# *PS LA 2007/18 (Withdrawn) - Tax technical litigation in Federal Court matters*

This cover sheet is provided for information only. It does not form part of *PS LA 2007/18 (Withdrawn) - Tax technical litigation in Federal Court matters*

This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9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 2007/18

This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9.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:** **Tax technical litigation in Federal Court matters**

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

**Table of contents** **Paragraph**


| | |
|---|---|
| **STATEMENT** | **1** |
| I. Glossary | 10 |
| II. General obligations | 11 |
| *Caution about coercive powers* | 13 |
| III. Types of Federal Court matters | 14 |
| *A. Direct appeals to the Federal Court* | 15 |
| *B. Appeal to the Federal Court from the Tribunal* | 17 |
| *C. Question of law referred by the Tribunal* | 30 |
| *D. Decisions reviewed under the ADJR Act* | 37 |
| *E. Section 39B of the Judiciary Act* | 48 |
| IV. Usual process for direct appeals to the Federal Court | 54 |
| *Initial steps upon receipt of taxpayer's appeal* | 57 |
| *Filing and record keeping* | 61 |
| *Strategic Internal Litigation Committee (SILC)* | 65 |
| *Instruction SILC* | 69 |
| *Engaging external legal providers* | 71 |
| *Conferences with counsel* | 75 |

*Prepare documents to be filed* 79
*Prepare appeal statement or appeal affidavit* 82
*Directions hearings* 88
*Interlocutory proceedings* 93
*Discovery* 96
*Interrogatories* 106
*Particulars* 107
*Subpoenas* 110
*Affidavits* 114
*Submissions* 119
*List of authorities and legislation* 120
*Hearing* 121
*Decision handed down* 124
*Settlement* 126
V. The Full Federal Court 130

**STATEMENT**

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

2. Law Administration Practice Statements PS LA 2007/17 and PS LA 2007/19 provide guidance for officers involved in legal proceedings in the Administrative Appeals Tribunal and the High Court.

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

4. Those involved in Federal Court litigation include LSB officers and officers from the Tax Counsel Network (referred to as Tax Counsel), the respective business line (BSL) officers, Centres of Expertise, and external legal service providers, including counsel. It is of vital importance that all of these parties communicate effectively and work collaboratively in order to ensure that the Commissioner adheres to all of the laws, policies and guidelines with which the Commissioner must comply as a model litigant in the Federal Court.

[1] This includes reviewable decisions under section 334 of the *Superannuation Industry (Supervision) Act 1993.*

5. The roles of each of the areas involved in litigation are set out in PS LA 2007/12 Conduct of Tax Office Litigation in Courts and Tribunals. Importantly, LSB has a responsibility to manage the litigation process and to ensure that, as a litigant, the Commissioner acts in accordance with all relevant internal and external policies and guidelines. Tax Counsel and the Centres of Expertise, where involved, have an important role in ensuring that the ATO view is maintained in the way the case is prepared for the court. The business lines retain risk ownership of the case.

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

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

7. References in this practice statement to various Federal Court Orders and statutory provisions are general guides only. Officers relying on the statements made should refer to the actual rules and provisions for the full detail and to ensure that the references are current.

8. This practice statement should be read in conjunction with the following:

- PS LA 2005/22 Litigation and priority technical issues
- PS LA 2007/2 Management of Decisions of Courts and Tribunals
- PS LA 2007/5 Settlements
- PS LA 2007/12 Conduct of Tax Office Litigation in Court and Tribunals
- PS LA 2007/15 Briefing Counsel, and
- PS LA 2007/16 Risk Management in litigation.

9. This practice statement is structured under five broad categories:

(i) Glossary (paragraph 10)

(ii) General Obligations (paragraphs 11-13)

(iii) Types of Federal Court matters:

(a) direct appeals to the Federal Court (paragraphs 15-16)

(b) appeal to the Federal Court from the Tribunal (paragraphs 17-29)

(c) a question of law referred by the Tribunal (paragraphs 30-36)

(d) decisions reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (paragraphs 37-47)

(e) section 39B of the *Judiciary Act 1903* (paragraphs 48-53)

(iv) Usual process for direct appeals (paragraphs 54-129)

(v) The Full Federal Court (paragraphs 130-136).

## I. Glossary

10. For the purposes of this practice statement the following terms are defined:

***AAT Act*** – *Administrative Appeals Tribunal Act 1975*.

***ADJR Act*** – *Administrative Decisions (Judicial Review) Act 1977*.

***Affidavit*** – A written statement in the name of a person, called the deponent, by whom it is voluntarily signed and sworn to or affirmed. It is expected to be tendered in evidence in the proceedings.

***AGS*** – Australian Government Solicitor.

***ATO view*** – The ATO view is the settled ATO view of the law in relation to a particular interpretative issue that has been determined by an officer in either the Tax Counsel Network or the relevant Centre of Expertise. See PS LA 2003/3 Precedential ATO view.

***BSL*** – Business and/or Service Line of the Tax Office.

***Decision Summary*** – This is a summary of the case prepared by the LSB case officer at the conclusion of the case. It is set out in a standard template and circulated within the Tax Office for reference purposes.

***CoE*** – Centre of Expertise of the Tax Office. The role of the CoE is to determine the ATO view on a technical matter where there is no precedent in place. There are various CoEs within the Tax Office, each with responsibility for a different area of tax technical expertise.

***Discovery*** – This is an order made by a Court by which one of the parties to the proceedings requests disclosure of documents by another party. The party against whom a discovery order is made must file and serve a list of documents that are required to be disclosed and an affidavit verifying the list. Subject to any successful claim for privilege, these documents must be disclosed.

***FCA*** – *Federal Court of Australia Act 1976*.

***FCR*** – Federal Court Rules made pursuant to the FCA.

***Interlocutory proceedings*** – proceedings normally relating to practice and procedure that arise during litigation prior to the substantive issues being determined. Interlocutory motions include steps taken for the purpose of assisting either party in the prosecution of their case; or of protecting or otherwise dealing with the subject matter of the action, or of executing the judgment when obtained.

***Interrogatories*** – Written questions asked with leave of the court by way of a notice which is filed and served by one party to a proceeding to another which relate to any matter in question between the parties. The party upon whom the interrogatories are served must answer the questions under oath.

***Judiciary Act*** – *Judiciary Act 1903*.

***LSB*** – Legal Services Branch of the Tax Office.

***Mandamus*** – This is a writ to secure performance of a public duty imposed on a public official. The relief will, ordinarily, be to compel the making of a decision where there is a legislative duty to make a decision.

***OLSC*** – Office of Legal Services Coordination of the Attorney-General's Department.

***Particulars*** – The details of the claim or the defence in an action which are necessary in order to enable the other side to know what case they have to meet.

***PTI*** – Priority Technical Issue. A PTI is a technical issue which has been ranked as a priority 1, 2 or 3 in accordance with PS LA 2003/10 Management of 'priority technical issues'. As an 'issues' based system, there may be several cases which could be associated with a single PTI entry. The responsibility for escalation of a PTI is with the BSL but once a matter is in litigation, LSB has a role to ensure that issues arising in the litigation are appropriately considered by the BSL and escalated. Once accepted as a PTI, appropriate resources such as Tax Counsel and/or CoE will be allocated to assist in the resolution of the issue. See PS LA 2003/10 Management of 'Priority Technical Issues' and PS LA 2005/22 Litigation and Priority Technical Issues.

***SILC*** – Strategic Internal Litigation Committee. A SILC is a meeting or phone hook-up organised within the Tax Office of the staff involved in the litigation to enable decisions to be made at important stages of the litigation process. SILCs normally include, as a minimum, the LSB officer, the BSL representative and where applicable, the Tax Counsel.

***Subpoena*** – This is an order of the Court in writing requiring the addressee to attend to give evidence or to produce the subpoena or a copy of it and a document or thing. See Order 27, rule 1 of the FCR.

***TAA*** – *Taxation Administration Act 1953*.

***TCN*** – Tax Counsel Network of the Tax Office

***Tribunal*** – Administrative Appeals Tribunal.

## II. General obligations

11. The Tax Office conducts and manages its litigation in accordance with its obligations under the law, the Attorney-General's Legal Services Directions 2005, relevant Court and Tribunal rules and directions, and other relevant internal and external policies and guidelines.

12. The Model Litigant Guidelines in Appendix B of the Legal Services Directions 2005 require that the Commissioner and the external legal providers that represent the Commissioner act honestly and fairly in handling claims. All those involved in litigation on behalf of the Commissioner must be aware of and adhere to the specific obligations set out in the Model Litigant Guidelines and ensure that all external legal providers are made aware of and act in accordance with them. Further details on the conduct of the Commissioner before the courts can be found in PS LA 2007/12 Conduct of Tax Office Litigation in Courts and Tribunals.

### *Caution about coercive powers*

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

## III. Types of Federal Court matters

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

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

    (ii) a taxpayer or the Commissioner may appeal to the Federal Court, on a question of law, from a decision of the Tribunal in accordance with section 44 of the AAT Act

    (iii) the Tribunal may refer a question of law arising in a proceeding before the Tribunal to the Federal Court for decision in accordance with section 45 of the AAT Act

    (iv) a taxpayer may apply to have a decision of the Commissioner reviewed by the Federal Court in accordance with section 5 of the ADJR Act

    (v) a taxpayer or the Commissioner may seek an injunction, a declaration or some other kind of relief in accordance with section 39B of the Judiciary Act, or

    (vi) the Commissioner may be involved in proceedings in the Federal Court for the recovery of outstanding taxation debts owed by taxpayers, either as the plaintiff in first instance proceedings or as the appellant or respondent in proceedings on appeal from a lower court. Debt litigation proceedings also include appeals by taxpayers against Departure Prohibition Orders (DPOs) issued by the Commissioner under Part IVA of the TAA. DPOs are orders preventing a person from leaving Australia and are issued by the Commissioner against taxpayers who have an outstanding tax liability where it is considered that if they leave Australian jurisdiction, recovery of the outstanding tax liability will be at risk. Procedures for appeals against DPOs are specifically dealt with in Order 52C of the FCR. Procedures in debt litigation proceedings involving the Commissioner are not dealt with in this practice statement.

### *A. Direct appeals to the Federal Court*

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

16. Most of the cases involving the Commissioner as a respondent in the Federal Court will be as a result of these types of proceedings. Many of the steps outlined later in this practice statement for Part IVC matters will also be applicable in other types of matters when the Commissioner is a respondent in Federal Court proceedings. (Further detail of the usual process for direct appeals is discussed at paragraphs 54-129 of this practice statement.)

### *B. Appeal to the Federal Court from the Tribunal*

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

18. Unlike a direct appeal lodged in the Federal Court at first instance, a decision of the Tribunal may only be appealed to the Federal Court on a question of law: subsection 44(1) of the AAT Act. It is therefore not enough to show that the decision is arguably incorrect; it is necessary to identify questions of law upon which to appeal. There is a significant body of case law on the distinction between questions of law and questions of fact.[2]

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

20. Order 53 of the FCR is the relevant order for the purpose of appeals from a decision of the Tribunal.

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

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

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

- the decision of the Tribunal from which the appeal is brought, the members constituting the Tribunal and the date when the decision was made
- the question or questions of law to be raised on the appeal
- the order sought, and
- briefly, but specifically, the grounds relied upon in support of the order sought.

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

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

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

26. When the Commissioner is the one to appeal, the Notice of Appeal should be cleared by the relevant Tax Counsel or if Tax Counsel is not involved, the relevant Assistant Commissioner, Litigation or a Senior Tax Counsel (Strategic Litigation).[3] Appeal periods should not be missed due to the unavailability of senior level staff. Decisions made should always be subject to the best advice available, and decisions that need to be made urgently to meet court timeframes should be reviewed as soon as possible after the appeal has been filed. The Senior Tax Counsel (Strategic Litigation) should also be consulted on whether funding should be offered to the taxpayer under the Test Case Program in relation to the appeal.

27. When the taxpayer is the one to appeal, consideration must be given to whether a cross appeal or a notice of contention is warranted.[4]

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

29. Other than as outlined above and the specific differences between Order 53 and Order 52B of the FCR, the procedure to be followed in proceedings arising from an appeal by either party to a decision of the Tribunal is the same as the procedure to be followed in proceedings arising from a direct appeal (see Part IV of this practice statement).

### *C. Question of law referred by the Tribunal*

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

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

[3] There are three Senior Tax Counsel responsible for strategic litigation, two with responsibility for income tax issues and one with responsibility for indirect tax issues.
[4] Order 53, rule 13.

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

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

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

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

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

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

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

### *D. Decisions reviewed under the ADJR Act*

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

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

    (1) a decision to which the ADJR Act applies[5]

    (2) the conduct of the person relevant to the making of the decision to which the ADJR Act applies,[6] or

    (3) the failure to make a decision to which the ADJR Act applies.[7]

[5] Subsection 5(1) of the ADJR Act.
[6] Subsection 6(1) of the ADJR Act.
[7] Section 7 of the ADJR Act.

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

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

Improper exercise of power is defined in the legislation[8] and, expressed briefly, it includes:

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

40. An application made under section 5 of the ADJR Act is often preceded by a request by the Applicant for a statement of reasons from the Commissioner under section 13 of the ADJR Act. The statement must set out the findings on material questions of fact, refer to the evidence or other material to which those findings were based, and give reasons for the decision.[9] However, it is not necessary for an Applicant to request a statement of reasons under section 13 in order to be entitled to apply for a review under section 5.

[8] Subsections 5(2) and 6(2) of the ADJR Act
[9] Subsection 13(1) of the ADJR Act.

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

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

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

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

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

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

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

47. Aside from the differences between Order 54 and Order 52B, and to the extent relevant, officers involved in an ADJR Act proceeding in the Federal Court should follow the procedures outlined below in Part IV (paragraphs 54-129) in relation to direct appeals.

### *E. Section 39B of the Judiciary Act*

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

49. Since the introduction of the *A New Tax System (Goods and Services Tax) Act 1999*, due to the fact that the Commissioner is not required to make an assessment to establish a GST liability, it can happen that taxpayers seek declarations from the court in relation to particular technical issues relating to their GST liability, prior to the issue of an assessment[10] and in substitution for commencing proceedings under Part IVC of the TAA to determine the issue in dispute.[11]

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

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

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

53. Once again, however, aside from the differences between Order 54A and Order 52B, the procedure to be followed in these types of matters is the same as outlined below in Part IV (paragraphs 54-129) in respect of direct appeals.

## IV. Usual process for direct appeals to the Federal Court

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

55. Throughout Australia, the Federal Court has adopted a docket system as the basis of its listing and case management system. The docket system is characterised by the random allocation of cases to judges and the fact that the judge to whom each case is allocated is responsible for managing the case until it is finalised. This system ensures transparency, facilitates efficiency and ensures consistency. The randomly chosen judge is the only judge required to understand the factual and legal issues in each case and is responsible for making all directions in relation to conferences, mediation and other procedures. The docket judge is also responsible for ensuring the parties comply with the directions that the judge has ordered.

[10] An assessment will only be made if one is requested by the taxpayer or as a result of audit action.

[11] This will not strictly be the case in every instance. Taxpayers may sometimes want a declaration from the Federal Court that an ongoing supply is GST-free. Due to the restrictions in section 105-65 of Schedule 1 to the TAA in getting refunds on overpaid GST on past sales, they are more concerned with using the declaration for future sales, whereas Part IVC of the TAA relates to past tax periods (although appeal decisions can have implications for the future).

56. In accordance with Order 52A subrule 13(1), which applies to appeals brought under Order 52B,[12] the Court has a discretion to give directions as thought proper by way of a directions hearing. Over time, procedures in Federal Court registries have developed differently from State to State. It is therefore difficult to prescribe an exact process that will occur in every direct appeal to the Federal Court throughout Australia. This practice statement sets out the various steps that may arise in any given matter. For the sake of convenience it is useful to firstly set out the following sequence of events which occurs in most of the direct appeals to the Federal Court:

(1) the application to appeal is filed at the Court's registry and served on the other party

(2) the Commissioner will file and serve an appeal statement (a statement of the Commissioner's contentions and the facts and issues as he perceives them)

(3) both parties will attend a directions hearing, which sets a timetable for the future conduct of the case

(4) the Applicant will file and serve a statement of facts, issues and contentions

(5) the Applicant will file and serve the evidence upon which they rely

(6) the Commissioner will file and serve the evidence upon which he relies

(7) the Applicant will file and serve their submissions

(8) the Commissioner will file and serve his submissions

(9) when the Court is satisfied that the matter can proceed to hearing, the Court will list the matter for hearing, usually at a directions hearing,[13] and

(10) both parties will attend the hearing.

### *Initial steps upon receipt of taxpayer's appeal*

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

58. The Commissioner's involvement in a Federal Court matter begins when AGS notifies the local LSB business manager that the Commissioner has been served with a sealed copy of an application to appeal against an appealable objection decision.

59. LSB must advise the appropriate BSL within 24 hours of receiving the appeal.

[12] See Order 52B, rule 3.

[13] When the Federal Court notifies AGS of a hearing date, AGS will advise the LSB case officer who must then advise the BSL case officer, TCN and any other internals involved within 24 hours.

60. At this time the LSB business manager must also allocate the case to an LSB officer. The factors which the LSB manager considers when allocating a case include:

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

### *Filing and record keeping*

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

62. The BSL officer will, at the request of the LSB officer, provide all information and documents relevant to the appeal.

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

64. The LSB officer must record the case and the details of the external solicitor representing the Commissioner in the matter in ATOlegals. This system enables electronic billing for our external solicitors. If counsel has been directly briefed without AGS involvement, a new request in ATOlegals will need to be completed in respect of counsel's engagement, but billing will continue from paper invoices outside the system.

### *Strategic Internal Litigation Committee (SILC)*

65. SILCs are to be convened in the course of all tax technical litigation at critical stages. SILCs are generally called at the following stages of litigation:

- Document Preparation SILC
- Instruction SILC
- Pre-hearing SILC
- Post-hearing SILC
- Pre-decision SILC
- Decision SILC
- Post-decision SILC
- Appeal SILC

66. Each SILC meeting has a particular purpose in managing the litigation matter. The purpose of each is not set out in detail in this practice statement, but references will be made to SILCs in relation to issues of specific relevance to Federal Court proceedings.

67. It is recognised that due to the various timeframes set by the Court, it is not always possible to convene every SILC for each litigation matter. Good judgment and consultation between the litigation team members is required to ensure continual good management of the case and that key decisions are made collaboratively. Although preferable, it is not always necessary to convene a SILC formally. The SILC can in some instances be conducted by phone and for easier matters by email consensus.

68. The actual SILC can vary depending on the significance of the matter, but will always include an LSB officer. Depending on the particular case, it may include the following people:

- BSL officer, and their manager (where appropriate)
- Tax Counsel Network officer, and
- Centre of Expertise officer.

### *Instruction SILC*

69. In the Federal Court, formal documents are due to be lodged within 28 days after an application has been served. A Document Preparation SILC convened before that time will clarify the issues in contention, and identify required documents, so that the appropriate formal documents can be lodged within the timeframe available.

70. The Instruction SILC will discuss the litigation strategy, endeavour to minimise the issues in contention and ensure that the ATO view is being applied. At the Instruction SILC for Federal Court matters it is important to discuss requirements for external legal providers such as AGS and counsel, evidentiary issues, whether there are settlement possibilities, and whether the case is suitable for alternative dispute resolution.

### *Engaging external legal providers*

71. As a result of decisions made at the SILC it may be necessary to engage external legal providers.

72. In a direct Federal Court taxation appeal, notice of the appeal will already have been served on AGS. However, it is the LSB officer's responsibility to ensure that an external solicitor is appropriately instructed in the case. The LSB officer is the Tax Office point of contact for all external legal providers, including AGS.

73. The LSB officer will consult the litigation team about the selection of counsel. Briefing counsel is subject to strict guidelines under the Attorney-General's Legal Services Directions 2005. Staff should familiarise themselves with the Directions and in particular the Engagement of counsel guidelines in Appendix D, and follow the guidelines set out in PS LA 2007/15 Briefing Counsel.

74. Litigation is to be conducted in a way that is consistent with the ATO view. Articulating the Commissioner's position is never more important than in court matters where judicial pronouncements make binding rules for the future. Counsel's views on the Commissioner's case should be sought early. If counsel and/or AGS believe that the ATO view is incorrect, the issue should be escalated to the relevant Tax Counsel involved in the case. If no Tax Counsel has been allocated, the matter is to be immediately raised with a Senior Tax Counsel (Strategic Litigation)[14] who will decide if the case needs to be escalated to a DCTC for urgent consideration.

### *Conferences with counsel*

75. Throughout the course of the matter, it may be necessary for the LSB officer to request conferences with counsel to discuss various aspects of the case and progress in the matter generally. In addition, counsel may from time to time call for conferences with his or her instructing officers to discuss particular issues. The LSB officer should attend all conferences with counsel and consider whether it is also necessary for BSL, Tax Counsel or other officers involved in the matter to attend. It is the LSB officer's responsibility to coordinate this and notify participants of the time and location for conferences with counsel.

76. Tax Counsel (where involved) should attend all conferences with counsel where the technical issues are discussed. As indicated above, depending on the nature of the case, other members of the litigation team may also attend conferences, however the efficient and ethical use of Commonwealth resources should always be considered.

77. The time spent with counsel is valuable and care should be taken to ensure that the conference is productive. The LSB officer is responsible for ensuring that the right Tax Office staff will be in attendance. Consideration should be given to providing research materials, notes to counsel, proposed agendas, or simply providing correspondence via our solicitor that identifies the issues to be discussed and decided. Conference notes should be taken and at the end of the conference the action items should be summarised to ensure that all attendees have a common understanding of the actions to be taken and who is responsible for each.

78. The LSB officer must ensure that Tax Office staff involved with the case who do not attend the conference are provided with appropriate updates.

[14] There are three Senior Tax Counsel involved in strategic litigation, two with responsibility for income tax issues and one with responsibility for indirect tax issues.

### *Prepare documents to be filed*

79. Order 52B, rule 5 of the FCR requires the Commissioner, in appeals other than appeals relating to private rulings, to file the following documents within 28 days of being served with a sealed copy of the application:

- a copy of the notice of objection decision
- a copy of the objection
- any return or other document in the Commissioner's possession or under the Commissioner's control to which the taxation objection relates that is relevant to the hearing of the matter, and
- an appeal statement or an appeal affidavit.

80. If an appeal relates to a private ruling, Order 52B, rule 5A of the FCR provides that within the shorter time frame of 14 days of being served with a sealed copy of the application, the Commissioner must file the following documents:

- a notice of appearance in accordance with Form 15
- a copy of the private ruling concerned
- a copy of the notice of objection decision
- a copy of the objection
- a copy of any documents given to the Commissioner by the Applicant in support of an application under section 359-10 of Schedule 1 to the TAA or containing information given by the Applicant to the Commissioner under sections 357-105 or 357-115 of Schedule 1 to the TAA, and
- a statement of any assumption made by the Commissioner when making the ruling and which is not stated in the notice of ruling.

81. The BSL officer must provide all relevant evidence, files and documents to the LSB officer as soon as possible, but definitely before the date the documents are due to be filed. The LSB officer will forward the relevant documents to AGS. AGS will file the documents required under Order 52B rule 5 and serve a stamped copy on the Applicant.

### *Prepare appeal statement or appeal affidavit*

82. As prescribed by Order 52B, subrule 5(2)(a)(iv) of the FCR, AGS must file and serve the Respondent's appeal statement or appeal affidavit within 28 days of being served with the application.[15]

[15] This practice is followed in most States with the exception of Western Australia. In WA, the practice is as follows:
- The Applicant files and serves a Statement of Grounds for appealing against the decision to disallow the objection to the assessment. This statement is to be in a similar form to the Statement of Claim.
- The respondent files and serves a response to the Applicant's Statement of Grounds. This should follow the format in the form applicable to a Defence and embody a Statement of Grounds upon which the respondent supports the assessment.
- The Court would then make orders for filing and serving any requests for particulars.

83. An appeal statement is defined in Order 52B, subrule 5(3) as a statement outlining succinctly the Commissioner's contentions and the facts and issues in the appeal as the Commissioner perceives them.

84. An appeal affidavit is defined in Order 52B, subrule 5(3) as an affidavit setting out the grounds for seeking an order at the first directions hearing and dispensing with filing an appeal statement, and setting out proposed directions with respect to the conduct of the appeal.

85. As explained in Federal Court Practice Note No. 22, the appeal statement will ordinarily be the appropriate choice since the Applicant will have already stated grounds in the taxation objection. If the Commissioner chooses to file an appeal affidavit, it should set forth any facts relied on as showing that it is inappropriate for the Commissioner to be required to file an appeal statement as the first procedural step in the appeal, and should state why the proposed directions are to be preferred.

86. The litigation team should all work together to ensure that the Commissioner files and serves the appeal statement within the required timetable. In order to ensure the highest level of compliance with the Model Litigant obligations, where it appears likely that the Commissioner will be unable to file the Appeal Statement or Affidavit within the required period, the Commissioner should, before the expiration of that period, seek from the court (with the consent of the other party if possible), an extension to the timetable for filing the Statement or Affidavit.

87. The LSB officer and Tax Counsel if involved, should work with counsel to make sure that the content of the Appeal Statement meets appropriate standards of quality, in particular:

- Does the statement clearly express the proposition(s) the Tax Office wishes to make about the case? Consider in particular if the ATO view is properly articulated.
- Is the point made early and simply or is it necessary to read the statement several times to understand the point?
- Does the statement clearly and concisely explain our case? Is it easy to read?
- Is the statement clear to the judge what it is the Court must do if the Court finds for the Commissioner?
- Does the statement set the parameters of the case? Consider evidence, discovery and subpoena issues.
- Are all of the material facts there to achieve the outcome we want?
- Are the facts put in context?
- Does the statement display all of the facts and contentions to show that the Commissioner's case is correct?
- Have we honoured our Model Litigant obligations? Does the statement in any way mislead or misrepresent the facts?

### *Directions hearings*

88. Order 52A, rule 13 of the FCR states that on a directions hearing, the Federal Court shall make any order it thinks proper.[16]

89. Pursuant to Order 52B, subrule 4(5) the date of the directions hearing set by the registry must be within five weeks of filing the application, or within 21 days for appeals relating to private rulings.

90. It is important that our representative is well prepared. The LSB officer should generally attend all directions hearings with our external solicitor. The solicitor (or sometimes counsel) representing the Commissioner should be fully briefed and the LSB officer should ensure this happens. The LSB officer should discuss the purpose of the directions hearing with the solicitor prior to attending court. If the solicitor representing the Commissioner is just 'filling in' for the usual solicitor or if counsel is to conduct the directions hearing, the LSB officer should undertake to explain the case as necessary, and provide an update on recent correspondence between the parties.

91. Many directions hearings are low key procedural matters that require little preparation by the Tax Office. Some directions hearings however may deal with the technical issues, by making orders that could have the effect of refining the issues in dispute, admissible evidence, affidavits, or the requirement for discovery and requests for subpoenas. In circumstances where important technical issues arise, if Tax Counsel is involved in the case, a conference prior to the directions hearing may be warranted to ensure that any technical issues are fully discussed and the case kept on the correct path at every key point of the proceedings. Written instructions, notes to counsel and research materials may also be warranted and can be provided to counsel at any point during litigation, including prior to directions hearings.

92. The first directions hearing will assist the Federal Court in clarifying the real issues in dispute, ascertaining the extent of evidence, limiting, where possible, the extent of evidence, and setting a timetable for interlocutory proceedings and finalisation of the matter at hearing. In accordance with the Model Litigant Guidelines, officers must ensure that the Commissioner (through his counsel) assists the Federal Court in this process.

### *Interlocutory proceedings*

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

94. If the Court makes a decision on an interlocutory motion that is adverse to the Commissioner, it may be appropriate for the Commissioner to consider seeking leave to appeal against the interlocutory decision.[17] Either party may seek leave to appeal against an interlocutory decision within 7 days of the decision or within such further time as the Court may allow. The process for appealing against an interlocutory decision is set out in Order 52, rule 10 of the FCR. PS LA 2007/2 Management of Decisions of Courts and Tribunals provides details on who the appropriate decision maker is in relation to whether or not the Commissioner should appeal a decision, including interlocutory decisions.

---

[16] Order 52A, rule 13 applies to direct appeals made under Order 52B because of the operation of Order 52B, rule 3. Order 10, the general order governing directions hearings, is also relevant.

[17] The process for any decision to appeal is set out in PS LA 2007/2 Management of Decisions of Courts and Tribunals.

95. The tests to be applied in determining whether leave to appeal from an interlocutory decision should be granted are broadly two-fold. First, the Court must be satisfied whether, in all the circumstances, the decision is attended with sufficient doubt to warrant it being reconsidered by the Full Court. The second is whether substantial injustice would result if leave were refused, supposing the decision to be wrong. These tests, however, are not isolated from each other and they may bear upon each other and involve a fine balancing of considerations.[18]

### *Discovery*

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

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

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

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

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

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

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

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

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

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

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

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

### *Interrogatories*

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

### *Particulars*

107. The Court may order a party to file and serve particulars.[19]

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

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

### *Subpoenas*

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

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

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

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

### *Affidavits*

114. In accordance with Order 52A, rule 5 of the FCR all evidence shall be by affidavit in tax matters unless otherwise ordered by the court or judge.[20]

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

---

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

[20] Order 52A, rule 5 is made applicable to applications made under Order 52B by Order 52B, rule 3.

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

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

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

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

### *Submissions*

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

### *List of authorities and legislation*

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

### *Hearing*

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

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

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

### *Decision handed down*

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

125. The decision management process is to be managed in line with PS LA 2007/2 Management of Decisions of Courts and Tribunals.

### *Settlement*

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

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

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

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

## V. The Full Federal Court

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

131. Where it is the taxpayer that has appealed, the LSB officer should ensure that the strategic litigation unit (through its mailbox at strategiclitigationunit@ato.gov.au) is advised to ensure that the Appeals Pending list is updated on ATOlaw. The Assistant Commissioner, Litigation and the Senior Tax Counsel (Strategic Litigation) should also be advised to ensure that the case is appropriately resourced.

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

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

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

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

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

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

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

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

The Full Court may allow an extension of time upon application within the 21 day period.[22] In addition the Full Court may allow a Notice of Appeal to be filed at any time if it has special reasons to do so, also upon an application to do so.[23]

[21] Order 52, paragraph 15(1)(a).
[22] Order 52, paragraph 15(1)(b).
[23] Order 52, subrules 15(2) and (3).

| Subject references | |
|---|---|
| Legislative references | AAT Act 44<br>AAT Act 44(1)<br>AAT Act 44(2A)(a)<br>AAT Act 44(3)(a)<br>AAT Act 44(3)(b)<br>AAT Act 44(3)(c)<br>AAT Act 45<br>AAT Act 45(2)<br>ADJR Act 1977 5<br>ADJR Act 1977 5(1)<br>ADJR Act 1977 5(2)<br>ADJR Act 1977 6<br>ADJR Act 1977 6(1)<br>ADJR Act 1977 6(2)<br>ADJR Act 1977 7<br>ADJR Act 1977 11<br>ADJR Act 1977 11(1)(a)<br>ADJR Act 1977 11(2)<br>ADJR Act 1977 11(3)<br>ADJR Act 1977 13<br>ADJR Act 1977 13(1)<br>ADJR Act 1977 13(2)<br>FCA 1976 14<br>FCA 1976 14(2)<br>FCA 1976 14(3)<br>FCA 1976 24<br>FCA 1976 25<br>FCA 1976 26<br>FCR 10<br>FCR 15<br>FCR 16<br>FCR 27<br>FCR 50<br>FCR 52<br>FCR 52A<br>FCR 52B<br>FCR 52C<br>FCR 53<br>FCR 54<br>FCR 54A<br>Federal Court of Australia Regulations 2004<br>Judiciary Act 1903 39B<br>TAA 1953 Pt IVA<br>TAA 1953 Pt IVC<br>TAA 1953 14ZZ(a)(ii)<br>TAA 1953 14ZZ(c)<br>TAA 1953 Sch 1 105-65<br>TAA 1953 Sch 1 357-105<br>TAA 1953 Sch 1 357-115<br>TAA 1953 Sch 1 359-10<br>Superannuation Industry (Supervision) Act 1993 334 |

| | |
|---|---|
| Related public rulings | |
| Related practice statements | PS LA 1998/1; PS LA 2003/3; PS LA 2003/10; PS LA 2005/22; PS CM 2005/27; PS LA 2007/2; PS LA 2007/5; PS LA 2007/12; PS LA 2007/15; PS LA 2007/16; PS LA 2007/17; PS LA 2005/19 |
| Case references | Azzopardi v. Tasman UEB Industries Ltd (1985) 4 NSWLR 139<br>Collector of Customs v. Agfa-Gevaert Ltd (1996) 186 CLR 389<br>Collector of Customs v. Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280<br>The Commissioner of Taxation for the Commonwealth of Australia v. Woodside Energy Limited [2006] FCA 1375<br>Ergon Energy Corporation Ltd v. Commissioner of Taxation [2006] FCAFC 125<br>Hope v. Bathurst City Council (1980) 144 CLR 1<br>Kuswardana v. Minister for Immigration and Ethnic Affairs (1981) 35 ALR 186<br>Vetter v. Lake Macquarie City Council (2001) 202 CLR 439 |
| Other references | Federal Court Practice Notes Nos 14, 17, 19 and 22<br>Federal Court Practice Direction on Guidelines for Expert Witnesses in Proceedings in the FCA |
| File references | 06/10690 |
| Date issued | 25 July 2007 |
| Date of effect | 25 July 2007 |
| Other Business Lines consulted | All |