.

33. In cases where directors are liable to indemnify the Commissioner pursuant to section 588FGA of the *Corporations Act 2001,* only the costs applicable to the indemnity action against the directors can be claimed from the directors. The Commissioner cannot claim costs from the director in respect of expenses incurred by him or her in the conduct of the case defending the claim made by the liquidator.[127] However, the director may still be required by the court to pay a portion of the liquidator's costs in certain situations.[128]

Duty under the *Financial Management and Accountability Act 1997*

34. Where the Commissioner is awarded legal costs against another party he has a duty under the *Financial Management and Accountability Act 1997* to seek to recover those legal costs, subject to the principles of good management. Where an external legal service provider is engaged and is acting in the matter they should be clearly instructed in respect of this obligation to seek to recover the legal costs. The Tax Office is entitled to retain amounts recovered relating to the costs associated with conducting litigation or dispute resolution.[129]

The Tax Office must be the 'model taxpayer' and 'model litigant'

35. The Tax Office as the administrator of the Commonwealth taxation laws must act in accordance with the Taxpayers' Charter and the model litigant obligation and must be seen to be fully compliant with all aspects of taxation law.

[127] *Sims v. Deputy Commissioner of Taxation* (2006) 57 ACSR 249.
[128] *Noxequin Pty Ltd v. Deputy Commissioner of Taxation* [2007] NSWSC 87.
[129] Finance Circular 2008/07.

36. Section 47 of the *Financial Management and Accountability Act 1997* creates an obligation on chief executives to actively pursue debts. The Tax Office must also act as a 'model litigant' in accordance with the Legal Services Directions 2005 of the Attorney-General. Appendix B Note 5 of these Directions explains that the Commonwealth's obligation to act as a model litigant 'does not prevent it from enforcing costs orders or seeking to recover its costs'.

37. To overclaim or overpay legal costs through the misapplication of the GST law or any other processes would adversely affect the integrity and public confidence of the Tax Office's administration of taxation laws. It would also be contrary to the *Financial Management and Accountability Act 1997*. It is therefore imperative that the Tax Office correctly applies the law, court rules and GST laws to legal costs that consist of proper calculations for payment and recovery, either by court order or settled by agreement between the parties.

38. The Tax Office as either a receiving or reimbursing party of legal costs will apply the same practice as described in this statement. This is in circumstances where the Tax Office is entitled to an input tax credit for its creditable acquisitions.

Who the cheque for costs is made out to

39. Generally, the payment of costs is determined by the order made, however practices vary from state to state, as shown in the following table:

State	***Normal practice (as advised by the relevant Law Society or Supreme Court)***
Australian Capital Territory	Normal practice is for the cheque to be made out to the solicitor but a signed authority from the client is required.
New South Wales	The *Legal Profession Act 2004* (NSW) relevantly states in subsection 246(4) that: Money received in the course of or in connection with the provision of legal services by a law practice for or on behalf of another person for the payment of costs due to the practice **(including costs that have been awarded by a court,** tribunal or other body that has power to award costs), is not trust money for the purposes of this Act. *(emphasis added)* On this basis, the Law Society of New South Wales advised that costs ordered by the court are 'due to the practice' and can be made payable to the solicitor's firm.
Northern Territory	Payment can be made either to the client or into the solicitor's trust account. If, however, payment of costs is requested to be made to the solicitor's trust account, an authority should be obtained from the client.
Queensland	Normal practice is for the cheque for costs to be made out to the solicitor's trust account.
South Australia	Ordinarily, payment should be made to the client. If, however, payment of costs is requested to be made to the solicitor's trust account, an authority should be obtained from the client.
Tasmania	Normal practice is for the cheque to be made out to the solicitor.[130]

[130] Section 101 of the *Legal Profession Act 1993* (Tas).

Victoria	Normal practice is for the cheque for costs to be made out to the solicitor without obtaining an authority. NB: The only matters in which costs are required to be paid directly to the client are Workcover matters.
Western Australia	Normal practice is for the cheque for costs to be made out to the solicitor.

40. Where the Commissioner is awarded costs the cheque should be made out to the Commissioner of Taxation.

EXPLANATION

41. This Annexure covers party/party, solicitor/client, indemnity costs, and test case funding arrangements. The courts have the discretion to award costs (which also includes disbursements) to be paid to a party to proceedings by another party. Depending on the rules of the particular court, and the specific circumstances of the outcome, the order to pay costs may only be for a portion of the total costs or a specific aspect of the case. Some lower courts and tribunals may not have the power to award costs, in which case each party must pay their own.

42. There are provisions in all court rules and in relevant legal practitioners' legislation to allow for costs to be assessed or taxed by the courts. For example, Order 62 rule 4 of the Federal Court Rules provides:

> 4(1) Subject to this Order, where by or under these Rules or any order of the Court costs are to be paid to any person, that person shall be entitled to his taxed costs.

43. The term 'costs' is used to describe the remuneration and expenses incurred in relation to legal work. The two broad headings of costs are remuneration and disbursements. Costs can be agreed between solicitor and client or, failing agreement, scale costs are applied. Disbursements are those payments which have been made in pursuance of the professional duty undertaken by the solicitor which he or she is bound to perform, or have been sanctioned as professional payments by the general practice and custom of the profession.

44. The ordinary rules in relation to costs are provided by various Acts, rules and orders. As an example, subsection 40(1) of the *Supreme Court Act 1935* (SA) provides:

> **Power of Court with regard to costs**
>
> Subject to the express provisions of this Act, and the Rules of Court, and the express provisions of any other Act whenever passed, the costs of and incidental to all proceedings in the Court, including the administration of Estates and Trusts, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid.

Similarly, section 43 of the *Federal Court of Australia Act 1976* provides:

> **Costs**
>
> (1) Subject to subsection (1A) and section 570 of the *Fair Work Act 2009*, the Court or a Judge has jurisdiction to award costs in all proceedings before the Court (including proceedings dismissed for want of jurisdiction) other than proceedings in respect of which any other Act provides that costs shall not be awarded.
>
> (1A) In a representative proceeding commenced under Part IVA or a proceeding of a representative character commenced under any other Act that authorises the commencement of a proceeding of that character, the Court or Judge may not award costs against a person on whose behalf the proceeding has been commenced (other than a party to the proceeding who is representing such a person) except as authorised by:
>
> (a) in the case of a representative proceeding commenced under Part IVA – section 33Q or 33R; or
>
> (b) in the case of a proceeding of a representative character commenced under another Act – any provision in that Act.
>
> (2) Except as provided by any other Act, the award of costs is in the discretion of the Court or Judge.

45. The general rule is that, in the normal course, a successful party should have its costs.[131] The court's discretion in awarding costs is unfettered except that the discretion must be exercised judicially.[132] Generally, the court will not exercise discretion against a successful party unless there is material upon which that discretion may be exercised.

Discretion to award costs

46. Within the exercise of the discretion to award costs under the courts' statutory powers and specific rules, courts are not usually limited to making an order for costs on any particular basis. This is subject to the requirement that costs recovered from another party cannot be greater than the amount payable by the client to the client's own solicitor under the original agreement entered into between solicitor and client. The usual order for costs is that the unsuccessful party pay the successful party's costs on a party and party basis which rarely covers the actual costs incurred. However, the courts have the power to award costs against parties (and solicitors) on an indemnity basis or solicitor and client basis where there is some special or unusual feature to justify departing from the usual orders.[133]

47. In all instances when seeking costs, recourse should be made to the particular court rules of the relevant jurisdiction as the rules vary from court to court. Brief descriptions of each of the more common forms of costs orders are set out in paragraphs 48 to 65 of this Annexure.

[131] *Ritter v. Godfrey* [1920] 2 KB 47, *Hughes v. Western Australian Cricket Association (Inc)* (1986) ATPR 40-748 at 48,136.
[132] *Trade Practices Commission v. Nicholas Enterprises Pty Ltd & Ors* (1979) 28 ALR 201 at 207.
[133] *Colgate Palmolive Co v. Cussons Pty Ltd* (1993) 118 ALR 248.

Party and party basis

48. Costs awarded on a party and party basis are all such costs as are necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.

49. Entitlement to costs on a party and party basis does not entitle the successful party to a complete indemnity for his or her costs against the other party. The costs are those that were necessary to enable the successful party to conduct the litigation and no more. That is, costs which appear to the court's taxing officer to have been incurred through over-caution, negligence, mistake or merely at the desire of the party are not allowed on a party and party basis.

50. Costs which are necessary or proper include costs incurred in obtaining the assistance of solicitors and counsel, witnesses and experts, the costs of interlocutory proceedings and expenses of the various steps in the proceedings.

Solicitor and client basis

51. Costs ordered on a solicitor and client basis provide for costs to be paid on a more generous scale than party and party costs.

52. Solicitor and (own) client costs are not the same as costs on a solicitor and client basis.[134]

53. Solicitor and client costs are the costs payable by the client to the solicitor on an assessment between them.

54. Costs awarded on a solicitor and client basis are the costs payable by one party to another on an assessment between the parties on that basis.[135]

55. Solicitor and own client costs have been equated with an indemnity.[136]

56. Costs on a solicitor and client basis have been described as 'substantially a party and party taxation on a more generous scale',[137] although a lesser scale than solicitor and own client costs.

57. An order for solicitor and client costs is made in special circumstances, which may include costs being awarded against an unsuccessful plaintiff:

- where the court's process has been used for an ulterior purpose
- on a contempt application
- where an unusual or special feature in the case justifies the court awarding on this basis
- where knowingly false or irrelevant allegations of fraud have been made
- where it appears that a plaintiff properly advised should have known they had no chance of success, or
- where an adjournment is caused by granting leave to file pleadings out of time.

[134] *Bouras v. Grandelis* 2005 NSWCA 463.
[135] See for example Saddington G A, Taxation of Costs Between Parties (1919) Sydney, Law Book Co pp 31-3, *Milosevic v. Government Insurance Office of New South Wales* 31 NSWLR 323 at 340-1 per Mahoney JA and *re Public Trustee Act* (2000) 1 Qd R 409 at [56]-[63].
[136] *Gibbs v. Gibbs* [1952] 1 All ER 942 at 949 and *re Public Trustee Act* (2000) 1 Qd R 409 at [66].
[137] *Giles v. Randall* (1915) 1 KB 290 per Buckley LJ at 295.

58. Costs on an indemnity basis have been more or less equated with orders for costs as between solicitor and own client.[138]

59. The various descriptions of bases of costs in the rules of the different courts have complicated the general concepts, and for that reason costs should be determined having regard to the rules of the court.

Indemnity basis

60. Costs ordered on an indemnity basis include all costs incurred by a party to litigation in undertaking proceedings, provided they have not been unreasonably incurred or are not of an unreasonable amount. The conduct of a party as a litigant will be relevant in determining if costs should be awarded on an indemnity basis.[139] Indemnity costs may, for example, be awarded in the following circumstances:

- where a party may have maintained a cause of action with no real prospect of success
- where a party has maintained an action for some ulterior purpose or with wilful disregard for known facts or clearly established law
- where deliberately false allegations of fact have been made, or
- where a party's conduct resulted in significantly prolonging the trial.

61. On the other hand, an order for costs on an indemnity basis may be made in exceptional cases, such as 'test cases', where a party has performed a significant public service by bringing the proceedings.

62. Costs as between solicitor and own client have been regarded as providing an indemnity for reasonably incurred costs.[140] Care needs to be exercised, however, as the context of specific court rules may contemplate that these terms have different meanings. Generally however for practical purposes the distinction, if any, between solicitor and client costs and indemnity costs has been referred to as a '*rather murky issue*'.[141]

Test Case Litigation

63. In cases that are funded under the Test Case Litigation Program, the test case secretariat will administer the funding of the taxpayer's costs pursuant to the test case funding deed.

64. Where a test case funding deed has been agreed between the parties, the agreement generally states that the parties will seek no order as to costs. The Commissioner's litigation team must advise the court that the matter is test case funded and seek the appropriate costs order.

65. Where test case funding is provided without a funding deed, the parties must seek appropriate costs orders, as agreed between the parties.

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[138] *EMI Records Ltd v. Ian Cameron Wallace Ltd* (1983) 1 Ch 59; (1982) 2 All ER 980.
[139] *NMFM Property Pty Ltd v. Citibank Ltd (No. 11)* [2001] FCA 480 at para 56.
[140] *Packer v. Meagher* (1984) 3 NSWLR 486; *Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Pty Ltd* (1988) 81 ALR 397; *Adams v. Kennedy* [2001] NSWCA 7; *Lee v. Kennedy* [2001] NSWCA 8; *Clark v. Tasmania (No. 2)* (1999) Tas SC 130 and *re Bond Corporation Holdings Ltd* (1989) 1 WAR 465.
[141] *Burnie Port Corp Pty Ltd v. Bank of Western Australia Ltd* [2003] TASSC 132 at 17.

ANNEXURE I

THE GOODS AND SERVICES TAX IMPLICATIONS IN THE RECOVERY OF LEGAL COSTS (PROFESSIONAL FEES AND DISBURSEMENTS) AWARDED BY COURTS OR SETTLED BY AGREEMENT BETWEEN THE PARTIES

PURPOSE: To ensure Tax Office staff:

(1) are aware of the GST implications in the recovery of legal costs, and

(2) correctly determine if GST is to be included when making a payment of legal costs or formulating a schedule of legal costs to receive payment under a court order or out-of-court settlement by agreement between the parties

BACKGROUND

1. This Annexure is concerned with the GST implications in the recovery of legal costs in civil matters.

2. When making a payment of legal costs, or formulating a schedule of legal costs to receive payment, either as a result of a court order or an out-of-court settlement by agreement that includes a provision for the payment of legal costs, Tax Office staff must:

   - consider any entitlement to an input tax credit of the parties to the original supply of legal services
   - apply the legislation, court rules and case law in each jurisdiction to determine the amounts to be paid, and
   - consider any jurisdictional differences in court rules regarding the assessment and determination of legal costs and whether or not an entitlement to an input tax credit is to be taken into account when making payment of legal costs.

STATEMENT

3. When making a payment of legal costs, or formulating a schedule of legal costs to receive payment, either as a result of a court order or an out-of-court settlement by agreement that includes a provision for the payment of legal costs, Tax Office staff must:

   - consider any entitlement to an input tax credit of the parties to the original supply of legal services
   - apply the legislation, court rules and case law in each jurisdiction to determine the amounts to be paid, and
   - consider any jurisdictional differences in court rules regarding the assessment and determination of legal costs and whether or not an entitlement to an input tax credit is to be taken into account when making payment of legal costs.

Standard or party/party basis in respect of professional fees

4. Most court rules for standard or party/party costs will provide a fixed scale of costs to determine the amounts to be paid for professional fees.

5. The amounts to be paid in legal costs on a standard or party/party basis in respect of professional fees should be determined as follows:

   - In jurisdictions other than in the Supreme and District Courts of South Australia and in the State Courts of New South Wales[142] the amounts for professional fees are determined by application of a fixed scale of costs in the court rules and these amounts cannot be reduced to take into account a party's entitlement to an input tax credit for the GST component of the expense.[143] Accordingly, the amounts to be paid are GST-inclusive.
   - In the Supreme and District Courts of South Australia the amounts for professional fees in the fixed scale of costs in the court rules provide that a party's entitlement to an input tax credit is to be taken into account to determine the amounts to be claimed in a schedule of costs. Accordingly, the amounts to be paid are:
     - GST-exclusive, in all circumstances where the receiving party is entitled to an input tax credit
     - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
     - GST-inclusive, in all circumstances where the receiving party is not entitled to an input tax credit.
   - In the State Courts of New South Wales the court rules do not prescribe a fixed scale of costs except in limited circumstances. The amounts to be paid in respect of professional fees are determined on a 'fair and reasonable' basis by applying the *Legal Profession Act 2004* (NSW).

Solicitor and client basis or indemnity basis in respect of professional fees

6. Most court rules for solicitor and client basis or indemnity costs provide a taxing officer (of the court) with a wide discretion to allow costs that are reasonable. If no amounts for professional fees are prescribed by a fixed scale of costs in the court rules for solicitor and client or indemnity costs, the receiving party's entitlement to an input tax credit should be taken into account in ascertaining what is reasonable to determine the amount of professional fees to be paid.

7. The amounts to be paid in legal costs on a solicitor and client basis or indemnity basis in respect of professional fees should be determined as follows in all jurisdictions:

   - GST-exclusive, in all circumstances where the receiving party is entitled to an input tax credit
   - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
   - GST-inclusive, in all circumstances where the receiving party is not entitled to an input tax credit.

[142] In limited cases a fixed scale of costs will apply.

[143] *Merringtons Pty Ltd v. Luxottica Retail Australia Pty Ltd* [2006] VSC unreported (per Wood M) (*Merringtons*); *Hennessey Glass and Aluminium Pty Ltd v. Watpac Australia Pty Ltd* [2007] QDC 057 per McGill DCJ (*Hennessey Glass*) have held that the amounts for professional fees on a fixed scale of costs in the court rules cannot be reduced to take account of a party's entitlement to an input tax credit.

Disbursements

8. Disbursements are discrete items of expenditure that can be fully recovered from the other party. If no amounts for disbursements are prescribed by a fixed scale of costs in the court rules, the receiving party's entitlement to an input tax credit should be taken into account to determine the amount of disbursements to be paid.

9. The amounts to be paid in legal costs for disbursements that are not fixed by a scale of costs should be determined as follows in all jurisdictions:

    - GST-exclusive, in all circumstances where the receiving party is entitled to an input tax credit
    - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
    - GST-inclusive, in all circumstances where the receiving party is not entitled to an input tax credit.

Out of court settlement of legal costs by agreement

10. Legal costs negotiated by agreement between the parties should be the amount that the receiving party would be entitled to by reference to the court rules, legislation, any court orders and case law. The GST treatments for professional fees and disbursements provided at paragraphs 4 to 9 of this Annexure should apply.

Who does this Annexure apply to in the Tax Office?

11. There are various areas in the Tax Office that may have direct involvement in dealing with legal costs, including:

    - Legal Services Branch
    - business line litigation liaison officers
    - business line officers involved in negotiating settlement of disputes
    - debt, and
    - in-house prosecutions.

12. There are also areas of the Tax Office that provide advice in litigation and settlement matters, such as:

    - Tax Counsel Network
    - business line technical advisors; and
    - Centres of Expertise.

13. All staff in the areas mentioned in paragraphs 11 and 12 of this Annexure should be aware of and understand this policy and these procedures. Where other Tax Office employees encounter legal costs payment issues, they must contact Legal Services Branch in their respective region for advice on the application of the Tax Office policy.

Where an external legal service provider is engaged

14. Where an external legal service provider has acted on the Tax Office's behalf in a matter, they will deal with the legal costs and discuss any issues that may arise with the Legal Services Branch case officer. It is important in this arrangement that instructions to the external legal service provider clearly specify the correct position of the GST law with respect to legal costs and the policy of the Tax Office in respect of the GST implications on the recovery of legal costs.

The Tax Office must be the 'model taxpayer' and 'model litigant'

15. The Tax Office, as the administrator of the Commonwealth taxation laws, must act in accordance with the Taxpayers' Charter and the model litigant obligation and must be seen to be fully compliant with all aspects of taxation law.

16. Section 47 of the *Financial Management and Accountability Act 1997* creates an obligation on chief executives to actively pursue debts. The Tax Office must also act as a 'model litigant' in accordance with the Legal Services Directions 2005 of the Attorney-General. Appendix B Note 5 of these Directions explains that the Commonwealth's obligation to act as a model litigant 'does not prevent it from enforcing costs orders or seeking to recover its costs'.

17. To over claim or overpay legal costs through the misapplication of the GST law or any other processes would adversely affect the integrity and public confidence of the Tax Office's administration of taxation laws. It would also be contrary to the *Financial Management and Accountability Act 1997*. It is therefore imperative that the Tax Office correctly applies the law, court rules and GST laws to legal costs that consist of proper calculations for payment and recovery, either by court order or settled by agreement between the parties.

18. The Tax Office as either a receiving or reimbursing party of legal costs will apply the same practice as described in paragraphs 3 to 18 of this Annexure. This is in circumstances where the Tax Office is entitled to an input tax credit for the GST amounts that are creditable acquisitions.

EXPLANATION

19. This Annexure deals with the GST implications of the recovery of legal costs awarded by the court or settled by agreement between the parties and how to properly account for the GST amounts to be paid.

Legal costs and the GST consequences

20. Legal costs are the costs for professional work and disbursements in relation to legal work or litigation.[144] These include fees, charges, expenses, disbursements and remuneration for work done by a person in the capacity of a barrister or solicitor. Disbursements are those payments that have been made in pursuance of the professional duty undertaken by the solicitor, which he or she is bound to perform, or which has been sanctioned as professional payments by the general practice and custom of the profession.[145]

[144] *Burford v. Allan* [1998] SASC 6693; *Cachia v. Hanes* (1994) 179 CLR 403.
[145] *Re Remnant* (1849) 11 Beav 603; 50 ER 949.

21. A legal practitioner of a party in a legal dispute will incur legal fees and disbursements in the conduct of legal work or litigation for his or her client. The client will pay such expenses based on a costs agreement (or the equivalent) between the client and his or her legal practitioner. This is called solicitor and own client costs (and not to be confused with a costs assessment on a solicitor and client basis). Most legal services are 'taxable supplies'[146] for which the legal practitioner as the supplier is liable to remit GST.[147] Whether a legal service is a taxable, input taxed or GST-free supply will vary according to the application of the GST law. Further, the application of the GST will vary according to the capacity in which the legal practitioner incurred the expenses on behalf of the client as agent for the client or as principal in providing a legal service to the client.[148]

22. If a client is registered for GST, to the extent that legal services are acquired for a creditable purpose the client will be entitled to an input tax credit.[149] The client will be entitled to an input tax credit equal to the GST payable to the legal practitioner as the supplier of the taxable supply.[150] This would not be the case for a client who is not registered for GST or does not acquire the legal services for a creditable purpose.

23. If the Tax Office is party to a legal dispute and is supplied with a legal service, such as the service of a barrister performing the counsel function, the barrister is required to provide the Tax Office with a tax invoice and include GST in the fee to be paid. The Tax Office is entitled to claim an input tax credit for the GST component charged by the barrister.

24. The following are legal fees and disbursements recovered as legal costs from the other side and the GST consequences on the original supply to the client:

Legal Fees	Disbursement	Application of GST
Professional fees (or solicitor fees)		GST applies
Barristers fees (or counsel fees) (if engaged by client)	Barrister fees (or counsel fees) (if engaged by solicitor)	GST applies
	Expert witness fees	GST applies if the supplier of the expert witness service is registered or is required to be registered for GST
	Fees for expert reports or attendance in court	GST applies[151]
	Legal administration fees (copying, courier, postage, etc)	GST applies

[146] Section 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).
[147] Sections 7-1 and 9-40 of the GST Act.
[148] GSTR 2000/37 Goods and services tax: agency relationships and the application of the law.
[149] Section 11-15 of the GST Act.
[150] Sections 11-20 and 11-25 of the GST Act.
[151] If an overseas expert is solely engaged to prepare a report in his or her home jurisdiction and is not required to attend court, GST may not apply as to be a taxable supply the supply must be connected with Australia and otherwise meet section 9-5 of the GST Act. However, should the reverse charge provisions in Division 84 of the GST Act apply, GST will apply.

Court-filing fees	No GST applies[152]
Fees for recording of court proceedings and fees to obtain court transcript	GST applies
Search fees (that is, Land Titles Office, Australian Securities and Investments Commission (ASIC) and Insolvency and Trustee Service of Australia (ITSA) searches)	GST applies[153]
Advertising fees	GST applies
Service of document fees	GST applies
Travel and Accommodation	GST applies

The recovery of legal costs

25. The reimbursement of legal costs by one party to another party under a court order for legal costs or an out-of-court settlement by agreement that includes a provision for the payment of legal costs is not consideration for a separate supply.[154] While no GST applies to the payment of legal costs from one party to another party, there will be amounts of GST to be recovered by one party from the other party for the legal fees and disbursements with respect to original taxable supplies.

26. Courts have statutory power to make an award of legal costs of one party to be paid by the other party. This usually follows the finalisation of a legal dispute and the unsuccessful party is ordered to pay the successful party's costs. Costs orders may be made during legal proceedings. On the application of a party, the court will make orders for one party to pay the other party's costs on what is usually a standard or party/party basis. Parties may apply to the courts for costs on a more generous basis, that is, on a solicitor and client basis or indemnity basis. If parties are unable to reach agreement on the quantum of legal costs to be paid pursuant to a court order, the court rules provide for a process to assess costs and adjudication on cost by way of taxation by the court. The party with a costs order against them will be liable to pay the legal costs of the other party and the party entitled to costs may take action pursuant to the order to recover legal costs through the process of taxation by the court. In some cases, during the proceedings or at the finalisation of a proceeding the court may fix an amount to be paid for legal costs by one party to the other party. This will depend on the court rules and nature of the matter.

[152] In some instances, GST may apply to the reimbursement by the client of this expense. If the expense is incurred by the solicitor as principal for the client and as part of providing a legal service to the client, GST is payable. If the expense is incurred by the solicitor as agent for the client, no GST is payable.

[153] GST applies only if the searches are outsourced (that is conducted by a solicitor as principal and not agent) or conducted through an intermediary entity such as Australian Business Research Pty Ltd or the Centre for Information Technology and Communication. If searches are performed directly with the ASIC, the ITSA or a Land Titles Office, there will generally be no GST payable.

[154] See paragraph 148 of GSTR 2001/4 Goods and Services Tax: GST consequences of court orders and out-of-court settlements.

27. In addition, parties may between themselves agree to make out-of-court settlements that include a provision for the payment of legal costs by one party to another and the amount to be paid. Based on this agreement, one party is liable to pay the costs of the other party. In such circumstances, parties will usually assess costs on a party/party basis and determine the amounts to be reimbursed for legal costs by applying the relevant court rules and legislation. If parties are unable to reach agreement on legal costs to be paid, then they may pursue recovery in the courts for these amounts based on the agreement to pay the legal costs.

28. The court rules and legislation in each jurisdiction provide for how legal costs are to be assessed and the items and amounts allowed to be recovered. The court rules will provide the basis for the assessment of costs.[155] In most cases an assessment of a party's costs will be on a party/party basis. These are costs necessary for the attainment of justice or for enforcing or defending the rights of the party. The court rules generally also provide for legal costs on a more generous basis and these are known as solicitor and client basis or indemnity basis.

29. Solicitor and client costs are the costs payable by the client to the solicitor on an assessment between them. This is not the same as solicitor and (own client) costs[156] as mentioned in paragraph 21 of this Annexure and pursuant to a costs agreement (or equivalent) between a solicitor and his or her client. Indemnity costs are all costs incurred by a party to litigation in undertaking proceedings, provided they have not been unreasonably incurred and not of an unreasonable amount.

30. The items and amounts allowed for costs to be recovered are determined by application of a fixed scale of costs in the court rules.[157] The scale of costs in the court rules will prescribe the items and amounts that are to be reimbursed for legal fees and disbursements incurred by a party in legal work or the conduct of litigation. The table in the Attachment to this Annexure shows the relevant legislation and court rules in each jurisdiction to assess costs and reference to a scale of costs to determine items and amounts to be paid.

Indemnity principle and recovery of the GST amount as an expense

31. At common law, the primary purpose of an order for legal costs is to provide an indemnity to the successful party for their costs incurred in the conduct of litigation. This is known as the indemnity principle. The indemnity is for the out-of-pocket expenses incurred by a party that they are required to pay at law. It is only intended to be a partial indemnity for the loss suffered by a party in the conduct of litigation and to compensate a party to the extent provided in the court rules, which limit the items and amount to be recovered.[158]

[155] Refer to Annexure H of this practice statement for a definition of the assessment of costs on a standard or party/party basis, solicitor and client basis or indemnity basis.
[156] The terms 'solicitor and own client costs' and 'indemnity costs' are sometimes used interchangeably, however, care needs to be exercised as some court rules contemplate that these terms have different meanings. See Annexure H of this practice statement for further details.
[157] A fixed scale of costs will apply in limited cases in the State Courts of New South Wales.
[158] *Oshlack v. Richmond River Council* (1998) 193 CLR 72 at 97; *Cachia v. Hanes* (1994) 179 CLR 403 at 410-411.

32. There are connected GST implications on the amounts for legal fees and disbursements as they relate to the original supply between a client and his or her legal practitioner (solicitor and (own client) costs) and the later recovery of those amounts by the client as a party from the other party as legal costs.

33. A party entitled to recover costs under a court order or settled by agreement between the parties is generally entitled to recover the amount referable to the GST paid on the legal fees and disbursements.[159] The GST component is an out-of-pocket expense incurred in legal work and the conduct of litigation by a party and recoverable from the other party. However, a party registered for GST and entitled to an input tax credit for the GST component on the original supply of the legal fees and disbursements would not be out-of-pocket for the GST component of the expense.[160]

34. Recent cases on the recovery of legal costs and the GST component have held that the amounts for professional fees as fixed by a scale of costs cannot be reduced to take into account a party's registration for GST and entitlement to an input tax credit for the GST component of the expense.[161] This is because there is no general discretion in the court rules for taxing officers (of the court) to allow less than the scale amounts except in instances that there is a power to do so.

Taking into account the GST implications on the recovery of legal costs

35. When making a payment for legal costs, or formulating a schedule for legal costs to receive payment for legal costs, either as a result of a court order for legal costs or an out-of-court settlement by agreement that includes a provision for the payment of legal costs, Tax Office staff must:

- consider any entitlement to an input tax credit of the parties to the original supply of the legal service
- apply the legislation, court rules and prevailing authority in each jurisdiction to determine the correct amounts to be paid, and
- consider any jurisdictional differences in court rules regarding the assessment and determination of legal costs and whether or not an input tax credit is to be taken into account.

[159] *Re Treneski* (2004) 80 ALD 760; *Re Keen* (2005) 89 ALD 595; *Keen v. Telstra Corporation Ltd* [2006] FCA 834; *Thornton v. Apollo Nominees Pty Ltd* 2005 ATC 4480; 59 ATR 244.
[160] This is provided that the goods or services for which GST is payable is a creditable acquisition for a creditable purpose: see sections 7-1, 11-20 and 11-25 of the GST Act.
[161] *Merringtons* and *Hennessy Glass*.

Assessment of costs on a standard or party/party basis and GST amounts to be paid for professional fees

36. In previous cases in Victoria and Queensland which dealt with costs assessments on a party/party basis, amounts allowed for in the fees are fixed by a scale of costs in the court rules.[162] The position is similar in the Federal Court and Federal Magistrates Court of Australia and it has been held that a taxing officer (of the court) cannot reduce the amounts for fees as fixed by the scale of costs in the court rules.[163] These authorities would equally apply to the jurisdictions of Tasmania, Western Australia, Northern Territory and Australian Capital Territory that provide for an assessment of costs on a standard or party/party basis by reference to a fixed scale of costs in the relevant court rules for the amounts for fees allowed.

37. In South Australia, the scale of costs for the Supreme and District Courts provide that a party's entitlement to an input tax credit is to be taken into account to determine the fee to be paid. In the State Courts of New South Wales, the court rules do not prescribe a fixed scale of costs, except in limited cases as detailed in the court rules.

38. The table in the Attachment to this Annexure provides the relevant sections and rules to assess costs and determine items and amounts to be paid.

39. In jurisdictions that assess costs on a standard or party/party basis by using a scale of costs, a party's entitlement to claim an input tax credit for the GST amount of the professional fees ought not to be taken into account in the amounts to be paid. The amount for professional fees is the amount as prescribed by the scale of costs in the court rules (or referred to there in) and no reduction can be made to the amount for the GST component of the fee that a receiving party is entitled to as an input tax credit. Most scale of costs in the court rules were adjusted to include an amount for GST and increased by 9.5% in 2000.[164] Accordingly, the amounts paid for professional fees in most jurisdictions on a standard or party/party basis should be the GST-inclusive amounts.

40. In the Supreme and District Courts of South Australia, the scale of costs in the court rules for professional fees provide that the GST amount is to be added to the scale amounts except if the receiving party is able to recover the GST amount as an input tax credit. A receiving party's registration for GST and entitlement to an input tax credit is taken into account and the amounts paid for professional fees on a standard or party/party basis should be:

    - GST-exclusive, in all circumstances where the receiving party is entitled to an input tax credit
    - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
    - GST-inclusive, in all circumstances where the receiving party is not entitled to an input tax credit.

[162] *Merringtons* and *Hennessy Glass*.
[163] In *Re Fat Sel Pty Limited and Brambles Holdings Limited* (1958) 2 FCR 440; 61 ALR 536.
[164] This is the case for State Supreme and Federal court scales. Refer to: *Quick on Costs* at [4.11]; *Re Treneski* (2004) 80 ALD 760 and *Re Keen* (2005) 89 ALD 595.

41. In the State Courts of New South Wales, the amount for professional fees is determined by applying the *Legal Profession Act 2004* (NSW) as the rules of court do not prescribe a fixed scale of costs. Costs are to be assessed on a party/party basis and amounts will be appropriate when they are fair and reasonable costs as assessed in accordance with the *Legal Profession Act 2004* (NSW). In determining what is 'fair and reasonable' in the amounts allowed and applying the indemnity principle, the receiving party's entitlement to an input tax credit ought to be taken into account to reduce the amount as they would not be out-of-pocket for the GST amount in the fee. The amounts to be paid for professional fees on a standard or party/party basis should be:

    - GST-exclusive, in all circumstances where the receiving party is entitled to an input tax credit
    - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
    - GST-inclusive, in all circumstances where the receiving party is not entitled to an input tax credit.

42. However, in limited cases in the State Courts of New South Wales a scale of costs is prescribed in the court rules for professional fees, and the practice as described in paragraph 41 of this Annexure apply. That is, the amounts as prescribed by the fixed scale of costs and a party's entitlement to an input tax credit ought not to be taken into account. In these limited cases, as detailed in the court rules, the amounts to be paid for professional fees in the State Courts of New South Wales on the standard or party/party basis should be the GST-inclusive amounts.

Assessment of costs on a solicitor and client basis or indemnity basis and GST amounts to be paid for professional fees

43. Case law provides that an assessment of costs on a solicitor and client basis or indemnity basis is different.[165] Most court rules provide a taxing officer (of the court) with a wide discretion to allow costs that are reasonable. In such cases, in determining what is 'reasonable' in the amount allowed and applying the indemnity principle, the receiving party's entitlement to an input tax credit ought to be taken into account to reduce the amount as they would not be out-of-pocket for the GST amount. Further, if no amounts for professional fees are prescribed by a fixed scale of costs in the court rules for costs on a solicitor and client basis or indemnity basis, the receiving party's entitlement to an input tax credit ought to be taken into account, and the amounts to be paid for professional fees on a solicitor and client or indemnity basis should be:

    - GST-exclusive, in all circumstances where the receiving party is entitled to an input tax credit
    - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
    - GST-inclusive, in all circumstances where the receiving party is not entitled to an input tax credit.

[165] *Merringtons* and *Hennessy Glass*.

GST amounts to be paid for disbursements

44. Cases have treated the GST amount for disbursements differently and apply the indemnity principle to take into account a receiving party registration for GST and entitlement to an input tax credit for the GST amount of the expense.[166] This is because each disbursement is a discrete item of expenditure which is fully recovered from the other party.

45. In circumstances where there are no fixed amounts provided for disbursements in the court rules and disbursements are allowable to the extent that they are properly and reasonably incurred in legal work or litigation and paid, in all jurisdictions the amounts for disbursements should be:

- GST-exclusive, in all circumstances where the receiving party is entitled to an input tax credit
- GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
- GST-inclusive, in all circumstances where the receiving party is not entitled to an input tax credit.

46. In circumstances where there is a fixed amount for disbursements in the scale of costs in the court rules, then the amount as fixed by the scale must be paid as there is unlikely to be any discretion by a taxing officer (of the court) to reduce the amount to take account of an entitlement to an input tax credit. This is similar to the fixed amounts in a scale of costs for professional fees in the court rules.

Examples

47. The following examples are provided to assist Tax Office staff to correctly apply this practice to factual situations.

Example 1

48. A party (receiving party) is registered for GST and entitled to claim legal costs from the other party (reimbursing party) either by costs awarded by the courts or settled by agreement between the parties.

49. The matter may be in any of the following jurisdictions: Victoria, Queensland, Federal Court and Federal Magistrates Court of Australia, Tasmania, Western Australia, Northern Territory, Australian Capital Territory and in limited circumstances in State Courts in New South Wales.

50. The assessment of costs is on the party/party basis and by application of a fixed scale of costs under the relevant court rules.

51. The receiving party's solicitor renders a bill of costs to his or her client for $980 being:

- court fees $100 (no GST payable)[167]
- search fees $220 (includes $20 GST payable),[168] and

[166] *Merringtons* and *Hennessy Glass*.
[167] Note by reference to the original supply, GST may be payable if this expense was incurred by the solicitor for the client as a principal and in providing a legal service.

- professional fees for the solicitor of $660 (this is the fees as fixed by the scale of costs in the court rules and includes GST).

52. The receiving party is entitled to an input tax credit of $80.

53. The correct amount of legal costs to be paid by the reimbursing party is $960 (being $100 plus $200 plus $660). The reimbursing party will not pay the GST of $20 for search fees as they fall under the category of disbursements and they will take into account the receiving party's entitlement to an input tax credit of $20. The reimbursing party will pay the $660 (including the GST component) for professional fees as fixed by the scale of costs in the court rules as they will not take into account a receiving party's entitlement to an input tax credit of $60.

Example 2

54. A party (receiving party) is registered for GST and entitled to claim legal costs from the other party (reimbursing party) either by costs awarded by the courts or settled by agreement between the parties (receiving party) from the other party.

55. The matter may be in any of the following jurisdictions of the State Courts of New South Wales and in the Supreme and District Courts of South Australia.

56. The assessment of costs is on the party/party basis.

57. In South Australia the amount to be paid is by reference to a fixed scale of costs that provides that an input tax credit is to be taken into account in a schedule of costs.

58. In the State Courts of New South Wales the amounts are to be paid by application of the *Legal Profession Act 2004* (NSW).

59. The receiving party's solicitor renders a bill of costs to his or her client for $980 being:

- court fees $100 (no GST payable)
- search fees $220 (includes $20 GST payable), and
- professional fees for solicitor of $660 (this includes GST).

60. The receiving party is entitled to an input tax credit of $80.

61. The correct amount of legal costs to be paid by the reimbursing party is $900 (being $100 plus $200 plus $600). The reimbursing party will not pay the GST of $20 for search fees as they fall under the category of disbursements and they will take into account the receiving party's entitlement to an input tax credit of $20. The reimbursing party will pay the $600 for professional fees and not the $60 for the GST component as they will take into account the receiving party's entitlement to an input tax credit of $60.

[168] As searches are outsourced (by the solicitor as principal not agent) or conducted through an intermediary entity such as Australian Business Research Pty Ltd or the Centre for Information Technology and Communication.

Example 3

62. The circumstances are the same as in Example 2 except the costs assessment is on a solicitor and client basis or indemnity basis and in all jurisdictions.

63. The correct amount of legal costs to be paid by the reimbursing party is $900 (being $100 plus $200 plus $600). The reimbursing party will not pay the GST of $20 for search fees as they fall under the category of disbursements and they will take into account the receiving party's entitlement to an input tax credit of $20. The reimbursing party will pay the $600 for professional fees and not the $60 for the GST component as they will take into account the receiving party's entitlement to an input tax credit of $60.

Example 4

64. A party is not registered for GST and is entitled to claim legal costs either by costs awarded by the courts or settled by agreement between the parties (receiving party) from the other party (reimbursing party).

65. The assessment of costs is either on the standard or party/party basis, solicitor and client basis or indemnity basis.

66. The matter may be in any jurisdiction (Victoria, Queensland, Federal Court and Federal Magistrates Court of Australia, Tasmania, Western Australia, Northern Territory, Australian Capital Territory, South Australia and New South Wales).

67. The receiving party's solicitor renders a bill of costs to his or her client for $980 being:

- court fees $100 (no GST payable)
- search fees $220 (includes $20 GST payable), and
- professional fees for solicitor of $660 (this includes GST payable).

68. The correct amount of legal costs to be paid by the reimbursing party is $980 (being $100 plus $220 plus $660). The reimbursing party will pay the GST of $20 for search fees and $60 for professional fees as they are proper expenses incurred in the conduct of legal work or litigation.

Details of legal costs required

69. Before Tax Office staff make a payment for legal costs or formulate a schedule for legal costs to receive payment, they must ascertain a schedule of costs:

- detailing the legal fees and disbursements that the receiving party's solicitor has incurred on behalf of his or her client and is claiming as costs against the other party according to the applicable court rules and any court order(s) made with respect to costs, and
- with sufficient detail to identify:
  - how the amounts were determined and whether the legal costs are legal fees or disbursements
  - whether GST applied, and
  - if GST applied, whether the other party was entitled to claim an input tax credit and if so, to what extent.

70. If the schedule of costs does not give sufficient detail, the receiving party's solicitor should be queried and further details requested in respect of the GST application and payment. In some cases, it may be appropriate, to request the invoices with respect to the legal fees and disbursements to verify the payments.

71. The payment of legal costs should then be made when the:

- legal costs claimed are reasonable given the nature and complexity of the matter, and
- GST amount is properly accounted for as provided in this Annexure for reimbursing the GST component in circumstances where the receiving party is entitled to an input tax credit.

72. The Tax Office, whether a receiving or a reimbursing party, will pay or receive GST amounts as detailed in this Annexure.

Less complex proceedings

73. There are less complex legal proceedings where there may be no need for Tax Office staff to prepare a schedule of costs, but the same policy applies. Where, for example, a Debt Officer obtains a default judgment on a summons issued for a tax liability, the only legal fees likely to be incurred by the Tax Office would be filing fees (no GST applied) and service fees (GST applied). In this situation, the Debt Officer should seek from the court the costs for the filing fee and the service fee exclusive of the GST amount (the costs of the service fee is a disbursement and the Tax Office is registered for GST and it is entitled to claim an input tax credit for the GST amount on the service fee).

When the Tax Office makes a settlement of legal costs by agreement

74. A settlement of legal costs by agreement may occur on finalisation of a dispute or as part of finalising a dispute and may occur prior to or after litigation. Regardless of what point in time the settlement of the legal costs by agreement issue occurs, Tax Office staff involved must ensure that a schedule of costs incurred to that point in time is prepared and provided by the receiving party. The schedule of costs must include the same details as described in paragraphs 69 to 73 of this Annexure. If costs are to be settled by agreement the starting point for negotiation should be the amount the receiving party would be entitled by reference to the court rules, legislation, any court orders, and case law. Some lower amount may be agreed to between the parties.

Standard or party/party basis in respect of professional fees

75. Most court rules for standard or party/party costs will provide a fixed scale of costs to determine the amounts to be paid for professional fees.

76. The amounts to be paid in legal costs on a standard or party/party basis in respect of professional fees should be determined as follows:

- In jurisdictions other than in the Supreme and District Courts of South Australia and in the State Courts of New South Wales[169] the amounts for professional fees are determined by application of a fixed scale of costs in the court rules and these amounts cannot be reduced to take into account a party's entitlement to an input tax credit for the GST component of the expense.[170] Accordingly, the amounts to be paid are GST-inclusive.
- In the Supreme and District Courts of South Australia the amounts for professional fees in the fixed scale of costs in the court rules provide that a party's entitlement to an input tax credit is to be taken into account to determine the amounts to be claimed in a schedule of costs. Accordingly, the amounts to be paid are:
  - GST-exclusive, in all circumstances where the receiving party is entitled to an input tax credit
  - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
  - GST-inclusive, in all circumstances where the receiving party is not entitled to an input tax credit.
- In the State Courts of New South Wales the court rules do not prescribe a fixed scale of costs except in limited circumstances. The amounts to be paid in respect of professional fees are determined on a 'fair and reasonable' basis by applying the *Legal Professions Act 2004* (NSW).

Solicitor and client basis or indemnity basis in respect of professional fees

77. Most court rules for solicitor and client basis or indemnity costs provide a taxing officer (of the court) with a wide discretion to allow costs that are reasonable. If no amounts for professional fees are prescribed by a fixed scale of costs in the court rules for solicitor and client or indemnity costs, the receiving party's entitlement to an input tax credit should be taken into account in ascertaining what is reasonable to determine the amount of professional fees to be paid.

78. The amounts to be paid in legal costs on a solicitor and client basis or indemnity basis in respect of professional fees should be determined as follows:

- In all jurisdictions, the amounts to be paid in respect of professional fees are:
  - GST-exclusive, in all circumstances where the receiving party is entitled to an input tax credit
  - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
  - GST-inclusive, in all circumstances where the receiving party is not entitled to an input tax credit.

[169] In limited cases a fixed scale of costs will apply.
[170] *Merringtons* and *Hennessey Glass* have held that the amounts for professional fees on a fixed scale of costs in the court rules cannot be reduced to take account of a party's entitlement to an input tax credit.

Disbursements

79. Disbursements are discrete items of expenditure that can be fully recovered from the other party. If no amounts for disbursements are prescribed by a fixed scale of costs in the court rules, the receiving party's entitlement to an input tax credit should be taken into account to determine the amount of disbursements to be paid.

80. The amounts to be paid in legal costs for disbursements that are not fixed by a scale of costs should be determined as follows:

- In all jurisdictions, the amounts to be paid for disbursements are:
  - GST-exclusive, in all circumstances where the receiving party is entitled to an input tax credit
  - GST-inclusive less the portion of an input tax credit the receiving party is entitled to claim, or
  - GST-inclusive, in all circumstances where the receiving party is not entitled to an input tax credit.

Out of court settlement of legal costs by agreement

81. Legal costs negotiated by agreement between the parties should be the amount that the receiving party would be entitled to by reference to the court rules, legislation, any court orders and case law. The GST treatments for professional fees and disbursements provided in this Annexure should apply.

Table of legislation and court rules in each jurisdiction

Jurisdiction	Legislation and Court Rules	Standard or party/party basis	Solicitor & Client basis	Indemnity basis
South Australia	Supreme and District Courts Civil Rules 2006	Rules 263, 264, Schedule 1 – scale of costs; see Schedule 1 Note M	R264(5)(a)	R264(5)(b)
	Supreme Court Rules 1987 and District Court Rules 1992	R101.07(6)(b), Schedule 2 – scale of costs	R107(6)(c)	R107(6)(d)
	Magistrates Court Civil Rules 1992	Rules 106(1),106(2), Schedule 3 – scale of costs		R106
Australian Capital Territory	Court Procedure Rules 2006 – Supreme, District & Magistrates Courts	R 1722(1) – Part 4.2 – scale of costs – items, Rules 1751(2), 1722(2)	Rules 1752(1)(a), 1752(3)	Rules 1752(1)(b), 1752(4)
	Uniform Civil Procedure Rules 2005 – Supreme, District & Magistrates Courts	R42.2		R42.5
New South Wales	*Legal Profession Act 2004 (*NSW)	Sections 319, 364, 365 and 367A		Subsection 364(4)
	Legal Profession Regulations 2005	Section 115 – GST may be added to costs; Division 2 (costs fixed)		
Northern Territory	Rules of the Supreme Court (NT)	Rules 63.25, 63.26, 63.28, 63.32, Appendix – scale of costs		Rules 63.25, 63.27, 63.29
	Local Court Rules (1997) (NT)	Apply Supreme Court Rules, Order 63 (above)		
Queensland	Uniform Civil Procedure Rules 1999 – Supreme, District & Magistrates Courts	Rules 689, 690, 703, Schedules 1, 2, 3 – scales of costs		R704
Tasmania	Supreme Court Rules 2000	R837, Schedule 1 – scale of fees and costs; R837A – GST on disbursements; R859		R837(2)
	Magistrates Court (Civil Division) Rules 1998	R138, Schedule 1- scale of costs	R138(8)	
Victoria	Supreme Court (General Civil Procedure) Rules 2005	Rules 63.28, 63.29, 63.31, 63.34(1), 63.69, Appendix A – scale of costs	Rules 63.28, 63.30, 63.32	Rules 63.28, 63.30, 63.30.1
	County Court Rules of Procedure in Civil Proceedings 1999	Rules 63A.28, 63A.29, 63A.29, 63A.31, 63A.34(1), Appendix A – scale of costs	Rules 63A.28, 63A.30, 63A.32	Rules 63A.28, 63A.30.1
	Magistrates' Court Civil Procedure Rules 1999	Rules 26.02, 26.03, Appendix A – scale of costs		

Jurisdiction	Legislation and Court Rules	Standard or party/party basis	Solicitor & Client basis	Indemnity basis
Western Australia	Rules of the Supreme Court 1971	Order 66 R11, refer to legal costs determination – scale of costs		
	District Court of Western Australia Act 1969 (WA)	Sections 64(1) and 66, refer to legal costs determination – scale of costs		
	Legal Practice Act 2003 (WA), Legal costs determination (2006)	Section 9 – scale of costs and inclusive of GST		Section 9(2)
	Magistrates Court (Civil Proceedings) Rules 2005	R81, refer to legal costs determination, clause 9; scale of costs and inclusive GST		
Federal Magistrates Court of Australia	Federal Magistrates Court Rules 2001	Rules 44.15, 21.10, Schedule 1 – costs		
	Federal Magistrates Court (Bankruptcy) Rules 2006	R13.01(1), Order 62 of the Federal Court Rules 1979		
Federal Court of Australia	Federal Court Rules 1979	Order 62 R12, Schedule 2 – scale of costs		
	Federal Court of Australia Act 1976	Section 43	Section 43	Section 43

Amendment history

Date of amendment	Part	Comment
6 September 2010	Paragraphs 73 and 74 of Annexure F	Updated to take into account the legislative changes that came into effect from 1 July 2010 to align the indirect tax rulings regime with the income tax rulings system.

Subject references	Litigation, Model Litigant Guidelines, Alternative Dispute Resolution, Costs, Party/party costs, Solicitor client costs, Indemnity costs, SILCs, Adverse Decision Reports, Decision Impact Statements, Challenging Court decisions, Test Case Funding, External Legal Service Providers, Briefing Counsel, Risk Management, Priority Technical Issues, Legal Services Branch, ATOLegals, ATO Legal Opinions Database, ATO Special Counsel
Commonwealth legislative references	Acts Interpretation Act 1901 15AA AATA 1975 3 AATA 1975 24AC AATA 1975 24AC(1) AATA 1975 25 AATA 1975 29 AATA 1975 29(11) AATA 1975 33(1A) AATA 1975 33(1AA) AATA 1975 34A AATA 1975 34A(5) AATA 1975 34D AATA 1975 34E AATA 1975 37 AATA 1975 37(1) AATA 1975 37(1AA) AATA 1975 37(1AE) AATA 1975 40(1A) AATA 1975 42C AATA 1975 44 AATA 1975 44(1) AATA 1975 44(2A)(a) AATA 1975 44(3)(a) AATA 1975 44(3)(b) AATA 1975 44(3)(c) AATA 1975 44(7) AATA 1975 44(8) AATA 1975 45 AATA 1975 45(2) AATA 1975 63(5)(b) Administrative Appeals Tribunal Regulations 1976 ADJR 1977 5 ADJR 1977 5(1) ADJR 1977 5(2) ADJR 1977 6 ADJR 1977 6(1) ADJR 1977 6(2) ADJR 1977 7 ADJR 1977 11 ADJR 1977 11(1)(a) ADJR 1977 11(2) ADJR 1977 11(3)

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	TAA 1953 14ZZ(a)(ii)
	TAA 1953 14ZZ(c)
	TAA 1953 14ZZF
	TAA 1953 Sch 1 105-60
	TAA 1953 Sch 1 105-65
State and Territory legislative references	Civil Procedure Act 2005 (NSW)
	District Court of Western Australia Act 1969 (WA)
	Legal Practice Act 2003 (WA)
	Legal Profession Act 2004 (NSW)
	Legal Profession Act 1993 (TAS)
	Supreme Court Act 1935 (SA) 40(1)
	County Court Rules of Procedure in Civil Proceedings 1999 (VIC)
	Court Procedure Rules 2006 (ACT)
	Legal Profession Regulations 2005 (NSW)
	Local Court Rules (NT)
	Magistrates Court (Civil Division) Rules 1998 (TAS)
	Magistrates Court (Civil Proceedings) Rules 2005 (WA)
	Magistrates Court Civil Rules 1992 (SA)
	Magistrates' Court Civil Procedure Rules 1999 (VIC)
	Rules of the Supreme Court 1971 (WA)
	Supreme Court Rules (NT)
	Supreme Court Civil Rules 2006 (SA)
	Supreme Court Rules 1987 (SA)
	District Court Civil Rules 2006 (SA)
	District Court Rules 1982 (SA)
	Supreme Court (General Civil Procedure) Rules 2005 (VIC)
	Supreme Court Rules 2000 (TAS)
	Uniform Civil Procedure Rules 1999 (QLD)
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Related public rulings	GSTR 2000/37
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	IT 2250
Related practice statements	PS LA 1998/1
	PS LA 2003/3
	PS LA 2003/10
	PS LA 2005/8
	PS LA 2007/5
	PS LA 2007/23

	PS LA 2008/3
	PS LA 2008/12
	PS CM 2003/2
	PS CM 2005/9
	PS CM 2005/27
Withdrawn practice statements	PS LA 2002/3
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	PS LA 2007/1
	PS LA 2007/2
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	PS LA 2007/15
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	Burford v. Allan [1998] SASC 6693
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	Cachia v. Hanes (1994) 179 CLR 403; 120 ALR 385
	CIC Insurance Ltd v. Bankstown Football Club Ltd (1997) 187 CLR 384
	Clark v. Tasmania (No 2) (1999) Tas SC 130
	Colgate Palmolive Co v. Cussons Pty Ltd (1993) 118 ALR 248
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	Cooper Brookes (Wollongong) Pty Ltd v. Commissioner of Taxation (1980) 147 CLR 297
	EMI Records Ltd v. Ian Cameron Wallace Ltd (1983) 1 Ch 59 Megarry VC (1982) 2 All ER 980
	Ergon Energy Corporation Ltd v. Commissioner of Taxation [2006] FCAFC 125
	Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Pty Ltd (1988) 81 ALR 397
	Gibbs v. Gibbs [1952] 1 All ER 942
	Giles v. Randall (1915) 1 KB 290
	Hennessey Glass and Aluminium Pty Ltd v. Watpac Australia Pty Ltd [2007] QDC 57; 69 ATR 374

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	Keen v. Telstra Corporation Ltd [2006] FCA 834
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	Family Court Practice Directions
	Federal Court Practice Directions and Notes
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	http://www.fedcourt.gov.au
	Litigation Risk Matrix

	LSB Instruction Bulletin 2006/1 LSB Instruction Bulletin 2008/2 LSB Instruction Bulletin 2009/1 Online Resource Centre for Law Administration Public Service Commissioner's Directions 1999 Taxpayers' Charter
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