PS LA 2013/3 - Alternative Dispute Resolution (ADR) in ATO disputes

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Practice Statement Law Administration

PS LA 2013/3

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.

SUBJECT: **Alternative Dispute Resolution (ADR) in ATO disputes**

PURPOSE: **To provide instruction to ATO personnel on what policies and guidelines must be followed when attempting to resolve or limit disputes by means of ADR**

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STATEMENT

ATO approach to disputes

1. Most taxpayer interactions with the ATO do not end up in dispute. When disputes do occur, the ATO prefers to resolve them as soon as possible at minimal cost to the parties. Most disputes are resolved quickly and informally through direct negotiation and discussions between the ATO and taxpayers.

2. The ATO outlines its key principles to managing disputes in its Disputes Policy and annual Dispute Management Plan. The ATO is committed to work with taxpayers to:

   - avoid disputes where possible
   - resolve disputes as early as possible
   - resolve disputes in the simplest and most cost-effective manner taking into account the merits and the risks
   - clarify disputes by listening to each other's views and considering all resolution options, and
   - manage disputes in a courteous and fair manner.

3. Further information on the ATO approach to disputes and the Dispute Management Plan is provided in the documents listed as 'related practice statements' and 'other references' at the end of this practice statement and are available on www.ato.gov.au.

ATO approach to ADR

4. For the purposes of this practice statement, ADR is an umbrella term for processes, other than judicial or tribunal determination, in which an impartial person, assists those in a dispute to resolve or narrow the issues between them.[1] This includes ADR processes run or initiated by courts or tribunals. For the purposes of this practice statement we refer to this impartial person as an ADR Practitioner and we provide some further information at paragraphs 31 to 33 of this practice statement.

5. When disputes cannot be resolved by early engagement and direct negotiation, the ATO is committed to using ADR where appropriate to resolve disputes. It is important to recognise though that not all cases are suitable for ADR. In cases where ADR is suitable, the ATO and the taxpayer should choose a process which is suited to the circumstances and the nature of the dispute.

6. Taxpayers and their representatives can expect that the ATO will:

   - identify opportunities for ADR
   - consider and respond to requests for ADR
   - suggest ADR where appropriate, and
   - speak with and write to the taxpayer before ADR to explain the process and what they can expect from it.

[1] See www.ag.gov.au and the *ATO Plain English Guide to Alternative Dispute Resolution* for more information about ADR.

7. By way of general observation, ADR may be appropriate when:

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

8. In practice, ADR may be appropriate where it will, for example:

- achieve a quicker or cheaper resolution particularly when the cost of litigating is out of proportion to the possible benefits
- narrow or clarify the facts and issues in dispute
- minimise risks associated with evidentiary difficulties
- facilitate a certain / earlier payment of tax, or
- maintain or improve the relationship between the parties in dispute.

9. ADR may be inappropriate where, for example:

- resolution can only be achieved by departure from an established 'precedential ATO view' and there is no material difference between the facts in dispute and the facts which form the basis of the 'precedential ATO view' [2]
- the cost and delay involved in ADR is disproportionate to the likely benefit
- the dispute turns on genuine and fundamental issues of law or is otherwise straightforward and there is a clearly identified public benefit in having the matter judicially determined
- The facts are clear and the application of the law is straightforward, or
- there is a genuinely held concern that the case involves serious criminal fraud or evasion.

Disputes to which this practice statement applies

10. This practice statement is written in respect of taxation and superannuation disputes. However, many of the principles set out in this practice statement will apply to other disputes to which the ATO is a party.

11. This practice statement should be read in conjunction with Law Administration Practice Statements PS LA 2007/5 *Settlements*, PS LA 2007/6 *Guidelines for settlement of widely-based tax disputes*, and the *Code of settlement practice*.

12. When matters are in litigation, this practice statement should also be read in conjunction with Law Administration Practice Statement PS LA 2009/9 *Conduct of ATO Litigation and engagement of Legal Services Branch*.

[2] See PS LA 2003/3 *Precedential ATO view*, particularly paragraphs 8 to 15.

EXPLANATION

ATO obligations with respect to ADR

13. Commonwealth agencies and their legal services providers have an obligation under Appendix B to the Attorney-General's *Legal Services Directions 2005* to act as model litigants in the conduct of litigation and in ADR.[3] The model litigant obligation requires agencies to endeavour where possible to avoid, prevent and limit the scope of legal proceedings by considering ADR before initiating legal proceedings and by participating in ADR where appropriate. The requirement to consider ADR is a continuing obligation from the time litigation is contemplated and throughout the course of litigation.[4]

14. When participating in ADR, government agencies must do so fully and effectively. An obstructive or uncooperative attitude indicates a failure to participate in good faith.[5] However, participation in good faith does not require a party to act other than in their self-interest.[6]

15. As a government agency, the ATO is required to approach ADR with 'good management' in mind. Good management requires that the ATO approach disputes in a way that promotes proper use of Commonwealth resources; that is, in a way that is efficient, effective, economical and ethical and not inconsistent with the policies of the Commonwealth.[7] Resolution of a dispute may therefore be appropriate as a matter of good management.

16. Parties to tax disputes under review in the Federal Court are obliged under the *Civil Dispute Resolution Act 2011* to file 'genuine steps' statements outlining what steps they have taken to resolve their dispute or the reasons why they have not taken any. The Act encourages parties to take genuine steps to resolve a dispute (including in tax and superannuation disputes) before commencing legal proceedings in the Federal Court of Australia.

When to initiate ADR

17. Although there is no optimal time for ADR, it may be appropriate:

    - after the ATO issues a position paper during an audit
    - during a review at the objection stage before a final decision is made by an ATO officer, or
    - during the litigation stage.

18. Attempting ADR too early, before key elements of the dispute have crystallised, may mean there is a lesser likelihood of success as the parties may not be in an informed position to engage in discussions to clarify, narrow or resolve the issues in dispute, increasing the overall cost to the parties and causing unnecessary delay.

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[3] *Legal Services Directions 2005* Schedule Part 4 Dictionary section 15: litigation, unless otherwise indicated, includes proceedings before courts, tribunals, inquiries and in arbitration and other ADR processes, and the preparation for such proceedings.
[4] *Legal Services Directions 2005* Appendix B section 5.1 and section 2(e)(iii).
[5] *Capolingua v. Phylum Pty Ltd* (*as Trustee for the Gennoe Family Trust and Ors*) (1991) 5 WAR 137.
[6] *Aiton Australia Pty Ltd v. Transfield Pty Ltd* [1999] NSWSC 996 [156].
[7] See section 44 of the *Financial Management and Accountability Act* 1997, which imposes an obligation on the Commissioner to manage the affairs of the ATO in a way that promotes the efficient, effective and ethical use of Commonwealth resources.

How to initiate ADR

19. ADR is generally initiated by agreement between the parties.

20. ATO personnel involved in disputes should actively look for opportunities where ADR can help to resolve or progress the dispute. Any opportunities identified should be discussed with the relevant manager(s) and appropriate technical staff (including Review and Dispute Resolution (RDR) officers) before approaching the taxpayer or their advisors.

21. Taxpayers can also request ADR. Requests should usually be directed to the tax officer managing the dispute, who will discuss the request with the relevant manager(s) and appropriate technical staff (including RDR officers) before responding.

22. If ADR is requested by a taxpayer and the ATO considers that ADR is not appropriate, the ATO will clearly communicate the reasons to the taxpayer.

Types of ADR

23. ADR processes are usually classified as facilitative, advisory or determinative:[8]

    - In a facilitative process, an ADR practitioner assists the parties to identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement about part or all of the dispute. Mediation is an example of a facilitative process.
    - In an advisory process, an ADR practitioner considers and appraises the dispute and provides advice on possible or desirable outcomes. Neutral evaluation and case appraisal are examples of advisory processes. Advisory processes, by their nature, cannot be made to be binding on any party.
    - In a determinative process, an ADR practitioner evaluates the dispute and makes a decision. Arbitration and expert determination are examples of determinative processes.
    - In a blended process, the ADR practitioner plays multiple roles. For example in conciliation and conferencing, the ADR practitioner may facilitate discussions as well as provide advice on the merits of the dispute.

24. Arbitration is generally not appropriate for tax disputes because it can incur similar costs and delays as litigation, potentially conflicts with the statutory responsibilities of the Commissioner as decision-maker, and can lack the openness and transparency of court or tribunal decisions.

25. Independent experts may be engaged to provide specialist knowledge to help resolve certain unique types of dispute (including valuation disputes). Further information on engaging independent experts is available at Appendix B.

[8] *ATO Plain English Guide to Alternative Dispute Resolution* contains more detailed information about different ADR processes used by the ATO and some examples of situations when they might be used.

What can a taxpayer expect from the ATO in ADR

26. When engaging in ADR, the ATO will:

- be prepared
- participate fully, effectively and in good faith
- ensure the taxpayer has been provided with all relevant documents prior to the ADR process
- be willing to negotiate and attempt to resolve all aspects of the dispute (if appropriate)
- listen to the taxpayer and remain courteous at all times
- ensure a decision maker is present;[9] in exceptional circumstances the decision maker may attend by video or telephone
- if the ATO considers that final resolution of the dispute is not possible at ADR but there is still value in the ADR process going ahead, the ATO will advise the taxpayer before the ADR process proceeds of any limitation of the scope of the ADR, and
- only resolve disputes in accordance with the law or published policy.

ATO expectations of taxpayers in ADR

27. The ATO expects taxpayers and their representatives to:

- be prepared, including ensuring that all relevant people are participating or directly accessible
- participate fully, effectively and in good faith
- be authorised to discuss and resolve the dispute
- provide the ATO with all relevant documents prior to the ADR process, and
- be willing to negotiate and attempt to resolve all aspects of the dispute or clarify prior to the ADR process any limitation of the scope of the ADR process

The ADR process

28. If the parties choose to participate in ADR, they may need to consider various options for the conduct of the ADR process.

29. If a court or tribunal is conducting the process, it will usually consult and advise as to how the relevant ADR process will be conducted and what documents will need to be filed and exchanged between the parties.

30. For an ADR process which is not conducted by the Federal Court or the Administrative Appeals Tribunal the parties will need to consider and agree on:

- the type of ADR process to be used
- where the ADR process will be conducted
- the terms and conditions of the engagement of the ADR practitioner, including payment of the ADR practitioner's fee, which is ordinarily shared between the parties.

[9] See paragraph 37 of this practice statement.

- the scope of the ADR process and the issues to be reviewed
- what documents if any will be provided to the ADR practitioner and exchanged prior to the ADR process
- what will be required of each party during the ADR process
- confirming that all communications during the ADR process are "without prejudice" and not able to be used in other contexts or in litigation
- who will attend the the ADR process for each party
- ensuring a decision maker for each party will attend the ADR process, and
- the circumstances in which an ADR process may be terminated early.

Engagement of a Practitioner for ADR

31. An ADR practitioner is an independent person who is trained to help parties in dispute to work towards a solution. The role of an ADR practitioner is different depending on the type of ADR process used. In some ADR processes, such as conciliation or early neutral evaluation, the ADR practitioner can provide advice to the parties in dispute, in others such as mediation the ADR practitioner will assist the parties to resolve some or all of the issues in dispute but will not provide advice to them. If the ADR process is not conducted by the Federal Court or the Administrative Appeals Tribunal the parties will need to consider which type of ADR process will best suit their needs and the context of the dispute.

32. ATO RDR can assist in the selection and engagement of ADR practitioners.

33. Annexure A of PS LA 2009/9 sets out further details on ATO policy in relation to seeking approval to engage and engaging ADR practitioners.

Participation in ADR

34. ATO personnel attending an ADR process should be clear in advance about their respective roles. An RDR officer must attend if the dispute is in litigation.

35. Further information about roles and responsibilities of different ATO personnel during different stages of an ADR process is set out in Appendix A of this practice statement.

36. ATO personnel must prepare thoroughly and be familiar with all facts, issues, law and policy relevant to the dispute. They should also have regard to the underlying interests of both parties when identifying options for resolution of the dispute.

37. The ATO personnel attending the ADR should have authority to make decisions about the issues likely to be discussed, including the authority to settle or make decisions about payment of debt. In exceptional cases where it is not possible for the ATO decision maker to be present at the ADR process, they will be accessible by telephone or video-conference during the course of the ADR.

38. It is desirable to persist with negotiations at ADR while there is any likelihood of a successful outcome.

39. The ADR process should be brought to an end if it becomes clear that there is no likelihood of a successful outcome.

40. Successful outcomes may include:

- resolution of the dispute, either in part or in full
- clarification of the facts or issues
- obtaining payment
- improving the relationship between the parties to the dispute, or
- agreeing on a way forward to progress the dispute towards resolution.

Confidentiality of the ADR process

41. Unless the parties agree otherwise, all ADR processes are conducted in a confidential and on a 'without prejudice' basis.

42. Any communications between parties for the purposes of an ADR process is privileged and cannot be used in legal proceedings without the consent of the other party.

43. The ATO Settlement Model Deed, at Appendix B of the *Code of settlement practice*, contains specific confidentiality clauses for formal settlement arrangements.

44. The ATO will seek feedback from participants in ADR to identify potential improvements to ATO processes and to provide community assurance. This will be sought independently of the ADR process, and will maintain the confidentiality of all participants.

Documenting an agreement

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

46. ATO personnel attending an ADR process must ensure that any settlement deed or agreement document is clear, unambiguous and fully reflects the agreed outcomes.

47. Sometimes parties will be unable to execute an enforceable agreement at the ADR process. In such circumstances a 'Heads of Agreement' should be drafted to record what has been agreed. Such a minute may or may not be enforceable depending on its terms. Accordingly, it is preferable for the parties to indicate whether they intend to be legally bound by the document. Alternatively, parties may wish to reserve the right to be bound only when an enforceable agreement is executed.

48. For the purposes of achieving certainty and finality for the parties, the agreement should take effect on its execution. Some courts and tribunals will have separate rules as to when an agreement becomes enforceable.

What can taxpayers do if their expectations are not met?

49. In accordance with the *Taxpayers' Charter*, it is important for the ATO to meet the standards of service outlined in the Charter and this Practice Statement. The *Legal Services Directions 2005* are a set of binding rules issued by the Attorney-General about the performance of legal work by Commonwealth agencies including their participation in alternative dispute resolution processes. If a taxpayer does not think the ATO has met those standards in an ADR process, the taxpayer has the right to make a complaint.

50. A taxpayer should first try to resolve the matter with the tax officer involved in the ADR process. If still unsatisfied, the taxpayer should talk to the tax officer's manager.

51. If a taxpayer is not satisfied with the way in which the complaint is being handled, the taxpayer may lodge a complaint using an online form which can be accessed on the ATO website.

52. A taxpayer's review and appeal rights will be unaffected by participating in ADR, subject to the terms of any settlement reached and compliance with the legislative timeframes.

APPENDIX A: ATO ROLES AND RESPONSIBILITIES IN AN ADR PROCESS

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

Task	**Responsibility [pre-litigation stage]**	**Responsibility [litigation stage][10]**
Identifying and reviewing ADR opportunities	Business Line (BSL) case officer	BSL in consultation with RDR and/or Tax Counsel Network (TCN)
Providing advice on ADR generally	RDR	RDR
Agreeing to ADR	BSL in consultation with RDR	BSL and/or TCN in consultation with RDR
Approval of expenditure on ADR practitioner	RDR	RDR
Selecting ADR practitioner	BSL and/or TCN with assistance of RDR	BSL and/or TCN in consultation with RDR
Engaging ADR practitioner[11]	RDR or external solicitor	RDR or external solicitor
Agreeing the ADR process used [and if necessary a protocol for the process]	BSL case officer with assistance of RDR and/or TCN as required	RDR with assistance of BSL and/or TCN as required
Preparing for and attending the ADR	At least 2 ATO officers	BSL and at least one other member of the litigation team
Drafting documents at ADR[12]	RDR / external solicitor (if engaged) otherwise BSL case officer	RDR or external solicitor in consultation with BSL and/or TCN
Agreeing terms of an agreement at ADR	BSL delegate[13] in consultation with TCN and/or Debt BSL regarding payment	BSL delegate in consultation with TCN and/or RDR in consultation with Debt BSL regarding payment
Authorising a settlement arising out of ADR	BSL delegate in consultation with TCN or RDR	BSL delegate in consultation with TCN and/or RDR
Ensuring settlement documentation is completed including entering data on case management system	BSL case officer with assistance of RDR and/or TCN as required	RDR case officer
Ensuring the agreement is given effect, including raising any agreed amended assessment/s	BSL case officer	BSL case officer
Completing ADR Register	RDR officer	RDR officer

[10] If a dispute is in litigation all decisions including the decision on whether to settle are made by the RDR business line.
[11] PS LA 2009/9; *Code of settlement practice*
[12] Documents should include a term as to whether they are intended to be admissible in any later proceedings.
[13] If it is not possible for a tax officer with authority to finalise the dispute or conclude a settlement to attend the ADR an authorised person should be available by phone so that an in-principle agreement can be made during the ADR.

APPENDIX B: INDEPENDENT EXPERTS

Engaging independent experts to assist in resolving disputes including valuation issues

54. There will be circumstances where engaging an independent expert will assist in resolving a dispute. The most obvious example of this may involve valuation-related issues. Where it becomes necessary, valuation-related disputes may be resolved where both the ATO and the taxpayer agree to an ADR process where both parties also commit to accepting the outcome of that agreed ADR process. Part of that ADR process may involve the parties jointly engaging an independent valuer. In appropriate cases, the ATO can agree to the appointment of a third party expert and the ATO may in fact nominate the third party expert(s) in the course of agreeing an acceptable ADR process.

55. As part of agreeing an ADR process involving independent experts, best practice indicates that the parties should also agree on acceptable aspects of the appointment(s) which may include, amongst other things, reference to:

- the agreed independent expert to be retained
- the requirements of the appointment
- the issues for expert consideration
- any agreed assumptions that will be made by the expert, or
- a joint commitment to accept the outcome of the process.

56. Both parties need to agree the elements of the ADR process and commit to the outcome of that process, as soon as possible, having regard to the issues in dispute.

Expert valuer conferencing

57. In disputes involving valuation-related matters, where both parties agree, the dispute may be resolved by each of the valuers meeting to discuss how their valuations were ascertained, that is, valuer conferencing.

58. The purpose of a valuer conference should be for the experts to explain the information and assumptions used in the methodology and the methodology that both parties have adopted. Even if the valuer conference does not result in agreement between the parties, the ATO personnel should ensure that the valuer conference results in establishing points of agreement and the areas that remain in dispute.

59. The points of agreement and issues remaining in dispute should be clearly documented and agreed together with any agreed processes or next steps which may lead to an early resolution of the dispute.

Referring valuation disputes to an ADR practitioner

60. Where valuer conferencing fails to resolve the dispute, it may still be appropriate for the dispute to be referred to an ADR practitioner in appropriate cases. However, there will be circumstances where the taxpayer considers that ADR would be appropriate, but the ATO disagrees.

61. Where this occurs, then the ATO's decision to not participate in ADR must be reviewed and approved by a senior executive service officer who has had no involvement in the dispute. After fully considering the request, this officer must communicate the outcome of the review, and the reasons to the taxpayer.

Subject references	Alternative Dispute Resolution ADR Litigation Settlement
Legislative references	Civil Dispute Resolution Act 2011 Financial Management and Accountability Act 1997 44
Related public rulings	
Related practice statements	PS LA 2003/3 Precedential ATO view PS LA 2007/5 Settlements PS LA 2007/6 Guidelines for settlement of widely-based tax disputes PS LA 2009/9 Conduct of ATO Litigation and engagement of Legal Service Branch
Case references	Aiton Australia Pty Ltd v. Transfield Pty Ltd [1999] NSWSC 996 [156] Capolingua v. Phylum Pty Ltd (as Trustee for the Gennoe Family Trust and Ors) (1991) 5 WAR 137
Other references	Taxpayers' charter – if you're subject to review or audit Disputes policy Dispute management plan Code of settlement ATO plain English guide to alternative dispute resolution Legal Services Directions 2005 Alternative dispute resolution (Attorney-General's Department)
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