# *PS LA 2007/16 (Withdrawn) - Risk management in litigation*

This cover sheet is provided for information only. It does not form part of *PS LA 2007/16 (Withdrawn) - Risk management in litigation*

This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9

This document has changed over time. This version was published on *20 November 2009*

Australian Government
Australian Taxation Office

# Practice Statement Law Administration

## PS LA 2007/16

This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9.

**FOI status: may be released**

*This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by Tax Office staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs Tax office staff must follow their business line's escalation process.*

**SUBJECT:** **Risk management in litigation**

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

**TABLE OF CONTENTS** **Paragraph**


| | |
|---|---|
| **STATEMENT** | **1** |
| Related practice statements | 6 |
| A. Identified risks in litigation | 7 |
| *Determining the level of litigation risk* | 13 |
| *Legal risks* | 18 |
| *Revenue risks* | 25 |
| *Operational risks* | 32 |
| *Compliance risks* | 35 |
| *Reputational risks* | 36 |
| B. Risk treatments | 37 |
| *Risk reduction* | 37 |
| *Reduce or eliminate risk through settlement* | 39 |
| *Risk retention* | 41 |
| *Risk management* | 44 |
| *(a) Review of risks in the course of litigation* | 48 |
| *Call-overs* | 49 |
| *Strategic Internal Litigation Committees* | 53 |
| *(b) Risk mitigation strategies* | 54 |
| *Legal risks* | 62 |
| *Part IVC litigation* | 62 |
| *Non-Part IVC litigation* | 69 |
| *Revenue risks* | 74 |

*Compliance risks* 79
*Reputational risks* 83

## STATEMENT

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

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

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

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

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

### Related practice statements

6. Related practice statements are:

   - PS CM 2003/02 Risk and Issues Management
   - PS LA 2003/10 Management of 'Priority Technical Issues'
   - PS LA 2005/22 Litigation and Priority Technical Issues
   - PS LA 2007/2 Management of Court and Tribunal Decisions
   - PS LA 2007/12 Conduct of Tax Office Litigation in Courts and Tribunals
   - PS LA 2007/17 Tax technical litigation in the Administrative Appeals Tribunal
   - PS LA 2007/18 Tax technical litigation in Federal Court matters, and
   - PS LA 2007/19 Tax technical litigation in High Court matters.

### A. Identified risks in litigation

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

8. If the taxpayer commences the proceeding, such as in tax technical litigation via Part IVC of the *Taxation Administration Act 1953*, risk assessment occurs as part of the initial SILC process to determine the litigation strategy. The SILC process has a number of critical decision making points, and the litigation risk should be reconsidered at each of those points to ensure that appropriate strategies are in place to meet the potential consequences of any changed risk profile. The SILC process also recommends whether the technical issue involved in the litigation should be managed through the PTI process.

9. If the Commissioner commences proceedings (for instance debt recovery proceedings) risk assessment occurs initially as part of the case selection process and then again in initiating the litigation process. Risk assessment in debt cases for example is covered by chapter 3 of the ATO Receivables Policy. If the taxpayer files a defence, the litigation risk needs to be reassessed. In debt matters this occurs through the debt litigation call-over process. The call-over process also recommends whether the risk is sufficient to be documented in a proposal and escalated as a PTI.

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

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

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

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

### *Determining the level of litigation risk*

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

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

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

16. Litigation should be risk assessed using the ATO Risk Matrix.[1]

[1] See PS LA 2003/10 The Management of ‘Priority Technical Issues’; and PS LA 2005/22 Litigation and PTIs

17. The Strategic Risk Register records the Tax Office's highest priority risks – that is, those rated as 'high' or 'severe'. The register is used as the basis for monitoring risk status at a corporate level; reporting to the ATO Executive, sub-plan executives and external stakeholders; and provides an up to date reference point for management and staff to check the status of risks and their mitigation as needed. The relevant Assistant Commissioner, Risk and Intelligence, is responsible for ensuring that adequate support is available to ensure that Sub-plan Risk Co-ordinators are able to maintain the register in a fit state at all times.

### *Legal risks*

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

19. As litigation provides law clarification and is an avenue for expressing and testing our views of the law to courts and tribunals, legal risk management is usually most appropriately dealt with through the PTI process.[2]

20. PTIs are those technical issues of an interpretive nature which have been determined as a 'priority' because of their association with higher level risks.

21. There are two possible scenarios in which PTI litigation can arise:

    (a) where the litigation is an anticipated and integral part of a strategy to address a particular risk associated with an established PTI – for example, where there are competing arguable positions in relation to a technical issue, litigation may be one of the strategies used to resolve the issue, or

    (b) where the possible consequences of a court or tribunal decision (adverse or favourable to the Commissioner) are assessed as giving rise to a level of risk that needs to be strategically managed and the technical issue underlying that risk is either linked to an existing PTI or is escalated and approved as a PTI in its own right.

22. The PTI process is set out in PS LA 2003/10 and PS LA 2005/22 and typically that process involves:

    - the priority of the issue being determined and agreed jointly by a Senior Executive Service officer in the business line and either a Deputy Chief Tax Counsel (DCTC) or Centre of Expertise (CoE) manager (depending on whether the matter requires a precedential ATO view
    - prioritisation based on risk assessment
    - each PTI having a Risk Owner and a PTI Owner (the TCN or CoE officer allocated to resolve the technical issue)

[2] See PS LA 2003/10 and PS LA 2005/22.

- a project management approach to business line management of the underlying risk and the Law Sub-plan management of the PTI resolution
- a cross-market/cross-revenue approach
- collaboration – stakeholders are identified and involved
- PTIs being actively managed using project management methodologies and all relevant information maintained on the PTI Register, and
- business line escalation processes in place to refer technical issues to CoEs for the establishment of a precedential ATO view where the issue is not a priority and to be dealt with as business as usual.

23. In terms of litigation risks, if it appears likely that appeals will follow the outcome of a court or tribunal decision, mitigation strategies should be identified in line with the processes set out in PS LA 2007/2 Management of Decisions of Courts and Tribunals.

24. Risks in terms of poor representation, preparation, or inadequate evidence should be avoided by appropriate team based approaches in litigation, such as use of SILCs and case call-overs, as well as through the application of procedures developed to ensure best practices in courts and tribunals.[3] Where the risks cannot be avoided, the case and issue is to be escalated either through the call-over process or the PTI process.

### *Revenue risks*

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

26. Revenue risks in litigation can be monitored at the organisational level of total disputed debt, or total tax in dispute in tax technical litigation. Overall trends in these areas may be indicative of systemic changes in taxpayer behaviour, or changes in Tax Office administrative practices. Revenue risks are usually monitored at the individual case level or at the issue level, where groups of cases carry like issues.[4] The level of revenue at risk in a particular case may highlight a reason to escalate the issue as a PTI, for example if the amount in dispute is large. Where the amount in dispute is small, it may suggest that careful consideration should be given to whether the case is suitable for settlement.

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

28. The tax revenue directly at risk in any particular tax matter is generally easily assessed by reference to the value of the assessments or transaction in dispute. The actual expected costs of litigation should also be factored into the anticipated costs. In some instances the costs of litigation may be greater than the tax revenue. The Legal Services Branch (LSB) officer and our

[3] See PS LA 2007/17 Tax technical litigation in the Administrative Appeals Tribunal, PS LA 2007/18 Tax technical litigation in Federal Court matters and PS LA 2007/19 Tax technical litigation in High Court matters.

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

external solicitor, if involved, should be able to provide a best estimate of the anticipated litigation costs.

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

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

31. Revenue risk is to be recorded in relevant Tax Office databases, such as the PTI Register (for example in the Risk Summary field) and for individual cases on the SILC, case call-over, and Significant Litigation templates, as necessary.

### *Operational risks*

32. Operational risks have been described as 'the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events'.[5]

33. The risks to be identified under this heading are diverse, including the capability and availability of the individuals involved in the litigation team to carry out their duties competently, and the capabilities of internal and external systems to support the litigation in unusual and unforseen circumstances. Operational risks can be as obscure as bad weather stopping a key witness from attending court.

34. Operational risks in litigation are more specifically dealt with under the headings of legal and compliance risks.

### *Compliance risks*

35. Compliance risk is an acknowledgment that a number of key factors can influence taxpayer behaviour in complying with the law. It is the current and prospective risk to revenue arising from community non-conformance with laws, regulations, precedential ATO views (such as public rulings), or standards of conduct normally expected of the community. Compliance risk also arises in situations where the law or ATO view expressed in precedential products may be ambiguous or untested. In this sense compliance risk is closely aligned with legal risk. The risk exposes the Commonwealth to loss of revenue. A case in litigation that potentially exposes a defect in the law can have widespread consequences for compliance by the community and confidence in the system.

### *Reputational risks*

36. Reputational risk refers to the negative experiences or perceptions that may arise during or as a result of litigation that may affect the Tax Office's standing with government, the judiciary, other departments, our external advisers, or the community.

---

[5] 'International Convergence of Capital Measurement and Capital Standards', Basel Committee on Banking Supervision (2004).

## B. Risk treatments

### *Risk reduction*

37. Having appropriate governance measures in all aspects of the Tax Office's business in the collection of Commonwealth revenue, as an employer and in commercial dealings reduces the risks of litigation itself and the risks that may flow from litigation. The following measures aim to reduce the risks to the Commissioner:

    - clearly established and comprehensive delegations and authorisations for all staff in the performance of duties, statutory functions and spending of money
    - responsibility for risk oversight and management attributed in our corporate governance framework across the Tax Office. Appropriate planning in each sub-plan of the office cover business outcomes, risk identification, performance objectives and reporting and financial controls
    - budgets and reporting systems across the business lines of the Tax Office enabling the evaluation of trends and identification of emerging or increased risks. Escalation processes are a part of these reporting systems
    - Tax Office values and behaviours as relevantly summarised in PS LA 2007/12 Conduct of Tax Office Litigation in Courts and Tribunals ensure transparency, consistency and fairness in our dealings and protect the interests of government and the community, and
    - clearly established views of the law through precedential decisions and a credible public rulings system accessible to the community, provide certainty about the Tax Office's view of the law, as well as confidence in the system due to the knowledge that treatment of all taxpayers is fair and consistent.

38. The SILC process is an avenue for regular review of the risks associated with litigation. These meetings and the biannual strategic litigation call-overs ensure that mitigation strategies can be created incrementally and at the earliest time. This has proven to reduce the severity of risks.[6]

### *Reduce or eliminate risk through settlement*

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

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

40. These considerations need to be assessed as objectively as possible. As a general rule the Tax Office will not compromise, nor make concessions where its view of the law on a particular issue is established.

[6] See PS LA 2005/22.

### *Risk retention*

41. Risks do not need to be entirely eliminated. As with any aspect of Tax Office business, risks are an inevitable part of the litigation process. Risks may be identified and quantified and recognition given that adverse outcomes are possible and may not be capable of being avoided or mitigated. A decision of a court or tribunal disclosing a defect in the law may have significant retrospective revenue consequences.

42. The cost of litigation will sometimes heavily outweigh the revenue or claim at stake in a particular matter however, the cost may be justified in the interests of law clarification and in ensuring that taxpayers are treated consistently and fairly.

43. Although some risk is retained in all litigation pursued, the consequences of the risk can usually be managed or mitigated, if identified.

### *Risk management*

44. In all areas of Tax Office business including litigation, officers need to ensure that the Tax Office has identified the highest risk exposures and has taken steps to properly manage these (as well as managing or monitoring other lower risks to make sure they do not get worse).

45. The environment for management of risk is enhanced by clearly defined management roles and responsibilities in the conduct of litigation.[7]

46. In taxation disputes the business lines have the primary role of ensuring compliance with the laws for their taxpayer client base. Business lines have the primary role of identifying the risks associated with a case and managing those risks, and where possible mitigating the adverse consequences of the risks.

47. Identified risks are rated according to the consequences if they were to eventuate, and the likelihood of their occurrence. It is therefore important to make sure that:

    - there are formal processes in place to analyse risks
    - there are either standard or tailored risk treatments, which may range from periodic monitoring by the executive, through to large-scale strategies as appropriate to the level of risk, and
    - processes are in place to regularly monitor at the Senior Executive level high to severe risks and the proposed mitigation strategy.

### *(a) Review of risks in the course of litigation*

48. An important aspect of risk management is regular review to ensure that risk assessments remain constant. Two key strategies undertaken in LSB which support the business line role as risk owners are call-overs and SILCs.

[7] See PS LA 2007/12.

*Call-overs*

49. All new Part IVC appeals are considered within the LSB call-over process. These call-overs are convened by the local LSB business manager and attended, where possible, by one or more of the relevant Senior Tax Counsel (Strategic Litigation) and/or the Part IVC Litigation Stream leader. The purpose of these call-overs is to monitor the progress of new and existing cases, and to identify and manage emerging risks.

50. By considering the risks arising from the litigation of a matter, the Senior Tax Counsel (Strategic Litigation) may, after subsequent consultation with the relevant DCTC, request the business line involved to prepare a PTI proposal and to escalate the issue according to the procedures set out in PS LA 2003/10 and PS LA 2005/22, if that process has not already been commenced. Once the business line risk owner and DCTC have agreed that the technical issue is a priority 1, 2 or 3, an appropriate Tax Counsel Network officer will be allocated.

51. All PTI litigation, as well as other cases considered by the relevant LSB business manager to require closer examination, will be reviewed more thoroughly at the Strategic Litigation call-overs, held every six months at every LSB site nationally. They are normally attended by the LSB officer, Tax Counsel and business line representatives. The technical issues in these cases are often discussed in some detail. The call-over panel includes one or more of the three Senior Tax Counsel (Strategic Litigation), the Part IVC Stream leader and the relevant LSB business manager.

52. Separate strategic call-overs are usually conducted on mass marketed scheme/aggressive tax planning cases and debt litigation.

*Strategic Internal Litigation Committees*

53. A SILC is convened at every critical stage of Part IVC and other strategically important litigation by LSB officers managing the litigation.[8] The consensus group for SILCs will include the LSB case officer and the business line case officer. Other attendees invited to participate in the SILC will vary depending on the business line involved and the strategic importance of the issues involved, but are likely to include any Tax Counsel assisting in the case and relevant officers from the business line and Centres of Expertise. The first SILC is held within two weeks of the commencement of litigation, and subsequent SILCs are mandated at each critical stage of the litigation. Each of these SILCs has a particular purpose in managing the litigation itself, evaluating emerging risks and developing mitigation strategies for the possible consequences of a court or tribunal decision.

### *(b) Risk mitigation strategies*

54. Through the course of litigation, particularly before and after the hearing, the litigation team[9] needs to consider the mitigation strategy in relation to the case. This will vary from one case to another, however, at the very least consideration should be given to who will be taking responsibility for advising

[8] The SILC process is a formal mechanism for ensuring collaboration between the LSB and the business line. A SILC is a meeting of the stakeholders involved in a litigation case and in addition to the LSB litigation officer and the business line case officer will include other participants depending on the issue and the significance and complexity of the case.

[9] 'Litigation team' will include the LSB case officer and the business line case officer and may also include Tax Counsel, a Centre of Expertise representative, a solicitor (Australian Government Solicitor or a Panel Firm) and external counsel.

the key people in the organisation and externals about the consequences of the decision once it is handed down.

55. Two key elements of the mitigation strategy in terms of strategic litigation are the consideration of the consequences of the litigation on the legislation and any media strategy that needs to be put in place. In terms of the legislative consequences, consideration should be given to an early relationship with Treasury who will monitor the litigation and prepare for the potential consequences of a decision that is contrary to the underlying policy of the legislation.[10]

56. PS LA 2003/10 describes the primary obligations of the PTI Owners and includes anticipating downstream or consequential impacts and ensuring that they are addressed in the strategy to resolve the technical issue, for example, any necessary changes to public rulings and/or ATO Interpretative Decisions, or to the law.

57. PS LA 2007/12 sets out the requirements for SILCs to be undertaken during the course of litigation. These are designed to ensure that risks are identified and managed throughout the course of litigation and after it is completed. At the initial stages consideration will be given to who needs to be on the litigation team.

58. SILCs also ensure that internal Tax Office processes and procedures should be followed. This, in part, is to ensure decisions (for example, settlement) and issues (for example, technical view/line of argument) are made or addressed by the appropriate person.

59. The litigation risks should be reconsidered at these points, covering various aspects of the case.

60. Following completion of a litigation case, a review should be undertaken as part of a SILC that examines the conduct of the litigation. The strengths and weaknesses in Tax Office practices and procedures should be considered and fed back to the original decision makers through the SILC process with the business lines.

61. The impacts of the decision should be considered in line with PS LA 2007/2 Management of Decisions of Courts and Tribunals.

### *Legal risks*

*Part IVC litigation*[11]

62. Legal risks in cases which involve tax technical issues are primarily managed through the PTI process.[12]

63. Due to the inherent legal risks arising from litigation, all litigation arising in the Administrative Appeals Tribunal, the Federal Court, High Court and State and Territory Supreme Courts and Courts of Appeal are risk assessed to determine whether or not the litigation gives rise to a PTI. Generally, litigation that involves a factual dispute will not give rise to a PTI. Business lines, with the assistance of LSB are required to risk assess all Part IVC litigation. An analysis of risk by the business line, together with the preparation of a PTI

[10] See PS LA 1998/3 Significant litigation matters, concerning communication to Government about strategically important litigation matters.

[11] Part IVC of the *Taxation Administration Act 1953* allows for the review of the Commissioner's decision on an objection against an assessment or a private ruling, an appeal to a court from an objection decision or a subsequent appeal from the Administrative Appeals Tribunal or Federal Court.

[12] See PS LA 2003/10 and PS LA 2005/22.

proposal, will ensure that, if required, the relevant Deputy Chief Tax Counsel can allocate a Tax Counsel Network officer at the earliest possible time.

64. Unexpected challenges can also arise in the course of litigation to well established Tax Office positions as well as to core tax principles not previously identified under the present PTI process. In these circumstances, escalation as a potential PTI is required to ensure that TCN and/or CoE resources are added to the litigation team.

65. A challenge to an ATO view is as important as the earlier resolution of the ATO view on that issue.

66. The business line 'risk owner' is responsible for the risk assessment of the underlying issue and the preparation of PTI proposals. At the preliminary SILC, the business line representative and the LSB officer will discuss the management of any new appeal and the LSB officer will provide assistance, if required, for the business line to risk assess the underlying issues of the case to determine whether the issues warrant the preparation of a PTI proposal. In this circumstance, it is appropriate that the SILC should make a recommendation to the risk owner as to the PTI priority level (priority 1, 2 or 3) of the PTI.

67. The PTI proposal, with a clear strategy and project plan, including a mitigation strategy in the event of a loss, will be prepared by the business line. Where guidance is needed in relation to risks associated with the litigation, LSB will provide assistance and advice to the business line. Once the proposal is approved by the Senior Executive Service risk owner, it is forwarded to the relevant Deputy Chief Tax Counsel.

68. It is recognised that any strategy or project plan prepared in the course of litigation will evolve as circumstances change that may affect the strategy. Circumstances that may cause the case plan to be reconsidered include unexpected actions taken by the taxpayer, new evidence, court directions and timetables, and decisions from other cases.

*Non-Part IVC litigation*

69. Business line risk owners, with the assistance of LSB, where appropriate, are required to risk assess all litigation commenced in the Supreme, Federal and High Courts. PTI proposals should be prepared for non-Part IVC litigation such as litigation under the *Administrative Decisions (Judicial Review) Act 1977* and under section 39B of the *Judiciary Act 1903*, unless the underlying issues are purely factual, or involve a review of an administrative decision where no technical issues are likely to flow from the decision.

70. Other litigation in tribunals or lower State and Territory courts may warrant escalation, depending on the level of risk associated with the particular case.

71. In view of the high volume and factual nature of litigation arising in debt, lodgment, registration, and in house prosecutions, formal risk assessment is only conducted on those cases where complex or unique features exist.[13] Where risk assessment is warranted, the relevant business line staff and the LSB officer, if involved, will collaboratively risk assess the litigation and then determine whether a PTI proposal should be prepared.

[13] Examples of factors to consider in the risk assessment process can be found in Attachment A of PS LA 2005/22 Litigation and Priority Technical Issues.

72. In all other non-Part IVC litigation identified as having underlying issues that may be a potential PTI, LSB officers should work with business line staff to identify and rate the underlying risk, determine a recommended PTI priority and clarify responsibility for dealing with related issues (for example, handling media queries, dealing with clients and their advisers, quantifying revenue exposure and so on). Responsibility for these latter tasks will usually rest with the business line risk owner.

73. Prior to the commencement of any litigation process, as part of the risk assessment undertaken by the business line, consideration should be given to whether or not external counsel should be engaged to give advice at the dispute or reviewable decision stage, and this should then be discussed with LSB.

### *Revenue risks*

74. At the commencement of litigation, the amount of revenue at risk needs to be determined.

75. High to extreme risk litigation should be subject to rigorous mitigation strategies in the course of litigation. These cases should be called over regularly and where necessary details reported to the Debt business line as well as the ATO Executive by the relevant Assistant Commissioner, Litigation.

76. In circumstances where the cost of litigation well exceeds the revenue at stake, consideration should be given to the Code of Settlement Practice which provides guidelines on the settlement of taxation disputes in relation to all taxpayers. It provides guidance as to the situations in which settlement could be considered and outlines the processes which should be followed. It highlights that settlement may be an appropriate way to resolve a matter if the cost of litigating (including internal Tax Office costs) is out of proportion to the possible benefits, having regard to the prospects of success (including collection of the tax), and likely award of costs, assessed as objectively as possible.

77. In debt litigation, the ATO Receivables Policy identifies the circumstances in which staff should obtain advice prior to commencing legal proceedings in terms of not only general risk strategies but also the risks of legal proceedings such as Mareva injunctions[14].

78. If a debt is determined to be irrecoverable at law or uneconomic to pursue then it can be written off in accordance with the *Financial Management and Accountability Act 1997*. This 'cost benefit analysis' is undertaken when debt litigation is commenced. However, this might not be appropriate where there is an overriding public interest reason to pursue the litigation despite the fact that the cost of litigation will exceed the likely recovery. For instance this may occur where it is necessary to pursue insolvency proceedings to prevent further escalation of a debt and/or to appoint an insolvency practitioner to investigate disposal of assets which were designed to defeat creditors.

### *Compliance risks*

79. Litigation can resolve some of the factors that influence taxpayer behaviour. In this sense, compliance risk can be identified as both an opportunity and a

[14] A 'Mareva injunction' is a form of injunction that is used to restrain a defendant or their agents from removing assets from the jurisdiction, or otherwise disposing of or dealing with those assets pending further orders by the court (usually until judgment is obtained against the defendant). The purpose of a Mareva injunction is to prevent the defendant from disposing of assets which would otherwise frustrate the enforcement of judgment subsequently obtained by a plaintiff.

threat. The finality that comes from a judicial decision will provide ultimate certainty about the meaning of the law. A real risk not often considered during litigation is the risk of failing to seize law clarification opportunities. Ensuring that a case is well run and all of the necessary issues are ventilated will aid in providing greater certainty about the law for the community.

80. On receipt of a litigation matter (in addition to the formal requirements) the background to the litigation and the process/actions followed by the original decision maker should be subject to review. Any concerns regarding the pre-litigation action or an assessment made that the case involves broader issues should be raised with the relevant technical area. Engagement of the relevant Tax Office staff is essential at the early stages of the litigation process.

81. Assessments of the broader impact of the litigation should be made (for example, covering internal processes and procedures, Tax Office policy, legislative deficiencies) and development of an appropriate action strategy should be made on a regular on-going basis. This should be incorporated as part of the 'Risk Mitigation Strategy'.

82. The requirement to obtain additional internal technical expertise (for example, Tax Counsel Network or Centres of Expertise) should also be considered. This may involve escalation of the issue(s) subject to litigation as a PTI (see PS LA 2005/22 and PS LA 2003/10).

### *Reputational risks*

83. Managing the Tax Office's reputation requires efficient communication and long-term solid relationships inside and outside of the Office. When the Tax Office has a high reputation with government and the community, the potential benefits that follow include:

- greater confidence in the tax system
- trust in the Tax Office's publicly stated views of the law
- reduced threats of dispute and litigation
- reduced public and government scrutiny, and
- greater latitude when inadvertent errors are made.

84. With increased media scrutiny, the Tax Office enhances its reputation through having greater transparency in all of our dealings, including interaction with our stakeholders at every opportunity. Our actions and conduct must be consistent with our values. From our employment practices, our relationships with contractors, to our administration of the tax system and delivering to government, our conduct should constantly aspire to be best practice.

85. In litigation the Tax Office strives to be a model litigant. Our obligations in this regard are set out in PS LA 2007/12. The standards set out in the Attorney-General's Legal Services Directions 2005, which we adhere to in the course of litigation, are communicated to our legal advisers and taxpayers.

86. We need to maintain strong relationships with the courts and tribunals either through direct liaison or through our external solicitors.

87. The business lines are primarily responsible for escalating issues that may be a severe risk to our reputation during the course of litigation to the ATO Executive.

88. LSB has a primary responsibility to ensure that litigation is conducted by the Commissioner consistently with our standards of conduct as summarised in

PS LA 2007/12. LSB will ensure that the Tax Office self-reports to the Office of Legal Services Coordination in the Attorney-General's department when breaches or possible breaches of the Legal Services Directions 2005 occur.

89. Media issues are to be managed in line with the Tax Office's media policy. This enables the Tax Office to maximise opportunities to ensure accurate reporting to the community, while minimising the risks inherent in media exposure. We need to provide a professional level of service to the media. Positive media exposure can significantly enhance our ability to meet corporate objectives such as increasing compliance levels and maintaining the community's confidence in our operations.

90. The media policy and protocol exist to maintain the consistency of Tax Office communications. Any media interest in any case that is before the courts must be dealt with carefully and should be managed between the media unit and the relevant Senior Tax Counsel (Strategic Litigation).

| | |
|---|---|
| Subject references | Risk management<br>Priority Technical Issues |
| Legislative references | AD(JR) Act 1977<br>Financial Management and Accountability Act 1997<br>Judiciary Act 1903 39B<br>TAA 1953 Pt IVC |
| Related public rulings | |
| Related practice statements | PS LA 1998/1; PS LA 1998/3; PS LA 2003/10; PS LA 2005/22; PS LA 2007/2; PS LA 2007/7; PS LA 2007/12; PS LA 2007/15; PS LA 2007/17; PS LA 2007/18; PS LA 2007/19;<br>PS CM 2003/02 (G) |
| Case references | |
| Other references | Code of Settlement practice; ATO risk matrix<br>*ATO Receivables Policy*<br>*ATO Receivables Policy* (link available internally only) |
| File references | 07/11457 |
| Date issued | 25 July 2007 |
| Date of effect | 25 July 2007 |
| Other Business Lines consulted | All |
| Amendment history | 11 September 2008<br>Para's 9, 77 & "Related practice statements" – references to PS LA 2006/11 removed<br>Link to the policy added to "Other references" |