PS LA 2009/9 - Conduct of ATO litigation and engagement of ATO Dispute Resolution

This cover sheet is provided for information only. It does not form part of *PS LA 2009/9 - Conduct of ATO litigation and engagement of ATO Dispute Resolution*

The Administrative Review Tribunal (ART) was established by the *Administrative Review Tribunal Act 2024* and commenced operations on 14 October 2024, replacing the Administrative Appeals Tribunal (AAT).

In this Practice Statement, a reference to a right to seek review of a reviewable objection decision or an extension of time refusal decision in the AAT should instead be read as a reference to a review in the ART.

This Practice Statement is being reviewed to reflect the above change and current ATO internal procedures. Where relevant, ATO staff should refer to current procedures in the Enterprise Knowledge Management system in myATO.

This document has changed over time. This version was published on *19 December 2013*

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2009/9

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FOI status: may be released

This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

Taxpayers can rely on this law administration practice statement to provide them with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this law administration practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

SUBJECT: **Conduct of ATO litigation and engagement of ATO Dispute Resolution**

PURPOSE: **To outline the policies and guidelines relevant to the conduct of ATO litigation**

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STATEMENT

1. This practice statement provides general guidance to ATO staff involved in legal disputes where the Commissioner is a party to the proceedings. It sets out the guiding principles relevant to the conduct of litigation, and describes the situations and processes on how and when the ATO Dispute Resolution (Dispute Resolution) teams should be engaged.
2. This practice statement does not apply to:
   (a) Tax Practitioners Board related matters
   (b) legal actions undertaken by the Serious Non-Compliance Prosecutions area, or
   (c) prosecutions referred to the Commonwealth Director of Public Prosecutions.

SECTION 1 – THE ATO'S APPROACH TO LITIGATION

3. The ATO conducts and manages litigation in accordance with its obligations under the law, the Attorney-General's Legal Services Directions 2005 (Legal Services Directions), the relevant court and tribunal rules, the relevant practice notes or directions, and ATO policies and guidelines.
4. The ATO strives to have all disputes brought to finality in a fair, timely and equitable manner consistent with the law, and supports the appropriate use of all dispute resolution techniques to minimise litigation and related costs. This practice statement should be read in conjunction with Law Administration Practice Statement PS LA 2013/3 – *Alternative Dispute Resolution (ADR) in ATO disputes*
5. Where the early resolution of disputes is not possible, the ATO recognises that courts and tribunals will provide final, fair and independent resolution of disputes. A key objective for the ATO when conducting litigation is to achieve law clarification for the community and the Government. Cases will be argued consistently with the ATO's published view of the law and cases will not be pursued where the ATO believes its position is not correct.

Guiding principles

6. In conducting litigation, the ATO is guided by the following principles:
   (a) the ATO has responsibility for administering various laws enacted by Parliament, such as those relating to taxation and superannuation
   (b) the ATO applies the law in the conduct of litigation, the resolution of disputes and in managing the outcome of court and tribunal decisions
   (c) the ATO will follow the results of finalised court and tribunal decisions in accordance with the rule of law[1]
   (d) the ATO will manage litigation in accordance with the Legal Services Directions (including the model litigant obligation), relevant court and tribunal rules and directions, legislation and policies relevant to Commonwealth agencies and the ATO's policies and guidelines
   (e) the ATO seeks to promote an environment where:

[1] There are exceptional circumstances where the ATO will challenge such a decision to obtain law clarification.

(i) the ATO will communicate effectively with taxpayers to ensure they understand their rights and obligations

(ii) the law can be complied with voluntarily

(iii) the law is applied and enforced consistently and fairly. In resolving various types of disputes, the ATO will maintain a level playing field for taxpayers in similar situations and disputes will be resolved in a principled way, and

(iv) disputes are resolved with minimal costs.

(f) the ATO will, wherever possible, obtain law clarification in a timely and cost effective manner which provides greater certainty for the community. The ATO has a continuing commitment to the Test Case Litigation Program which, in appropriate circumstances, provides financial support for a taxpayer's litigation costs to achieve law clarification

(g) the ATO will risk assess litigation cases to ensure that cases are appropriately managed

(h) the ATO will attempt to resolve disputes early to avoid unnecessary litigation and related costs

(i) the ATO will assist the courts, tribunals and other parts of the legal system to promote efficiency in the conduct of litigation wherever possible

(j) the ATO will foster a close working relationship with the Attorney-General's Department, as the agency responsible for law and justice matters and policies

(k) the ATO will seek to gain value for money from the engagement of external legal services providers, and

(l) ATO staff will have the appropriate range of skills and competencies, including qualified lawyers, to support its litigation strategy.

Key expectations and obligations

7. The key expectations and obligations of the ATO in conducting litigation matters include:

(a) the relevant rules, practice notes and directions issued by the various courts and tribunals

(b) responsibilities under the *Financial Management and Accountability Act 1997* (FMA Act)

(c) responsibilities under the Legal Services Directions, in particular the obligation to act as a model litigant

(d) the obligation to assist the Administrative Appeals Tribunal (AAT), and

(e) the consideration of whether other methods of dispute resolution would be appropriate.

Court and tribunal rules, practice directions and practice notes

8. All officers are expected to adhere to the various rules, practice notes and directions of the relevant court or tribunal in which the proceedings are held. This is discussed further in section 5 of this practice statement.

Financial Management and Accountability Act 1997

9. The FMA Act provides the framework for the proper management of public money and public property. 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.

Legal Services Directions

10. The Legal Services Directions places various obligations on Commonwealth agencies in the handling of claims or the conduct of litigation, across a range of areas such as the use of in-house lawyers and the engagement of counsel. A key obligation placed on agencies is the obligation to act as a model litigant, which is further discussed below.

11. The Attorney-General's Department, through the Office of Legal Services Coordination (OLSC), also provides related Guidance Notes to the Legal Services Directions. Tax officers are expected to adhere to both the Legal Services Directions and the related Guidance Notes.

12. The OLSC oversees reports of non-compliance with the Legal Services Directions. Any assertions or suspected breaches of a Legal Services Direction by the ATO must be escalated to the relevant Assistant Commissioner in Dispute Resolution who will determine what action is required, including whether the issue needs to be reported to the OLSC.[2]

Model litigant obligation

13. The model litigant obligation[3] requires the Commonwealth, its officers, solicitors and counsel, to act with complete propriety, fairly and in accordance with the highest professional standards in handling claims, noting that the agency is not to commence legal proceedings unless it is satisfied that litigation is the most suitable method of dispute resolution.

14. Importantly, the obligation requires the Commissioner to not rely on technicalities and to not take advantage of claimants who lack the resources to litigate a legitimate claim.

Obligation to assist

15. In matters before the AAT, the Commissioner and his or her representatives must use their best endeavours to assist the AAT to make its decision, as required by subsection 33(1AA) of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

Dispute resolution

16. The Commissioner recognises that there are various dispute resolution processes available and is committed to resolving matters in the most cost effective and timely fashion. This commitment is reflected in the ATO's annual Dispute Management Plan which sets out the ATO's key principles for managing disputes.

[2] Guidance Note No 3 – Breach of the Legal Services Directions.
[3] Set out in Appendix B of the Legal Services Directions.

17. The Commissioner's practices in relation to alternative dispute resolution generally are set out in PS LA 2013/3 – *Alternative Dispute Resolution (ADR) in ATO disputes*

SECTION 2 – ENGAGEMENT OF DISPUTE RESOLUTION TEAMS

18. The ATO's in-house legal services are provided by the Dispute Resolution teams, primarily for tax and debt disputes, and ATO General Counsel, for non-tax legal issues. These teams deliver a range of legal services and expertise for the ATO, from the conduct and management of litigation, to the provision of advice on any legal issue, including those which may arise prior to litigation. The teams are primarily comprised of legally qualified personnel and provide specialist skills, particularly in respect of evidentiary issues and dispute resolution strategies.

19. The in-house legal teams are the corporate budget holders for legal services and are therefore responsible for the engagement and management of legal services received on behalf of the ATO from external providers.[4]

The nature of the work undertaken by the Dispute Resolution teams

20. Generally, the Dispute Resolution teams will provide in-house litigation, dispute resolution and legal advice services across the following broad categories of work:

    (a) matters involving, directly or indirectly, the existence of an entity's liability to taxation and excise duty, and/or their rights and obligations arising from the various Acts relating to superannuation ('Tax, Excise duty & Superannuation matters');

    (b) matters relating to the ATO's collection of tax revenue, including insolvency matters under the various laws administered by the Commissioner, and other relevant legislation such as the *Corporations Act 2001* and the *Bankruptcy Act 1966* ('Debt resolution matters'); and

    (c) matters relating to the operations of the ATO as a government agency such as legal issues relating to: contracts and procurement; Freedom of Information requests; employment law, including requests for legal assistance by ATO employees; secrecy; privacy; access and information gathering; and other general law issues not covered by (a) and (b) above.

Tax, Excise duty & Superannuation matters

21. Under this broad category of work, Dispute Resolution manages litigation arising from:

    (a) Part IVC of the *Taxation Administration Act 1953* (TAA)

    (b) section 39B of the *Judiciary Act 1903* (Judiciary Act)

    (c) *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act)

    (d) Division 290 of Schedule 1 to the TAA,[5] and

    (e) any other matter involving an entity's taxation, excise or superannuation liability.

[4] The exception to this is legal expenditure relating to prosecution work.
[5] See PS LA 2008/7 and PS LA 2008/8.

Debt resolution matters

22. The range of matters that Dispute Resolution is responsible for under this umbrella of work include:

    (a) prosecution of civil claims for recovery which have been defended by the taxpayer. These 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

    (b) filing creditors' petitions to secure the bankruptcy of a taxpayer where satisfactory payment arrangements have not been made

    (c) opposing applications by companies for the setting aside of statutory demands

    (d) filing applications to wind up companies, after a statutory demand has not been paid and where satisfactory payment arrangements have not been made

    (e) applications made by taxpayers to the Small Taxation Claims Tribunal for release from liability for certain classes of tax debts

    (f) 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

    (g) acting on behalf of the Commissioner in opposing applications to set aside Departure Prohibition Orders or in pursuing freezing orders where there is a real risk of creditor prejudice through dissipation of a taxpayer's assets

    (h) acting on behalf of the Commissioner to set aside Deeds of Company Arrangements

    (i) recovering monies owed to the Commissioner pursuant to Reparation Orders

    (j) providing legal advice to the BSL in relation to debt litigation and associated issues, and

    (k) family law intervention proceedings.

23. Ordinarily, the services of Dispute Resolution are utilised after other ATO debt recovery areas have been unsuccessful in ensuring compliance by taxpayers in the payment of their taxation liabilities.

Non-tax related matters

24. General Counsel (GC) is responsible for the provision of expert advice, dispute resolution and litigation services for matters that do not relate to a tax dispute. They provide the following services:

    (a) *Legal Advice:* general legal advice on issues including privacy, secrecy, access and information gathering and other areas of the law that impact upon the ATO as an organisation which are not dealt with by Dispute Resolution.

    (b) *Commercial law:* assistance, advice, dispute resolution and litigation services in relation to contracts, tendering and procurement processes, and associated administrative law issues, as well as intellectual property rights and real property.

(c) *Freedom of Information:* processing Freedom of Information requests on behalf of the ATO, as well as providing advice, dispute resolution and litigation services related to those and other information requests including subpoenas, third party notices and summonses.

(d) *Employment law*: assistance, advice, dispute resolution and litigation services relating to the ATO's relationship with its employees, and includes issues relating to industrial relations.

(e) *Monetary and Civil Claims:* advice, dispute resolution and litigation services relating to the ATO's relationship with taxpayers and their representatives. The issues most commonly relate to assertions of negligence or defective administration by the ATO which has caused financial loss to the taxpayer for which they are seeking compensation. General Counsel also has responsibility for the co-ordination and management of all Act of Grace requests.

Early involvement of Dispute Resolution

25. The ATO is committed to ensuring that disputes are resolved in the simplest and most cost-effective manner possible, taking into account the merits and the risks of each case. The Dispute Resolution teams provide expert dispute resolution services, leadership and advice to the ATO. The following disputes should be referred to Dispute Resolution as soon as they are identified (prior to the commencement of litigation) to ensure appropriate dispute resolution strategies are in place as early as possible:

    (a) where a dispute has been identified by a compliance or objections area of the ATO as likely to end up in litigation in the Federal Court; or

    (b) where the issue or amount in dispute is sufficiently significant or complex that it is prudent to have Dispute Resolution involved, for example in large settlement negotiations or mediations.

26. The specific escalation processes for these referrals as set out in the ATO's internal policies must be followed.[6]

27. Depending on the nature of the referral, the early involvement of relevant experts, including Dispute Resolution may provide strategic advantages including:

    (a) minimising the number of disputes that may progress to litigation

    (b) providing, to varying degrees, guidance in respect of draft or potential decisions, or

    (c) ensuring the ATO is prepared for potential or anticipated litigation, particularly for high risk matters or matters that are likely to be filed in the Federal Court.

Engaging Dispute Resolution teams

28. Depending on the nature of the issues involved, the following matters should be referred to the following:[7]

    (a) for matters involving tax technical and debt recovery issues – the relevant Dispute Resolution manager, and

[6] See the Online Resource Centre for Law Administration (ORCLA) and related procedures.
[7] See the Dispute Resolution pathway page for current contact details.

(b) for matters involving issues unrelated to tax – the ATO General Counsel or Deputy General Counsel.

SECTION 3 – LITIGATION STAKEHOLDERS

29. Once a matter is in litigation, the number of stakeholders involved will vary depending on the nature and significance of the matter. An officer from Dispute Resolution or ATO General Counsel will always be involved in the litigation, and other stakeholders may include:

    (a) appropriate officers from the BSL

    (b) members from the TCN

    (c) the ATO Special Counsel

    (d) external solicitors, and

    (e) counsel.

30. Stakeholders are expected to conduct and manage matters collaboratively and decisions should be made with the involvement of all relevant stakeholders. Where internal stakeholders can not come to a consensus on how a matter should proceed, paragraphs 39 to 42 of this practice statement sets out how disagreements should be escalated and resolved.

31. The specific roles of each stakeholder in litigation are set out below.

The role of the Dispute Resolution teams

32. In litigation matters, in addition to the general services discussed in section 2 of this practice statement, the Dispute Resolution teams:

    (a) must ensure that stakeholders are consulted and kept fully informed of developments in a timely manner

    (b) provides a single point of contact for the ATO and external parties, including court and tribunal personnel, taxpayers' and their representatives

    (c) must ensure that they understand the strategic value of the matter for the ATO

    (d) must ensure that effective case management strategies are adopted and manage the costs of litigation appropriately

    (e) will provide advice on the admissibility of evidence

    (f) ensure that ATO policies and procedures are followed, for example, that the ATO does not argue inconsistently with a precedential ATO view without appropriate escalation and approval

    (g) ensure that relevant ATO systems and databases are kept up to date and accurate, and

    (h) ensure that the conduct of the litigation is in accordance with the Legal Services Directions.

The role of the Business Service Line

33. During the course of the litigation, the BSL will:

    (a) ensure that the Dispute Resolution team recognises the strategic importance of the litigation to the ATO

(b) be responsible for ensuring that the Dispute Resolution team, external solicitors and counsel are provided with all necessary facts and material, including evidence and information collected during the course of any audit or review and any subsequent objection

(c) be responsible for informing the Dispute Resolution team of any related matters or entities and any relevant compliance activities

(d) have a crucial role in informing internal stakeholders of the broader compliance implications of an issue, the business context in which it arises, its impact in terms of numbers of taxpayers affected, the revenue at risk and other implications for the Government and the community as a whole

(e) have a role in assisting the litigation team to develop an understanding of the scope and operation of the relevant tax law and any underlying compliance and administrative issues

(f) have a key role in any early or alternative dispute resolution processes[8]

(g) be an important link to relevant experts within the BSL in respect of the issues or subject matter, and

(h) be responsible for managing the risk associated with the case, including the development of a risk mitigation strategy and any contingency plan to manage the implications of the litigation.

34. At the conclusion of the litigation, the BSL is responsible for issuing assessments and amended assessments, or implementing any relevant decisions. The BSL must ensure the accuracy of those assessments.

35. Where a dispute is resolved without a court decision, and resolution was reached with the consensus of all internal stakeholders, the BSL is responsible for authorising or approving any actions necessary to give effect to the decision, including the execution of any settlement deed. In instances where the BSL disagrees with the decision to have the matter resolved prior to a court or tribunal decision, the person approving the decision to settle the matter will be responsible for authorising and executing the deed.

The role of the Tax Counsel Network

36. The role of the TCN in litigation matters[9] is to provide strategic and technical leadership for the ATO. However, the level of involvement by the TCN in litigation may vary between cases depending on the specific issues and risks of each case.

37. Where a member of the TCN is involved in a litigation matter, they will:

(a) be the decision maker in respect of any technical and strategic aspect of the litigation

(b) approve instructions to external legal service providers, particularly where:

(i) they relate to arguments not previously contemplated by the ATO

(ii) actions to be taken are contrary to the advice of counsel, or

[8] See Practice Statement PSLA 2013/3 - *Alternative Dispute Resolution (ADR) in ATO disputes* for details.

[9] The TCN is not generally involved in any litigation which falls under the responsibility of the General Counsel Practice.

(iii) there is disagreement between senior officers of the ATO regarding the arguments or the strategy to be put to counsel

(c) ensure that cases are prepared and presented in a way that best enables the precedential ATO view to be presented to court, and

(d) contribute to the management of the wider risk associated with the litigation.

38. Where the TCN officer is not a Tax Counsel or Senior Tax Counsel, they are expected, as a matter of judgement, to keep their manager informed on significant developments in the matter. The Senior Tax Counsel for their team and/or the relevant Senior Tax Counsel (Strategic Litigation) should be involved in major decisions, especially where there may be disagreement in the litigation team regarding the appropriate course of action.

Escalation and resolution of disagreements between internal stakeholders

39. In matters where the TCN is involved and there is any disagreement between internal stakeholders, the TCN member will determine the issue and resolve the disagreement.

40. Where the TCN is not involved, the matter should be escalated to the relevant manager in Dispute Resolution or General Counsel, who will consult with relevant stakeholders to try and resolve the issue. If unresolved, the relevant Assistant Commissioner in Dispute Resolution or the ATO General Counsel should be advised, and provided an opportunity to intervene prior to any final decision being made.

41. Where there is disagreement between internal stakeholders on whether a matter should be resolved prior to a court or tribunal decision, the responsibility for authorising or approving any actions necessary to give effect to that decision rests with the person approving the decision to settle the matter. This includes the execution of any subsequent settlement deed. For example, where the TCN member has decided to settle the matter, and it is contrary to the BSL view, then the TCN member is responsible for ensuring the deed is executed.

42. Regardless of who the decision maker is, all stakeholders will remain actively involved in the matter and retain their respective roles and responsibilities. For example, regardless of who decided that a matter should settle, the BSL will be responsible for issuing assessments or amended assessments, and the Dispute Resolution officer will be responsible for executing relevant court or tribunal documents such as a section 42C agreement[10].

The role of the ATO Special Counsel

43. The ATO may retain former Judges, Queens Counsel and Senior Counsel to perform legal services for the ATO. 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 ATO.

44. The TCN facilitates access to ATO Special Counsel and all requests for access to the services of ATO Special Counsel must be referred to them.

[10] Under section 42C of the *AAT Act*, the AAT may make a decision in terms agreed by the parties in writing if it is satisfied that the decision is within the powers of the AAT. Under paragraph 42C(1)(b) of the AAT Act, the agreement must be signed by or on behalf of each party. The AAT can then make a formal decision in the agreed terms without holding a hearing (or without completing the hearing if one has commenced).

The role of external solicitors

45. External solicitors will provide general legal services including recommendations on the selection of counsel, drafting and filing of court and tribunal documents, advice on the adequacy and admissibility of evidence, advice on court requirements and procedures, and will undertake advocacy where appropriate.

46. The external solicitor is expected to have a clear understanding of the requirements of the Commissioner in respect of the case, and to relay those requirements to counsel.

47. External solicitors acting for the Commissioner:

    (a) must follow instructions and are expected to assist the Commissioner in the conduct of litigation to achieve timely and appropriate resolution of the particular dispute

    (b) are expected to conduct themselves consistently with the standards of conduct expected of ATO staff

    (c) must comply with the Legal Services Directions and notify the Dispute Resolution officer immediately if they suspect or receive an assertion that a breach of the Legal Services Directions has occurred. They must also advise on any possible actions that would minimise the impact of that breach

    (d) must comply with the tax law secrecy provisions, and

    (e) must avoid any conflict of interest with the ATO, and where one arises, advise the ATO immediately.

The role of counsel

48. Counsel may be engaged to provide advice or to represent the Commissioner in litigation proceedings. Where appropriate, counsel may also be engaged to conduct or assist in other activities, such as interviews with taxpayers.

49. Counsel briefed by the Commissioner are required to comply with the conditions and expectations placed on the ATO's external solicitors as set out above. Additionally, counsel are required to comply with their taxation obligations. This expectation should be brought to counsel's attention prior to their acceptance of a brief. Any concerns raised by counsel in relation to this must be escalated to the appropriate Assistant Commissioner in Dispute Resolution.

50. As counsel are already subject to the strict requirements of their various Bar associations, counsel are not required to undertake the Commonwealth's vetting process before they are engaged by the ATO.

SECTION 4 – ENGAGEMENT OF EXTERNAL LEGAL SERVICE PROVIDERS AND EXTERNAL ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS

Engaging external legal service providers – generally

51. The Dispute Resolution teams have responsibility for the management and coordination of legal services in the ATO, including access to and the engagement of external legal service providers. Such providers include:

    (a) counsel

    (b) external solicitors, and

(c) third party dispute resolution practitioners.

52. External legal service providers must not be engaged directly by a BSL under any circumstances, whether or not the matter is in litigation. The BSL must refer the request to the relevant Dispute Resolution or ATO General Counsel manager.

Factors to be considered in engaging an external legal service provider

53. The following factors should be considered when deciding whether it is appropriate to engage an external legal service provider:[11]

(a) the complexity of the matter

(b) the experience of ATO officers involved in the matter

(c) where there are differing views between internal stakeholders

(d) the expected length of any hearing (as a general rule, where a matter has been listed for more than one day, it is expected that counsel will need to be engaged)

(e) the complexity of the factual matrix and volume of the documentary evidence

(f) whether there is a need for detailed cross examination, including where the credibility of a witness is relevant or if lengthy cross examination is required

(g) the significance or sensitivity of the issues

(h) where the precedential ATO view is being challenged

(i) where the quantum in dispute is significant

(j) where counsel and legal or accounting firms are representing the other party

(k) where the other party has a high net wealth and/or is prominent, and

(l) where the other party has a history of audits or investigations by the ATO.

The process of the engagement of an external service provider

54. In General Counsel, the engagement of an external legal service provider must be approved by a Principal Legal Adviser.

55. In Dispute Resolution, the process for the engagement of an external legal service provider is as follows:

(a) the Dispute Resolution officer will, where possible, discuss the selection of an appropriate service provider with internal stakeholders, and

(b) forward the request to the relevant Dispute Resolution manager, who will make a recommendation to the relevant Assistant Commissioner, Dispute Resolution. The request must provide sufficient detail, including internal stakeholder views and preferences, to allow the decision maker to make an informed decision.

[11] For factors to be considered when engaging an external alternative dispute resolution practitioner, see PS LA 2013/3 - *Alternative Dispute Resolution (ADR) in ATO disputes.*.

56. In making the decision and selection, the relevant decision-maker should take into consideration the views and preferences of internal stakeholders.

57. For significant tax technical and debt litigation matters, where there is disagreement between internal stakeholders on the selection of counsel, the matter should be escalated to a Deputy Chief Tax Counsel (DCTC).

58. There may be instances where it is critical that an external firm is engaged immediately. In these circumstances it is not always possible to consult with all stakeholders prior to the firm's engagement. In these instances, the appropriate Assistant Commissioner in the Dispute Resolution team will decide whether an external firm should be engaged.

59. The approval to engage or brief an external legal service provider must be recorded in the relevant ATO systems.

Management of external legal service providers and associated costs

60. Where an external legal service provider is engaged:

    (a) the Dispute Resolution officer has responsibility for managing the relationship with the external service provider, ensuring that there is minimal duplication of roles and effort amongst all stakeholders.

    (b) direct contact with the external service provider should not be made by other internal stakeholders, unless by prior arrangement with the Dispute Resolution officer.

61. The Dispute Resolution team must ensure that invoices received directly from external legal service providers who are not panel firms, are manually recorded onto ATOLegals.[12]

Engaging Counsel

62. In any matter, regardless of complexity, consideration should be given to obtaining counsel's advice to assist in determining the ATO position or to provide advice on prospects for success, where there is:

    (a) uncertainty about the ATO position

    (b) disagreement between stakeholders, or

    (c) concern regarding the application of the precedential ATO view.

63. Where a matter is clearly significant or complex, or there is uncertainty relating to the precedential ATO view, counsel should be considered as early as possible. Counsel should also be considered where a matter involves a significant volume of material and/or requires extensive or expert cross examination. Counsel should generally not be engaged for matters before the Small Taxation Claims Tribunal.

64. Counsel are to be selected in accordance with paragraph 4D of Appendix D to the Legal Services Directions. In selecting counsel, all reasonable endeavours are to be made to:

    (a) identify all counsel in the relevant practice area

    (b) genuinely consider engaging such counsel, and

    (c) regularly monitor and review the engagement of counsel.

[12] Invoices from panel firms are automatically received onto the system.

65. If advice is received from counsel indicating that they have concerns regarding the precedential ATO view, the Dispute Resolution officer must escalate these concerns to the relevant Assistant Commissioner, Dispute Resolution.

Engaging external solicitors

66. In accordance with Appendix F to the Legal Services Directions, the ATO must utilise the whole of government legal services multi-use list when engaging external legal services.

67. The multi-use list is divided into four broad categories of law:

    (a) Government and Administrative Law

    (b) Corporate and Commercial Law

    (c) Dispute Resolution and Litigation, and

    (d) all other legal services.

68. The use of external legal firms complement the Dispute Resolution teams by allowing the ATO increased flexibility in the provision of legal services, access to innovations and systems, and access to other external specialists as and when required.

'Tied legal work'

69. Notwithstanding the existence of the panels, certain legal work is tied to the Australian Government Solicitor and the Attorney-General's Department.[13]

70. Tied legal work is work of a kind described by paragraph 1 of Appendix A to the Legal Services Directions. Relevantly, this includes constitutional law issues, certain legal advice to be considered or relied upon by Cabinet and legal advice on certain legislative proposals. Dispute Resolution officers are expected to understand and adhere to the requirements of Appendix A to the Legal Services Directions.

71. Other tied legal work, described in paragraphs 2 and 3 of Appendix A to the Legal Services Directions, includes legislative drafting work relating to Bills or amendments to Bills and public international law work. This work is tied to the Office of Parliamentary Counsel, the Office of Legislative Drafting and Publishing or the Department of Foreign Affairs and Trade.

72. The Attorney-General may approve other providers to undertake tied work.[14]

Engaging external alternative dispute resolution practitioners

73. Alternative dispute resolution practitioners, although accredited, may or may not be legal practitioners. Nonetheless, they may be engaged to conduct a variety of dispute resolution processes including mediation, conciliation and neutral evaluation.[15]

SECTION 5 – OBLIGATIONS UNDER THE VARIOUS JURISDICTIONS

74. The Commissioner may be involved in litigation across various jurisdictions, including:

[13] See Appendix A to the Legal Services Directions.
[14] See paragraph 3B of Appendix A to the Legal Services Directions.
[15] See PS LA 2013/3 – *Alternative Dispute Resolution (ADR) in ATO disputes.*

(a) the Administrative Appeals Tribunal (AAT)

(b) Fair Work Australia (FWA)

(c) the Australian Human Rights Commission (AHRC)

(d) the Federal Circuit Court (FCC)

(e) the Federal Court of Australia (Federal Court)

(f) the High Court of Australia (High Court)

75. The specific obligations and responsibilities on ATO stakeholders as they relate to each of the above jurisdictions are set out later in this section, but common to all litigation are the following requirements:

(a) strict adherence to court and tribunal timeframes. Where it is not possible for the ATO to meet court or tribunal deadlines, leave must be sought from the court or tribunal as early as possible, but at a minimum prior to the date listed by a tribunal or specified by a court order. The request should ideally be made with the consent of the other party. Where timetables can not be met in a tribunal and leave has not been granted, this must be escalated to the relevant Dispute Resolution manager.[16] If this occurs in a court, it must also be escalated to the relevant Assistant Commissioner, Dispute Resolution.

(b) early consideration should be given to whether any jurisdictional issues exist. Jurisdictional arguments should generally be made prior to arguing the substantive issues

(c) the management and coordination of any document production (pursuant to a summons, notice to produce, subpoena or discovery process) will rest with the relevant Dispute Resolution team. Any searches or inquiries for such documents are to be conducted by the BSL. A record must be kept of the systems and databases searched, and

(d) adopting effective case management strategies to ensure the most timely and cost effective resolution of disputes. Case Management Plans and cost estimates should be utilised in all matters other than routine debt matters.[17]

Administrative Appeals Tribunal

76. ATO officers are expected to adhere to any relevant rules and practice directions of the AAT including:

(a) the *AAT Regulations 1976, and*

(b) the practice directions issued pursuant to subsection 20(2) of the AAT Act, which include:

(i) the General Practice Direction

(ii) the practice direction relating to section 37 of the AAT Act

(iii) the Listing and Adjournment Practice Direction

(iv) the Small Taxation Claims Tribunal Practice Direction

(v) the Freedom of Information Practice Direction

[16] Officers are reminded of the Tribunal's policy and procedures relating to fixing matters for hearing and to applications for adjournments of hearings – see the Practice Direction on Listing and Adjournments.
[17] The case management plan is not necessary in matters in the General Counsel Practice.

(vi) the practice direction under subsection 37(1AB) of the AAT Act for matters in the Taxation Appeals Division, and

(vii) the practice direction under section 20 of the AAT Act for Australian Business Number matters to be heard in the Taxation Appeals Division.

77. Tax officers are expected to be aware of, and adhere to, any other relevant guidelines as issued by the AAT.

78. In circumstances where a decision of the Commissioner is subject to review by the AAT:

(a) the relevant Dispute Resolution ,manager will notify the BSL of receipt of an application as soon as possible

(b) as soon as practicable (no later than one week for Small Taxation Claims Tribunal matters, and two weeks for all other matters) following notification of the application, the BSL must provide Dispute Resolution with copies of all material relevant to the decision in question. This material must be accompanied by a comprehensive index[18]

(c) the Dispute Resolution officer should advise the AAT and the applicant or his/her representative who the ATO contact officer is for the matter

(d) the Dispute Resolution officer is generally responsible for the preparation of a draft statement of facts, issues and contentions,[19] and provide internal stakeholders with the opportunity to review and comment on the draft prior to finalising and filing the document, and

(e) where counsel has been briefed, submissions should be prepared by counsel. Counsel should be requested to provide a draft of the submissions at least seven days prior to the date they are to be filed.

79. Some of the key events and issues that officers need to be aware of when conducting matters before the AAT include:

(a) the need to actively seek the AAT's involvement where cases are not being progressed efficiently. For example, seeking a directions hearing where applicants have consistently not met timetables

(b) an adversarial approach may not be necessary or appropriate as taxpayers are often unrepresented applicants before the AAT and the AAT aims to provide prompt review with as little formality and technicality as possible.

(c) the obligation on ATO officers to use their best endeavours to assist the AAT to make its decision, as required by subsection 33(1AA) of the AAT Act

(d) whether any jurisdictional issues exist. The AAT does not have a general power to review decisions under Commonwealth legislation. It can only review a decision if an Act, Regulation or other legislative instrument specifically provides that the AAT can review the decision, and

[18] These documents and index will form the basis of the documents which must be filed under section 37 of the AAT Act. They must be filed within 14 days of the application for Small Taxation Claims Tribunal matter and within 28 days for all other matters.

[19] Where a member of the TCN or an external legal service provider is involved, they should provide assistance and settle the document. It may be appropriate in significant and complex matters for the statement of facts, issues and contentions to be prepared by the panel firm and/or counsel.

(e) whether a matter is likely to provide important law clarification. Tax officers should consider the potential significance of a decision, and turn their mind to the appropriate constitution of the AAT, for example whether they should seek to have the matter heard by a presidential member.

Fair Work Australia and the Australian Human Rights Commission

80. The Commissioner may be involved in proceedings before Fair Work Australia (FWA) or required to respond to the Australian Human Rights Commission (AHRC) in respect of complaints of unlawful discrimination. These types of proceedings are discussed together as they are managed internally by General Counsel and place similar obligations on internal stakeholders.

81. Proceedings before FWA usually involve the following:

(a) an unfair dismissal dispute

(b) an industrial relations dispute, or

(c) a general protections (adverse action) dispute

82. Officers are expected be aware of, and adhere to, any relevant rules, practice notes, or guidelines issued by FWA, including for instance, the *Fair Work Australia Rules*.

83. The Commissioner's involvement before the AHRC is usually pursuant to one of the following Federal discrimination laws:

(a) the *Age Discrimination Act 2004*

(b) the *Disability Discrimination Act 1992*

(c) the *Racial Discrimination Act 1975,* or

(d) the *Sex Discrimination Act 1984*

84. Where the Commissioner is involved in a proceeding before FWA or the AHRC:

(a) GC will notify the relevant BSL and the ATO People Business Line of the receipt of the application as soon as possible

(b) where a BSL or the ATO People Business Line receives the notification they will notify GC of the receipt of the application as soon as possible

(c) GC will notify the ATO People Business Line and the relevant BSL of the name of the GC officer within 24 hours of receiving the application

(d) the ATO People Business Line will advise GC of the name of the ATO people case manager and the relevant BSL contact officer(s) and provide access to all the documentation[20] within 24 hours of being advised of an application, and

(e) the responsibility for the preparation of the ATO's response to the application and any relevant documents rests with GC.[21] GC must provide internal stakeholders with the opportunity to review and comment on the draft prior to finalising and filing the document.

85. Some of the key events and issues the GC officers need to be aware of include:

[20] This includes cases on the Personal Incident Escalation System.

[21] Where an external legal service provider has been engaged, the preparation of the ATO's response can be prepared by either the external legal service provider or the Dispute Resolution officer.

(a) FWA's focus is on providing fast and effective assistance for employers and employees with as little or as much formality as is required. Applicants are often unrepresented applicants before FWA, and officers are reminded that an adversarial approach may not be necessary or appropriate in these circumstances, and

(b) officers are reminded that the AHRC is not a court or a tribunal and that parties do not have to prove or disprove the complaint. Officers are to assist the AHRC and adopt an informal, flexible approach to resolving complaints and actively participate in the conciliation process should the AHRC decide to deal with the compliant in that manner.

Federal Court of Australia

86. The Commissioner may be involved in litigation before the Federal Court in the following matters:

(a) applications in respect of objection decisions made pursuant to Part IVC of the TAA

(b) appeals from the AAT pursuant to section 44 of the AAT Act and with referrals of questions of law pursuant to section 45 of that Act

(c) other matters in the original jurisdiction of the Court including applications invoking the jurisdiction conferred by section 39B of the Judiciary Act and orders for review pursuant to the ADJR Act

(d) applications in respect of the imposition of civil penalties pursuant to Division 290 of Schedule 1 to the TAA

(e) a range of recovery and debt related matters

(f) applications arising from the *Fair Work Act 2009*

(g) applications alleging unlawful discrimination pursuant to various Federal discrimination laws, and

(h) matters in the appellate jurisdiction of that Court.

87. ATO officers are expected to adhere to any relevant rules, practice notes or administrative notices of the Federal Court; some of which include:

(a) the Administrative Decisions (Judicial Review) Regulations 1985

(b) the Federal Court (Corporations) Rules 2000

(c) the Federal Court of Australia Regulations 2004

(d) the Federal Court (Bankruptcy) Rules 2005, and

(e) the Federal Court Rules 2011.

88. The Commissioner may be involved in a range of matters before the Federal Court, however, the majority of the proceedings relate to applications made pursuant to Part IVC of the TAA and administrative law applications which are discussed in further detail below.

Applications made to the Federal Court pursuant to Part IVC of the TAA

89. Where an application is made to the court in respect of an objection decision pursuant to Part IVC of the TAA, Dispute Resolution and the BSL must work collaboratively to ensure court timetables are met.

90. In these matters, Dispute Resolution will:

(a) immediately notify the BSL of receipt of an application,

(b) raise the matter with the relevant Assistant Commissioner, Dispute Resolution discussing preliminary strategies on how the case should be managed, such as:

(i) the allocation of appropriate resources

(ii) whether external legal service providers should be engaged immediately, and

(iii) whether it is appropriate to conduct the matter as the Solicitor on Record.[22]

(c) as soon as practicable following receipt of the application, prepare a draft Appeal Statement. Where an external solicitor is engaged, the statement will be prepared by the external solicitor (with assistance from the Dispute Resolution officer if appropriate).

(d) prepare the Pro-Forma Questionnaire, with information to be provided by the BSL as required,[23]

(e) ensure that submissions prepared by counsel are circulated to internal stakeholders prior to filing. Counsel should provide draft submissions at least one week prior to the date they are to be filed, and

(f) manage and co-ordinate any document production pursuant to notices to produce, subpoenas or discovery.

91. In these matters, the relevant BSL will:

(a) Within one week following notification of the application, provide copies of all material relating to the decision in question.[24] This material must include a comprehensive index and the Facts and Evidence Worksheet,

(b) as soon as practicable following notification of the application, provide a document (including a chronology) that can be used to evaluate the Genuine Steps statement filed by the applicant and to prepare any reply, and

(c) conduct any searches or inquiries pursuant to notices to produce, subpoenas or discovery. A record must be kept of the systems and databases searched.

92. Some of the key events and issues that officers need to be aware of in proceedings before the Federal Court include:

[22] Assuming that approval to act as solicitor on the record has been provided by the Attorney-General in accordance with Clause 5 of the Legal Services Directions

[23] This information may include details of:
(a) status of the debt,
(b) any objections with the same issues which are likely to be litigated,
(c) any objections containing related matters, either by common issue or common taxpayer,
(d) whether the matter is a test case, or if an application has been forwarded for test case funding, or
(e) whether the case needs to be fast-tracked.

[24] This material is not limited to that which must be filed for the purposes of Rule 33.03 of the *Federal Court Rules 2011*.

(a) Practice Note PN Tax 1 regarding 'arrangements for the management of tax cases'.[25] This Practice Note aims to improve the national and regional management of tax cases. It deals with the role of the Tax List Coordinating Judge in each region and provides arrangements to promote just and efficient determination of tax disputes in a timely manner. The Dispute Resolution officer must ensure that matters are conducted in accordance with PN Tax 1 and utilise the case management plan and cost estimate process which has been modelled to comply with PN Tax 1

(b) use of the Commissioner's powers to obtain information and evidence regarding the taxpayer or related entities, whilst court proceedings are in progress. Advice must be sought from Dispute Resolution before this occurs as this may amount to contempt of court, and

(c) any implied or express undertakings not to use documents disclosed in other proceedings. Where a party to litigation is compelled to disclose documents or information during legal proceedings, the party obtaining the disclosure cannot, without leave of the court, use that information for any purpose other than for which it was given.[26] Breach of the implied undertaking amounts to a contempt of court and exposes the Commissioner to court sanctions (and ATO officers to breaches of the Code of Conduct).[27]

Administrative law proceedings

93. The Commissioner may also be involved in proceedings before the Federal Court where applicants are seeking judicial review of administrative decisions or actions by ATO officers. These proceedings are commonly pursuant to:

    (a) the ADJR Act, and

    (b) section 39B of the *Judiciary Act 1903*.

94. Judicial review of administrative decisions or actions by ATO officers involves the court reviewing whether the process by which the decision was made was flawed, or whether the decision involves an error of law. In these instances, the court generally cannot remake the decision, so the remedies available from judicial review may be limited to remitting the decision back to the original decision maker with an order to remake the decision according to law.

The ADJR Act

95. An applicant can apply to have a decision of the Commissioner reviewed by the Federal Court. The applicant must be aggrieved by a decision, or the failure to make a decision, to which the ADJR Act applies.[28]

96. As soon as practicable after receiving notice of an application for an order for review, prompt consideration should be given as to whether an objection to competency should be made in respect of the application.

[25] Practice Note PN Tax 1, paragraph 1.1.
[26] This implied undertaking is known as the Harman Principle (*Harman v. Secretary of State for the Home Department* [1983] 1 AC 280).
[27] Further details regarding the implied undertaking and how it impacts the ATO are set out on the intranet, ORCLA.
[28] Section 5 of the ADJR Act provides the grounds for judicial review.

97. If an objection is to be made to the competency of the application, the *Federal Court Rules 2011* require the Commissioner to file and serve a notice of objection to the competency within 14 days after service of the application. The notice must state briefly, but specifically, the grounds of his objection.

Section 39B of the Judiciary Act 1903 – Declaratory Proceedings

98. Section 39B of the *Judiciary Act 1903* confers jurisdiction on the Federal Court[29] including with respect to any matter in which a writ of prohibition or mandamus or an injunction is sought against an officer or officers of the Commonwealth. Proceedings are sometimes brought against the Commissioner under this provision by taxpayers seeking relief in the form of a declaration.[30]

99. The Commissioner generally prefers to see disputes regarding tax assessments and the like resolved through the procedures for which Parliament has provided in Part IVC of the TAA. It is exceptional for declaratory proceedings to be an appropriate mechanism for resolution of a tax dispute[31]. Where an assessment has issued, it is clear that declaratory proceedings are not appropriate and if litigation proceeds it should be by way of application for review of, or appeal against, the objection decision.[32]

100. A number of GST disputes have been resolved through the use of declaratory proceedings. However, with GST operating under a full self-assessment regime since 1 July 2012, declaratory proceedings are not appropriate to challenge assessments deemed to be made on lodgement of returns.

101. However, there are some remaining categories of disputes where declaratory proceedings *may* be appropriate for the resolution of GST or other indirect tax disputes. These include disputes relating to tax periods before the introduction of self assessment on 1 July 2012 and disputes regarding input tax credit entitlement where the credit has not yet become attributable[33].

102. However, whether a declaration should be made is always at the discretion of the court. Even where parties agree between themselves that declaratory proceedings are desirable to resolve a dispute, the court may hold that a declaration should not be made in the circumstances.[34]

103. As a guide, the following factors are relevant when determining when declaratory proceedings may be considered appropriate:

    (a) have assessments been issued or is there a deemed assessment? Declarations can only be sought where no assessment has been issued or no deemed assessment (and there is no immediate concern that relevant time limits for issuing or amending assessments may expire)

[29] See also section 39 of the Judiciary Act relating to State Courts.
[30] These are commonly referred to as 'declaratory proceedings'.
[31] *PM Developments Pty Ltd* [2008] FCA 1886
[32] *Platypus Leasing Inc v Federal Commissioner of Taxation* [2005] NSWSC 388
[33] Section 29-10(4) of GST Act
[34] See Logan J's comments in *PM Developments Pty Ltd* [2008] FCA 1886 at paragraphs 19 -24.

(b) are there any factual or evidentiary controversies? Declaratory proceedings are usually not preferred where there are significant factual or evidentiary controversies. A declaration will be more likely to be capable of resolving a dispute when the question before the court in declaratory proceedings is a clear question of law, with clear criteria against which the court can make a determination one way or another. However, this does not mean that there must necessarily be agreement on every aspect of the facts. For example, it may be satisfactory for affidavit evidence to be adduced, with the court asked to make particular findings or inferences from the evidence, such as regarding the construction of a contract or the character of a transaction.

(c) does the matter involve a real controversy sufficient to engage the jurisdiction of the court (as distinct from being a hypothetical issue)?, and

(d) whether the declaration sought will completely resolve and finalise the entire dispute.[35] Declaratory proceedings will not be appropriate where there may be remaining disagreement about the consequences which would flow from the making of the declaration.

104. Taxpayers who may be contemplating the commencement of declaratory proceedings and/or their representatives may wish to contact the ATO before commencing the proceedings. This may allow the parties an opportunity to work co-operatively in good faith early to try to resolve issues regarding the court's jurisdiction or the appropriateness of declaratory proceedings in the particular circumstances without incurring unnecessary costs in litigation. This early engagement with taxpayers may require the involvement of counsel, and counsel to counsel discussions may be appropriate.

105. On occasions, taxpayers ask the ATO to hold off making an assessment to facilitate an application for a declaration. This would be an exceptional course and counsel's opinion should be sought if appropriate. The issue must be escalated to the relevant compliance group business line Assistant Commissioner, the relevant Assistant Commissioner, Dispute Resolution, and the relevant STC, Strategic Litigation.

106. ATO officers cannot unreservedly promise to hold off making an assessment in order to facilitate a taxpayer's application for a declaration. It would be rare for the ATO to indicate that it did not contemplate issuing an assessment while the declaratory proceedings were on foot and then find it necessary to do so. However, if the Commissioner were to decide that it is necessary to make an assessment for the relevant tax period before the finalisation of declaratory proceedings, the Commissioner must bring the assessment to the court's attention.[36]

107. Whilst either party can apply for a declaration, it is usually up to the taxpayer to commence proceedings as the Commissioner will not generally be in a position to do so – the Commissioner will not have been party to the relevant transactions and may not be in a position to put relevant evidence before the court. Nevertheless, the ATO should be open to the possibility of commencing proceedings itself where it is appropriate to do so in the interests of achieving law clarification for the benefit of the community. Advice of senior counsel would usually be appropriate before commencing such action.

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[35] See Gzell J at paragraph 81 in *Platypus Leasing Inc v Federal Commissioner of Taxation* [2005] NSWSC 388 – *"Granting declarations as staging posts is frowned upon. Courts should proceed to the ultimate relief."*

[36] See *Platypus Leasing Inc & Ors v Commissioner of Taxation* [2005] NSWCA 399, McClelland CJ at paragraph 63.

108. As with any litigation, there will be various risks that will need to be considered. Particular to declaratory proceedings, there is a risk that the proceedings may not provide certainty for either party. For example, where there are more than two outcomes possible, the court may decline to accept the contentions of either party and leave the dispute unresolved. In contrast, the operation of the burden of proof provisions in Part IVC proceedings ensures certainty and clarity when those proceedings are finalised. That is, under Part IVC proceedings, taxpayers need to show not only that an assessment is excessive, but also what the correct assessment should be.

109. There is also a risk that declaratory proceedings may leave parties with no avenue of appeal. For the Commissioner, there is a risk that a declaration may make a finding contrary to an ATO view, but provide no opportunity for the Commissioner to appeal.[37]

110. It is important that in any proceeding invoking the jurisdiction conferred by section 39B of the *Judiciary Act 1903*, prompt consideration should be given as to whether it is appropriate for the matter to be dealt with under this section. Officers should determine if there are more suitable avenues for review, such as the Part IVC process. If this is the case, it may be appropriate for the Commissioner to seek to have the section 39B proceedings dismissed.

Applications made to the Federal Court pursuant to the Fair Work Act 2009 or Federal discrimination law

111. The Commissioner may be involved in proceedings before the Federal Court arising from the *Fair Work Act 2009* and applications alleging unlawful discrimination pursuant to various Federal discrimination laws.[38] Where the Commissioner is involved in such proceedings before the Federal Court, ATO officers must follow the same procedures and guidelines as set out in paragraph 84 of this practice statement.

Federal Circuit Court

112. The Commissioner may be involved in proceedings before the Federal Circuit Court (FCC). The FCC provides an alternative to litigation in the Federal Court and Family Court of Australia. The FCC's jurisdiction includes, but is not limited to, administrative law, bankruptcy, human rights and industrial law. Proceedings before this court can thus involve either Dispute Resolution or General Counsel.

113. ATO officers are expected to be aware of, and adhere to, any relevant rules, practice notes, or guidelines issued by the FCC, such as the *Federal Circuit Court Rules*.

114. Where General Counsel is involved in a proceeding before the FCC, stakeholders are to follow the same procedures and guidance as set out in paragraph 84 of this practice statement.

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[37] For example, in *South Steyne Hotel Pty Ltd & Ors v Commissioner of Taxation* [2009] FCA 13, where the Full Federal Court declined to make one of the declarations sought by the taxpayer for reasons that were not consistent with the Commissioner's submissions.

[38] These include the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*.

High Court of Australia

115. The Commissioner may be involved in litigation before the High Court including:

    (a) applications for special leave to appeal against the judgment of another court

    (b) matters in the appellate jurisdiction being those where special leave to appeal was granted or appeals from single judges of the High Court, and

    (c) matters in the Court's original jurisdiction such as where a party is seeking a writ or injunction.

116. Most commonly, the Commissioner will be involved in applications for special leave to appeal and, where granted, the ensuing appeal.

117. Officers are expected to be aware of, and adhere to any relevant rules or practice directions issued by the High Court.

118. Matters before the High Court are generally central to the Commissioner's law clarification objectives and are likely to present significant risks to the Commissioner.

119. These matters are therefore expected to be managed with a very high degree of consultation and stakeholder involvement. It is also essential that a broader range of stakeholders or ATO officers are continually informed and kept apprised of the progress of the matter and any developments that have occurred.

120. In particular, the Solicitor-General must be advised where the Commissioner is contemplating seeking special leave to appeal to the High Court[39] in litigation involving:

    (a) significant financial implications,[40] either in the relevant case, or which may have flow on effects to other taxpayers in the event of an adverse outcome in the case,[41] or

    (b) whole of government implications.

121. In these instances, the Solicitor-General must be provided with:

    (a) a copy of the judgment, and

    (b) the advice of counsel briefed in the matter on the prospects of special leave being granted.

122. The Solicitor-General will then form an independent view in relation to whether the application for special leave should be made (or should proceed in circumstances where an application has already been filed).

[39] OLSC's Guidance Note 11. The guidance note requires that the Solicitor-General receive a request to be briefed to advise in every case in which an agency is contemplating seeking special leave to appeal to the High Court. However OLSC has advised that, in practice, the ATO may consider these matters on a case-by-case basis and determine whether the proposed application needs to be brought to the Solicitor-General's attention. This may be done in consultation with OLSC.

[40] For ATO purposes, considered to be tax in dispute in excess of $100 million.

[41] An example is *Commissioner of Taxation v. Anstis* [2010] HCA 40 where the amount in dispute was relatively minor but the outcome affected thousands of taxpayers.

SECTION 6 – CASE MANAGEMENT

123. The management of technical issues across the ATO, including litigation, is subject to the Enterprise Risk Management Framework. In addition to this, litigation matters are subject to rigorous case management processes to ensure that cases and issues are regularly risk assessed and reviewed.

124. All debt and tax technical matters are subject to the Strategic Internal Litigation Committee (SILC) process and regular call-overs.[42] Strategic litigation matters will be discussed separately within this section as there are specific requirements which must be followed to ensure they are managed appropriately.

The SILC Process

125. The SILC process is essential to all litigation matters. It facilitates communication between all stakeholders and ensures that appropriate consultation takes place prior to the making of any key decisions or the adoption of strategies.

126. A SILC conference is a meeting between key internal stakeholders, organised by the Dispute Resolution officer and convened at various critical stages of the litigation matter. Where appropriate, external legal service providers can also be invited to participate in key SILC conferences.

127. The following SILC conferences **must** be convened for each litigation matter:

    (a) the initial SILC conference

    (b) the case evaluation SILC conference, and

    (c) the post-decision SILC conference.

128. These conferences must be minuted to ensure that key decisions and strategies are appropriately captured. It is expected that stakeholders will exercise good judgment and engage in regular consultation as required to ensure continual good management of the case.

The initial SILC conference

129. The purpose of this SILC conference is to re-evaluate the decision of the Commissioner that is in dispute, including an appraisal of the issues, and whether the facts and evidence support the views taken by the Commissioner.

130. This SILC conference should be convened as soon as possible after receipt of the application, but must occur before the first conference or scheduling conference. One of the key outcomes of this SILC conference should be the development of the litigation strategy, and whether early or alternative dispute resolution is appropriate.

The case evaluation SILC conference

131. In first instance proceedings, the case evaluation SILC conference will ordinarily occur shortly after the service of the applicant's evidence. The intention of this SILC conference is to provide a specific point in the process where:

    (a) the case is re-evaluated in light of the applicant's evidence

[42] General Counsel matters have separate case management processes and are not subject to the SILC and call-over process discussed in this section.

(b) officers further consider, decide and, where possible, implement any appropriate steps to ensure that the Commissioner can file any evidence required, and

(c) officers consider whether an alternative dispute resolution process is appropriate.

132. In appellate proceedings, or in proceedings where evidence is not to be filed, this SILC conference should occur well in advance of the preparation of submissions and emphasis should be placed on identifying and managing risks, including the consideration or implementation of risk mitigation strategies and contingency plans.

The post-decision SILC conference

133. The primary focus of the post-decision SILC conference is to ensure that consideration is given to the proper management of the decision. This SILC conference should be convened as soon as possible but no later than one week following the receipt of a decision.

134. At this SILC conference, the following should be addressed:

(a) risk mitigation strategies and contingency plans

(b) any errors or difficulties with the decision

(c) whether a media strategy is necessary

(d) whether notification or advice should be given to Treasury

(e) whether notification should be given to another government department or agency which has administrative responsibility for legislation that may be affected by the litigation

(f) whether the Solicitor-General should be briefed in accordance with the OLSC *Guidance Note 11*

(g) the risks involved in the litigation (including identification of any new risks) and the implications of the decision. This is of particular importance where the decision is adverse. However, risks or implications may also arise from a favourable decision, for instance, it may be based on reasoning not advanced by the Commissioner, or may not be consistent with a precedential ATO view

(h) whether there are any implications on ATO systems

(i) whether any law clarification was achieved – particularly, if the matter was test case funded or an agreement was in place regarding the payment of the taxpayer's costs, and

(j) any appeal prospects and where applicable, whether a notice of appeal or cross-appeal or notice of contention should be filed.

Case management plans

135. A case management plan must be prepared for all tax technical and complex debt litigation matters.

136. A case management plan is a document setting out the details and status of a litigation matter, including the litigation strategy and any milestones. The document should include all critical information such as a summary of the issues, the precedential ATO view, the significance of the matter, and the ongoing costs related to the matter.

137. Responsibility for the preparation and ongoing periodic review of the case management plan rests with the Dispute Resolution officer, with the assistance of other internal stakeholders.

138. The case management plan is to be prepared shortly after the commencement of the proceedings and regularly updated throughout the litigation process, particularly following key decisions or events. The document should be amended to reflect any developments in the matter or changes in the litigation strategy.

139. The case management plan should be provided to all internal members of the litigation team following its preparation or subsequent review.

140. The intention of the case management plan process is to promote:

(a) proactive management and regular monitoring of costs

(b) strategic management of litigation by monitoring the timely progress of cases

(c) collaborative partnerships between all relevant stakeholders

(d) limitation of interlocutory disputes where appropriate, and

(e) increased consideration and use of alternative dispute resolution processes.

Ensuring continual improvement

141. Near the conclusion of a matter, internal stakeholders should take the opportunity to review the conduct of the proceedings, turning their minds to how the ATO's management of the litigation process could be improved. In particular, feedback should be provided to the relevant Dispute Resolution manager on the following:

(a) the conduct and performance of external parties such as the external solicitor and counsel.

(b) the Dispute Resolution officer's performance and effectiveness during the course of the litigation.

(c) any practice and procedural issues relevant to Dispute Resolution generally.

(d) any BSL operations or practices that might be impacting on the quality and efficiency of the ATO's litigation process or may otherwise assist in the management of disputes generally.

(e) any system deficiencies which may impact on the Commissioner's ability to comply with relevant laws, regulations or policy.

142. The Dispute Resolution manager will ensure relevant feedback is referred to the appropriate business area.

The call-over process for Dispute Resolution

143. All new litigation matters are reviewed within the call-over process. These call-overs are convened by the relevant Dispute Resolution manager, and attended by the Dispute Resolution officer and the relevant Assistant Commissioner, Dispute Resolution. These call-overs allow senior officers to regularly monitor and assess the progress of new and existing cases, and to identify and manage any emerging risks.

The management of strategic litigation matters

144. If a matter has been identified as strategic, it will be subject to further evaluation and monitoring. Strategic litigation refers to litigation that promotes clarification of the law in key high risk areas. Strategic litigation also includes cases where law clarification opportunities may not be the primary objective, but the other risks to the Commissioner are sufficiently significant to warrant a strategic corporate response.

145. Generally, strategic litigation matters will include the following:

(a) matters listed in the monthly significant litigation report

(b) matters with significant revenue or compliance risk attached

(c) matters which raise media interest

(d) matters which raise a contentious question of law

(e) matters which have the TCN involvement

(f) matters under the Test Case Litigation Program

(g) matters which involve a dispute with a state or territory government agency

(h) appeals commenced by the Commissioner against adverse court or tribunal decisions, and

(i) matters being conducted in the Full Federal Court, a state Court of Appeal or above.

Strategic litigation stakeholders

146. In respect of strategic litigation, the following stakeholders may also be involved:

(a) the Senior Assistant Commissioner, Strategic Litigation (SAC, Strategic Litigation) who provides technical leadership and is responsible for ensuring that strategic litigation is managed effectively. This includes ensuring that arguments on behalf of the ATO are consistent with precedential ATO views

(b) a Senior Tax Counsel, Strategic Litigation (STC, Strategic Litigation) who will provide technical leadership. There are three STC, Strategic Litigation, and any one of them may take direct responsibility for, or closely monitor, a strategic litigation case regardless of other TCN involvement, and

(c) the Strategic Litigation Unit who provides support to the SAC, Strategic Litigation to ensure that the highest priority litigation is identified, reported and managed corporately.

Engagement of the Tax Counsel Network

147. Once a matter has been identified as strategic, it must be escalated to ensure that appropriate technical expertise from the TCN is engaged. The Dispute Resolution team must refer to PS LA 2012/1 – *Management of high risk technical issues and engagement of tax technical officers in the Tax Counsel Network* and related references for guidance on how to engage the technical expertise within the TCN.

148. In line with the guiding principles of PS LA 2012/1, the level of involvement by the TCN will be determined having regard to the specific issues and risks involved.

Strategic litigation call-overs

149. Strategic litigation matters are further reviewed at call-overs convened by the SAC, Strategic Litigation every 3 months. These are normally attended by the Dispute Resolution officer, the TCN member, the relevant BSL representative and the external solicitor if engaged. Where appropriate, external counsel may also be invited to attend.

150. The technical issues and strategic management of these matters are often discussed in detail. The call-over panel will generally include the SAC, Strategic Litigation, the relevant STC, Strategic Litigation, both Assistant Commissioners in Dispute Resolution, and the relevant Dispute Resolution manager.

Strategic litigation considerations

151. As mentioned earlier, strategic litigation will often involve matters with significant revenue or compliance risk, attract media attention, provide law clarification opportunities under the Test Case Litigation Program or involve issues which should be referred to external bodies, such as Treasury or the Attorney-General's Department. These considerations are briefly discussed below.

Strategic litigation risk mitigation strategies

152. Due to the potential risk to revenue and compliance, it is prudent for the Dispute Resolution team to develop risk mitigation strategies for all strategic litigation matters. Whilst this should be developed collaboratively, the BSL has ultimate responsibility for ensuring that risk mitigation strategies and contingency plans are in place in respect of a potential decision or judgment.

153. In broad terms, the risk mitigation strategy involves consideration of:

(a) the consequences of the litigation on the intended operation of the law and its application

(b) any related issues, such as any media strategy that may need to be put in place or any potential changes to ATO systems, and

(c) whether, in respect of potential policy implications, notification or advice should be given to Treasury. It may be prudent to notify Treasury at an early stage of the litigation, so that Treasury can monitor the case and prepare for any potential consequences of a decision.

154. Although the risk mitigation strategy will vary from case to case, it should generally include a communication strategy which sets out who will be responsible for advising key stakeholders about the consequences of the decision once it is handed down.

155. The risk mitigation strategy should include developing a contingency plan that will set out the immediate action that is to be implemented should the Commissioner receive an adverse court or tribunal decision which is not appealed.[43] Immediate guidance should be provided to ATO officers and the community on how like cases should be managed pending the publication of a Decision Impact Statement.

156. To the extent possible, precedential ATO views that may be impacted by an adverse decision should be identified prior to the decision being handed down so that they can be appropriately annotated if necessary.

Media attention and strategic litigation

157. Where a court or tribunal matter is likely to attract media attention, the Dispute Resolution officer must advise the following:

    (a) the Assistant Commissioners, Dispute Resolution or the ATO General Counsel

    (b) the relevant STC, Strategic Litigation

    (c) the SAC, Strategic Litigation, and

    (d) the Dispute Resolution manager.

158. The Media Unit must then be informed and briefed by the most appropriate senior officer involved.

159. With the exception of those provided by the Commissioner, a Second Commissioner, the Chief Tax Counsel or DCTC, all media comments must be cleared by a STC, Strategic Litigation. For matters managed by General Counsel, all media comments must be cleared by the ATO General Counsel.

The Test Case Litigation Program

160. The Test Case Litigation Program is managed by the Strategic Litigation Unit.[44] The purpose of the program is to clarify the operation of the laws administered by the Commissioner where:

    (a) there is uncertainty about how the law operates

    (b) the issue is of significance to a substantial section of the public or has significant commercial implications for an industry, and

    (c) it is in the public interest for the issue to be litigated.

161. If a matter involves an issue which satisfies the above criteria, the matter should be referred to the Strategic Litigation Unit to determine whether it is appropriate for the matter to be funded under the Test Case Litigation Program.

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43 A contingency plan may not be required where the circumstances of the taxpayer who is party to the litigation are so specific to them, that it is unlikely that there will be any unrelated taxpayers who have like cases that could be affected by an adverse decision.

44 The Strategic Litigation Unit can be contacted at strategiclitigationunit@ato.gov.au.

Notification or advice to Government Ministers, Treasury or other Commonwealth Departments

162. It may be necessary to notify or provide formal advice to a Minister, Treasury or other Commonwealth department or agency with administrative responsibility for legislation which may be affected by the litigation. The situations in which it may be necessary to notify any of them include matters where the issues:

(a) are significant

(b) are expected to affect the reputation of the ATO or the Government

(c) have a significant impact on the revenue, or

(d) require consideration of a change to the law.

163. The BSL, with assistance from the other internal stakeholders if appropriate, has responsibility for the preparation of any notification or advice, and should contact the Minister, Treasury, or relevant Commonwealth department at the earliest opportunity.

The Attorney-General's Department notification

164. It may be appropriate or necessary to notify the Attorney-General's Department of litigation matters or issues. Officers should be aware of these notification requirements set out in the Legal Services Directions, including where the litigation:

(a) gives rise to a constitutional issue

(b) may have a 'whole of government' impact

(c) is covered under the OLSC *Guidance Note 11,* or

(d) is covered by the 'Reporting on significant issues' requirements in the Legal Services Directions.

165. Consideration must be given to whether notification should be provided to the Attorney-General's Department. Where such potential issues arise, they should be escalated to the relevant Assistant Commissioner, Dispute Resolution or for General Counsel matters, to the ATO General Counsel.

SECTION 7 – MANAGEMENT OF COURT AND TRIBUNAL DECISIONS

166. The management of court and tribunal decisions for tax technical or debt litigation matters[45] is an important aspect of the ATO's litigation function. This section addresses the following:

(a) the notification, receipt and circulation of decisions

(b) the post-decision SILC conference

(c) Decision Reports and the decision making process for appeals

(d) Decision Impact Statements (DIS), and

(e) the ATO's approach when challenging final court decisions in other proceedings.

[45] General Counsel Practice litigation matters are excluded from this section.

Notification, receipt and circulation of decisions

167. Upon notification that a decision is to be published, the Dispute Resolution officer must, on the same day, notify all stakeholders. For all strategic litigation decisions or any decisions favourable to the taxpayer, the following officers must also be notified:

    (a) the SAC, Strategic Litigation

    (b) the relevant STC, Strategic Litigation

    (c) the Assistant Commissioners, Dispute Resolution

    (d) the BSL litigation co-ordinator, and

    (e) strategiclitigationunit@ato.gov.au.

168. As soon as practicable following receipt of the decision, the Dispute Resolution officer must circulate it to the officers identified above. The decision should ordinarily be accompanied by:

    (a) a summary of the outcome

    (b) advice as to the timeframe for filing a notice of appeal, and

    (c) a brief summary of the reasoning of the court or tribunal, identifying any unexpected or significant consequences. However, circulation of a significant decision should not be unduly delayed to prepare this summary.

169. If the Dispute Resolution officer is notified that a taxpayer has appealed or taken some other form of action in respect of a decision or judgment, they must notify the ATO officers set out at paragraph 167 of this practice statement as soon as practicable.

170. The post-decision SILC conference should assist in the preparation of a Decision Report.

Decision Reports

171. The Decision Report performs two key functions in that:

    (a) they provide a summary of the decision, including the facts, issues and outcomes, and

    (b) for decisions favourable to the taxpayer, they provide an analysis of the decision, indicating stakeholders' views regarding whether an appeal should be instituted, and record the decision maker's decision regarding an appeal.

172. The Decision Report, insofar as it addresses the first function, should be concise and convey the issues, outcomes and importance of the case. Policy implications should be clearly identified.

173. For decisions favourable, or partly favourable, to the taxpayer, the Decision Report is expected to provide a robust technical analysis and commentary of the perceived correctness of the decision, with the views of the various stakeholders identified. The document is ultimately intended to assist the decision maker in determining whether or not the decision should be appealed.

174. The Decision Report is the corporate record of that decision.

175. The Decision Report template has two distinct sections: 'Summary' and 'Appeal Considerations'. The 'Summary' section needs to be completed for all decisions, whilst the 'Appeal Considerations' section need only be completed for adverse or partly adverse decisions.

Decision reports for decisions favourable to the Commissioner

176. For decisions which are favourable to the Commissioner, a Decision Report:

(a) must be prepared by the Dispute Resolution officer in consultation with other internal stakeholders

(b) must be prepared, finalised and circulated within one week of receipt of the decision

(c) is to be circulated to the stakeholders set out at paragraph 167 of this practice statement, and

(d) the relevant Dispute Resolution manager must refer the Decision Report to ATOlaw[46] for internal publication on the ATOlaw database.

Decision reports for decisions favourable or partly favourable to the taxpayer

177. For decisions which are favourable, or partly favourable, to the taxpayer:

(a) the requirements in paragraph 176 of this practice statement apply to the preparation of the 'Summary' section. That is, the 'Summary' section of the Decision Report must be finalised and circulated within one week, and

(b) the 'Appeal Considerations' section, including the recording of the decision on whether to appeal, must be finalised and circulated before the expiration of any relevant appeal period.

178. The Dispute Resolution officer has primary responsibility for the preparation of the Decision Report. However, for decisions favourable to the taxpayer, the following should be noted:

(a) the TCN member involved in the litigation matter should provide assistance in the preparation of the Decision Report

(b) efforts should be made to obtain the views of all the internal stakeholders before finalisation of the Decision Report

(c) advice from counsel (or other external providers) will often be sought in respect of the Commissioner's prospects for success. These views should be identified in the Decision Report

(d) where the views of all the stakeholders cannot be obtained within a reasonable time, this should not prevent the Decision Report from being escalated to the decision maker within an appropriate timeframe to ensure a decision is made before the appeal period expires, and

(e) notwithstanding the above, where a decision is significant, a Decision Report should not be finalised nor should a decision to appeal be made absent the views and recommendations of the TCN member involved and the relevant STC, Strategic Litigation or the SAC, Strategic Litigation.

[46] nat.atobss@ato.gov.au.

The content of the Decision Report

179. The Decision Report should address:

(a) the identification of the question of law and/or grounds of appeal that should be relied on

(b) an analysis and commentary on the correctness of the decision

(c) an analysis of any basis on which an appeal is justified. For decisions partly or wholly favourable to the taxpayer:

(i) by the AAT: whether a question of law is sufficiently significant to warrant an appeal to the Federal Court

(ii) by a single judge of the Federal Court, Federal Circuit Court or a State Supreme Court: the errors that would warrant an appeal, or

(iii) by the appellate court of a State Court or the Federal Court:[47] whether there is a question of sufficient public importance that would result in a grant of special leave.

(d) whether Treasury needs to be informed of the decision, possibly to remedy any perceived deficiencies in the legislation

(e) whether the decision is inconsistent with a published precedential ATO view of the law, and

(f) where appropriate, commentary on the conduct of the litigation that led to the decision, such as any difficulties with evidence, witnesses, or any interlocutory decisions of the Court that may have adversely influenced the outcome.

Decision making – whether or not to appeal

180. All decisions seeking special leave to appeal to the High Court must be made by the Chief Tax Counsel.

181. In tax technical litigation:

(a) for decisions which turn on their facts and have no precedential value, the decision maker as to whether or not the Commissioner should appeal is the relevant STC, Strategic Litigation, and

(b) for all other matters, the decision maker as to whether or not the Commissioner should appeal is the relevant DCTC.

182. In debt litigation, the decision maker as to whether or not the Commissioner should appeal is made jointly by the relevant Assistant Commissioner, Dispute Resolution and the relevant STC, Strategic Litigation.

183. Where there is disagreement between the relevant STC, Strategic Litigation and the relevant Assistant Commissioner, Dispute Resolution, the debt litigation matter should be escalated to the relevant DCTC.

[47] Or, where the Federal Court is exercising original jurisdiction as a Full Court.

Where a decision is not appealed

184. Where the ATO decides not to appeal an unfavourable decision, or there is no further right of appeal in respect of an unfavourable decision, immediate direction must be provided by the BSL risk owner to ATO officers as to what action should be taken in respect of like cases (regardless of which stage the dispute is in) prior to the Decision Impact Statement (DIS) being published.

185. Where the implications of the decision are clearly relevant and favourable to other taxpayers, it may be appropriate to authorise case officers to immediately make favourable decisions in respect of like cases. Where the implications of the decision are less clear, and the implications have not yet been sufficiently determined to permit this, the direction should require case officers to defer making any decisions in respect of like cases until the DIS is published.

186. To the extent that the Decision Report has been able to identify precedential ATO views that may need to be amended as a result of the unfavourable decision, BSL case officers should be advised by the BSL risk owner. The Law Practice Management Unit should also be advised so that these precedential ATO views can be appropriately annotated.

Decision Impact Statements

Purpose

187. A Decision Impact Statement is published to advise the community of the ATO's view on the implications of a particular court or tribunal decision.

When a Decision Impact Statement is required

188. A Decision Impact Statement is published for all significant and strategic decisions which includes all matters listed on the Significant Litigation Report[48] and all decisions partly or wholly adverse to the Commissioner **except** for partly or wholly adverse Tribunal decisions where:[49]

- the Commissioner has made a concession and that is the only unfavourable part of the decision
- the adverse aspect of the decision only concerns the remission of administrative penalty and has not wider ramifications; or
- the adverse aspect of the decision has no wider ramifications beyond the taxpayer's circumstances.[50]

189. Ordinarily, a Decision Impact Statement will not be published until all appeals have been concluded and there is a final decision. However an interim Decision Impact Statement may be published where a matter is on appeal and the ATO seeks to communicate to the community how it will deal with similar cases while the appeal is being resolved. For further information see below; When is an Interim Decision Impact Statement required.

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[48] Matters listed on the Significant Litigation Report.

[49] These cases will be listed on the external website under 'No DIS'. If there is disagreement over whether a DIS is required, then the Strategic Litigation Unit can be contacted to discuss and assess whether a DIS is required.

[50] If you are unsure whether a DIS is required, contact the Strategic Litigation Unit.

Preparation, responsibilities, and approval

190. Strategic Litigation Unit manages the Decision Impact Statement process for the ATO, including the monitoring, tracking and publication of DIS.

191. The Dispute Resolution officer is responsible for the preparation and coordination of the first draft of a Decision Impact Statement between the BSL, TCN officer and any other stakeholders.

192. The Dispute Resolution officer must prepare and escalate the draft Decision Impact Statement to either the TCN officer involved in the case and relevant DCTC (where the matter is strategic), or the relevant Senior Tax Counsel (STC) Strategic Litigation [see below 'approval of DIS for publication'].

193. The TCN officer or STC, Strategic Litigation have the leadership role in the Decision Impact Statement process and as the 'contact officer' they are responsible for settling the final version of the Decision Impact Statement and appropriate escalation.

194. A Decision Impact Statement must be published within eight weeks of a decision.

195. To meet the 8 week timeframe, officers should follow the process set out below:

Timeframe (From decision)	**Task**	**Responsibility**	**Comments**
5 weeks	Circulate first draft of Decision Impact Statement.	Dispute Resolution	Preparation of the statement should commence prior to expiry of the appeal period.
6 weeks	Collate stakeholder comments re the draft Decision Impact Statement and settle.	Dispute Resolution	Any outstanding issues should have been discussed and resolved by this point.
7 weeks	Forward the settled Decision Impact Statement for approval.	Tax Counsel Network If a TCN officer is not involved, then STC, Strategic Litigation.	Approving officer for significant matters: Deputy Chief Tax Counsel. Approving officer for all other matters: STC, Strategic Litigation. [51]
7 weeks[52]	Forward the approved document to Strategic Litigation Unit	TCN officer, STC, Strategic Litigation	Strategic Litigation Unit completes the final review of the document.
8 weeks	Approved Decision Impact Statement sent for publication, and published.	Strategic Litigation Unit.	Strategic Litigation Unit will arrange publishing with ATOLaw. Instructions to publish will only be accepted from Strategic Litigation Unit.[53]

[51] These are also the approving officers for the publication of an updated Decision Impact Statement.
[52] Note that timeframes may differ if a Minute to the Minister is required. See paragraph 21.

Approvals of Decision Impact Statement for publication

196. *Non-significant decisions:* All Decision Impact Statement prepared for non-significant decisions must be approved by the relevant STC, Strategic Litigation. Once the STC, Strategic Litigation has approved the final Decision Impact Statement, it must be sent to the SLU mailbox (strategiclitigationunit@ato.gov.au) where the document is checked for consistency in style and content.

197. *Significant decisions:* All Decision Impact Statement prepared for a significant decision (including all cases listed on the Significant Litigation Report or other decisions considered significant), must be approved by the TCN officer and the relevant DCTC. The DCTC approved Decision Impact Statement should then be sent to the SLU mailbox for publication (strategiclitigationunit@ato.gov.au). [54]

Content of Decision Impact Statements

198. The Decision Impact Statement will:

(a) provide the case details;

(b) classify the DIS as:

(i) *'ATO is reviewing the impact of the decision'* – where an advice, guidance product or ATO view is to be updated or reviewed as a result of the decision, or there is some other form of administrative action that needs to be taken or;

(ii) *'The decision has no impact for the ATO'* – where no further action is needed to be taken by the ATO as a consequence of the decision other than giving effect to it for that particular taxpayer.

(c) provide a list of ATO view documents which are 'relevant' to the decision and a list of ATO view documents which may be affected and are being reviewed as a result of the decision

(d) if there is uncertainty surrounding a court or tribunal decision, explain how the Commissioner will administer the law pending any review of a published ruling or otherwise and whether or not the ATO view is likely to change as a result of the decision; and,

(e) provide details of a contact officer – this will usually be the TCN officer involved in the case; where a TCN officer is not involved, the relevant STC, Strategic Litigation will be listed as the contact officer.

199. A Decision Impact Statement must not disclose information that is 'protected', as defined by Division 355 of Schedule 1 of the *Taxation Administration Act* 1953, and information must not be disclosed unless the disclosure falls within one of the exceptions in that Division, for example, the information is publicly available.

200. In preparing a Decision Impact Statement, officers should be guided by the following:

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[53] Note: ATOLaw requires at least three days notice to publish a Decision Impact Statement.
[54] Prior to obtaining DCTC approval, the final Decision Impact Statement should be sent to the SLU mailbox

(a) brevity is a key concept; it is not necessary to restate all of the facts or to repeat ATO arguments in full;[55]

(b) an ATO view may be set out, explaining the implications on current public rulings. For complex decisions, the statement may 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;[56]

(c) a Decision Impact Statement must not be used as a proxy for altering existing ATO view documents;

(d) generally a Decision Impact Statement should not contain advice, unless there are exceptional circumstances;[57]

(e) a Decision Impact Statement is not a public ruling for the purposes of Part 5-5 of the *Taxation Administration Act 1953.*

When is an Interim Decision Impact Statement required?

201. An Interim Decision Impact Statement may need to be published in two circumstances:

(a) where there are exceptional circumstances and it is not possible or practicable to meet the 8 week timeframe. Significant and strategic Decision Impact Statements are often complex and require external consultation; or

(b) where a matter is on appeal and the ATO seeks to communicate to the community how it will deal with similar cases while the appeal is being resolved.

202. Strategic Litigation Unit will be responsible for drafting and publication of all category (i) Interim Decision Impact Statements within 8 weeks of the final decision.

203. For category (ii) Interim Decision Impact Statements, the preparation, responsibilities and approvals are the same as indicated in paragraphs 190 to 197.

Minute to Ministers

204. In exceptional circumstances, a Decision Impact Statement may need to be sent to the Minister under a covering Minute for information prior to it being published.

205. When this is necessary, the Dispute Resolution team should consider whether a Minute is necessary and consult with Strategic Litigation Unit. Factors that may indicate a Minute is necessary include matters that have broader implications such as ongoing revenue impact, are subject to legislative change or review or have had significant media attention The Minute will be prepared by the officer responsible for settling the Decision Impact statement. The Minute and Statement must then be approved by the Chief Tax Counsel or the Second Commissioner, Law. Enquiries relating to practices regarding the Minute should be referred to Strategic Litigation Unit.

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[55] See also paragraphs 35-39 of Law Administration Practice Statement 2008/12 Public advice and guidance products: selection, development, publication and review processes.

[56] In accordance with Law Administration Practice Statement PS LA 2003/3 Precedential ATO view, staff must apply the ATO view as set out in the Decision Impact Statement.

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

Following publication

206. Ordinarily, a Decision Impact Statement will have a specific contact officer, usually the TCN officer or STC, Strategic Litigation listed on the Decision Impact Statement. The contact officer:

(a) must either respond to any external representations directly or ensure that the representations are referred to the relevant Business Line;

(b) will be expected to manage responses to any external representations and to ensure that if there are any consequences that were 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;

(c) will be responsible for providing any updates to the Decision Impact Statement, such as the status of the review of any rulings;

(d) will be responsible for ensuring that impacted precedential documents are actioned and referred to an appropriate area for further action.[58]

SECTION 8 – ADMINISTRATION AND RELATED MATTERS

Payment of accounts

207. Payment of all appropriate accounts, including those of external legal services providers, must be made within 30 days of receipt.

208. In circumstances where the ATO has a specific contract, payment should be made in accordance with the terms and conditions of that contract.

209. Where counsel and other legal services providers have been directly briefed by the ATO, the Dispute Resolution officer must record the engagement on ATOLegals and arrange for payment of the account.

210. Where Dispute Resolution has obtained the goods or engaged the services, responsibility for the management and payment of the account rests with the Dispute Resolution team.

211. In all other circumstances, the responsibility rests with the BSL that obtained that service.

Costs orders by the courts

212. The Dispute Resolution officer has responsibility for the management of cost orders made by the courts.

213. In all cases, issues relating to costs awarded by the court must be resolved with reference to the court rules, jurisdiction and the taxpayer's entitlement to input tax credits.

214. Officers managing these cases must obtain a schedule of costs, whether they relate to settled or taxed costs, setting out the following:

(a) taxpayer's legal fees

(b) disbursements

(c) the GST payable on these amounts, and

[58] The contact officer should contact the Strategic Litigation Unit when all action is completed and update the Decision Impact Statement.

(d) whether, and to what degree, the taxpayer is entitled to input tax credits.

215. It may be appropriate in certain circumstances to engage a cost consultant for advice. In cases involving significant costs or contentious issues relating to costs, a cost consultant may provide assistance in determining the level and type of appropriate legal costs to be claimed in the particular case. The engagement of a cost consultant must be approved by an Assistant Commissioner, Dispute Resolution.

216. All enquiries relating to costs awarded by the court in matters under the Test Case Litigation Program must be referred to the Strategic Litigation Unit.

Appealing costs orders

217. Decisions seeking to appeal costs orders must be made by the relevant Assistant Commissioner, Dispute Resolution.

Amendment history

Date of amendment	Part	Comment
15 September 2023	Contact officer	Updated.
19 December 2013	Various	Updated to reflect various internal and external structural and name changes,
1 July 2013	Various	Updated to reflect various changes that have come into effect since 2010 for example, the Federal Court's Practice Note 1 relating to the case management of tax litigation. Also various changes to structure.
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	ATO Litigation Engagement of Dispute Resolution Engagement of External Legal Service Providers Legal Services Directions Model Litigant Guidelines
Legislative references	Administrative Appeals Tribunal Act 1975 Administrative Decisions (Judicial Review) Act 1977 Judiciary Act 1903 Taxation Administration Act 1953
Related public rulings	GSTR 2000/37 GSTR 2001/4 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 LA 2012/1 PS CM 2003/2 PS CM 2005/9 PS CM 2005/27
Withdrawn practice statements	PS LA 2002/3 PS LA 2005/22 PS LA 2007/1 PS LA 2007/2 PS LA 2007/12 PS LA 2007/15 PS LA 2007/16 PS LA 2007/17 PS LA 2007/18 PS LA 2007/19 PS LA 2008/16 PS LA 2008/17
Other references	Administrative Appeals Tribunal Practice Directions APS Values and Code of Conduct in practice Code of settlement Family Court Practice Directions Federal Court Practice Documents Federal Circuit Court Practice Directions Finance Circular 2008/07 High Court Practice Directions http://www.fedcourt.gov.au Legal Services Directions 2005 Litigation risk matrix Online Resource Centre for Law Administration (link internally available only) Public Service Commissioner's Directions 1999 Taxpayers' charter

Date issued	20 November 2009
Date of effect	20 November 2009
Business line	RDR
Other Business Lines consulted	All

ATO references

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