PS LA 2007/2 (Withdrawn) - Management of Decisions of Courts and Tribunals

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This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9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 2007/2

This practice statement is withdrawn with effect from 20 November 2009 and has been replaced by PSLA 2009/9.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 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:	**Management of Decisions of Courts and Tribunals**
PURPOSE:	**To advise procedures for managing all Court and Tribunal decisions and risks arising from those decisions**

STATEMENT

1. The Legal Services Branch (LSB) in the Office of the Chief Tax Counsel is responsible for managing the litigation process and conducting litigation for the Commissioner. One key aspect of managing litigation includes ensuring that decisions[1] of Courts and Tribunals[2] are circulated to and considered by the appropriate stakeholders within the timeframes set out below and that risks arising from the decisions are analysed and strategically managed.

2. LSB officers are responsible for managing Court and Tribunal decisions in accordance with this practice statement. Officers from other areas such as the Tax Counsel Network, the relevant business line (BSL), the Priority Technical Issues and Public Rulings Branch or Centres of Expertise will also have a role to play in the management of decisions and risks arising from them.

3. The approach outlined in this practice statement will ensure a more corporate approach to dealing with the risks to the Commissioner arising from Court and Tribunal decisions.[3] It is essential that staff follow the procedures set out in this practice statement to ensure that these risks are minimised.

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[1] 'Decisions' will include interlocutory decisions which have some strategic importance.
[2] Includes the Administrative Appeals Tribunal, Small Taxation Claims Tribunal and Australian Industrial Relations Commission.
[3] There will be instances where litigation will have consequences not only for the Commissioner, but for the community and government as a whole.

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

LSB will:

i) provide advice to key Tax Office stakeholders about the progress of litigation including advice that a decision is about to be handed down

ii) provide within specified timeframes to key Tax Office stakeholders copies of the decision, the Decision Summary, opinions of counsel and Tax Counsel, and the Adverse Decision Report and the Decision Impact Statement if necessary

iii) confer with key stakeholders at Strategic Internal Litigation Committees (SILCs)[4] which will be convened at critical stages of the progress of the litigation, and

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

The relevant BSL will:

i) manage the mitigation strategies for the litigation, including the media strategies, particularly the adverse implications of the decision

ii) escalate emerging priority technical issues (PTIs) to the Tax Counsel Network (TCN) or the Centres of Expertise as soon as they become aware of the issue, and

iii) if necessary, in collaboration with Law Sub-plan stakeholders, provide timely advice of the progress and implications of strategically important litigation[5] to the ATO executive, the Treasurer, the Minister for Revenue and the Assistant Treasurer and/or to Treasury.

If Tax Counsel Network (TCN) is involved, the relevant tax counsel will:

i) be involved in preparing recommendations to appeal (or not appeal) adverse decisions of the Tribunal and Courts

ii) provide input into the development of any media and mitigation strategy, and

iii) approve the Decision Impact Statement before it is published.

The relevant decision maker (paragraph 9 of this practice statement explains who this is depending on the type of decision) will have sufficient information to enable a defensible decision to be made about appealing a decision of the Court or Tribunal.

[4] SILCs are convened by the LSB officer for all Court and Tribunal matters. Other attendees in the SILC will vary depending on the BSL involved and the strategic importance of the case, but are likely to include relevant officers from the BSL and Centres of Expertise, and the Tax Counsel Network. The first SILC is held within two weeks of the commencement of litigation, and subsequent SILCs are mandated at each critical stage of litigation.

[5] Refer to Attachment A for indicators of 'strategic litigation'.

5. Litigation managed and conducted for the Commissioner includes:

- taxation decisions contested under Part IVC of the *Taxation Administration Act 1953* (Part IVC litigation)
- declaratory proceedings and reviews of administrative decisions (ADJR cases), and
- debt, Freedom of Information (FOI) and commercial and general litigation.

6. Where any part of the process for managing decisions differs for a particular kind of litigation this is specified and set out separately.

EXPLANATION

Chronology of management of decisions

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

Step	Relevant paragraphs	Procedure	Primary Responsibility	Timeframe
a.	13 to 16	Advice to government ministers and Treasury relating to the policy implications of particular decisions.	BSL (in consultation with the Centre of Expertise and/or TCN where involved)	As soon as it becomes apparent that litigation could have adverse consequences for the intended operation of the law.
b.	17 to 18	Media strategy	BSL and LSB officer to agree who takes responsibility	As soon as it becomes apparent that litigation may attract media interest.
c.	20	Post-hearing SILC	LSB officer	Within 14 days of the hearing.
d.	21 to 23	Notification that a decision is to be handed down	LSB officer	Immediately after being notified that a decision will be handed down.
e.	24 to 25	Pre-decision SILC	LSB officer	As soon as practicable after notification that the decision is imminent.
f.	26 to 30	Circulation of decision	LSB officer	Strategically important and adverse decisions – on the day the decision is received. Other decisions – within 7 days of the decision being handed down.
g.	31 to 36	Decision SILC	LSB officer	Adverse decision – within one business day of the decision being handed down. Substantive decision in favour of the Commissioner – within 28 days of the decision being handed down or sooner if necessary. Interlocutory decision of some strategic importance in favour of the Commissioner – the next business day after the decision is handed down.

Step	Relevant paragraphs	Procedure	Primary Responsibility	Timeframe
h.	37 to 39	Decision Summary	LSB officer	Strategically important decision – within 2 business days of the decision being handed down. Interlocutory decision – within 2 business days of the decision being handed down Other decisions – within 7 days of the decision being handed down.
i.	40 to 46	Post-decision SILC	LSB officer	Adverse decision – within 5 business days of the decision being handed down. If taxpayer appeals – within 5 business days of receiving notice that the taxpayer has appealed. Favourable decision where the taxpayer has not appealed – within 28 days of the decision being handed down or sooner if necessary.
j.	47 to 60	Adverse Decision Report	LSB officer	Interlocutory decision – within 2 business days of the decision being handed down. Other decisions – within 7 days of the decision being handed down
k.	61 to 65	Finalisation of Adverse Decision Report and circulation	LSB officer	As soon as a decision on whether or not to appeal is made.
l.	66 to 68	Appeal SILC	LSB officer	Adverse or strategically important decision – no later than 7 days before appeal or cross-appeal period expires.
m.	69 to 81	Decision Impact Statement published onto the external Tax Office website	LSB officer	As soon as possible but no later than 8 weeks of the decision being handed down.

Senior Tax Counsel (Strategic Litigation)

8. Strategic Litigation is collectively managed by three Senior Tax Counsel. The first takes a corporate role in relation to all strategic litigation and is located in Legal Services Branch. There is also a Senior Tax Counsel (Strategic Litigation) Indirect Taxes and a Senior Tax Counsel (Strategic Litigation) Aggressive Tax Planning. These latter positions are located in the Tax Counsel Network and have specialised areas of interest. They are described in the practice statement as:

   - STC (Strategic Litigation)
   - STC (Strategic Litigation) Indirect Taxes, and
   - STC (Strategic Litigation) Aggressive Tax Planning

   In this practice statement, a reference to the STC (Strategic Litigation) is a specific reference to the first person in the above list. A reference to the *relevant* STC (Strategic Litigation) is a reference to the appropriate STC in the list.

Decision makers

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

Decision	Final Decision Maker
1. All Court or Tribunal decisions where: • Tax Counsel has been involved • the case is linked to a priority technical issue • the decision is contrary to the ATO view of the law, or • there is disagreement between the Senior Executive Services officers in the relevant business line and LSB. 2. Declaratory relief in Federal or State Courts (other than in debt, employment law or FOI cases). 3. Actions under section 39B of the *Judiciary Act 1903* or section 75 of the Constitution. 4. Intervention is contemplated in an appeal where the Commissioner is not otherwise a party to the litigation.[6]	Deputy Chief Tax Counsel (DCTC)

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

Decision	Final Decision Maker
1. Court and Tribunal decisions arising from Part IVC litigation that turn on their facts and have no precedential impact on the law. (This includes release applications, but does not include FOI cases.) 2. Court and Tribunal decisions where Tax Counsel has not been involved. 3. ADJR cases (other than cases involving access issues, FOI, non-tax law issues or employment matters).	STC (Strategic Litigation), Indirect Taxes; (for indirect taxes including GST, excise and superannuation), or STC (Strategic Litigation), Aggressive Tax Planning (for mass marketed schemes and employment benefit arrangements), or STC (Strategic Litigation) for all other cases. If there is disagreement between the STC's the matter should be escalated to the relevant DCTC.
Debt cases	Decisions to appeal: STC (Strategic Litigation) Decisions not to appeal; relevant Assistant Commissioner, Litigation If there is disagreement between the STC (Strategic Litigation) and the relevant Assistant Commissioner, Litigation, the matter should be escalated to a DCTC.
1. ADJR cases involving access issues, FOI, and non-tax law issues including employment matters 2. Non-tax law issues, including civil disputes and employment law decisions. 3. All FOI decisions	ATO General Counsel However, as some of these issues will sometimes be relevant and cross over to other streams, a co-ordinated approach should be adopted where all the relevant stakeholders in the decision making process are consulted.

Risk mitigation strategies

2. Through the course of litigation, and before and after the hearing, the litigation team[7] needs to consider the risk mitigation strategy in relation to the case. This will include the development of an action plan that ensures that appropriate corporate consideration is given to the case and the implementation of that plan. This plan will vary from one case to another however, at a minimum, the team should decide who will be responsible for advising the key people in the Tax Office and external parties about the consequences of the decision once it is handed down. This action alone enables risks to be better identified and in a more timely way. The risk mitigation strategies should be discussed at the various SILCs held at each critical stage of litigation.

[7] 'Litigation team' will include the LSB officer and the BSL officer and may also include tax counsel, a representative from the relevant Centre of Expertise, a solicitor (Australian Government Solicitor or an external service provider on the Panel of service providers) and external counsel. Where there are international taxation issues involved, a representative from International Strategy and Operations (ISO) should also be part of the litigation team.

3. Two key elements of the risk mitigation strategy are the consideration of the consequences of the litigation on the intended operation of the law, and any media strategy that may need to be put in place. In terms of the potential policy implications, the team should decide whether or not to advise Treasury at an early stage of litigation, so that Treasury can monitor the case and prepare for the potential consequences of a decision that is contrary to the underlying policy of the legislation.
4. Where litigation might have a 'whole of government' impact, the litigation team should decide whether the Office of Legal Services Co-ordination (OLSC) in the Attorney-General's Department is notified and briefed on the case.

Advice to Government Ministers and Treasury relating to strategically important decisions

5. In relation to litigation, formal advice should be provided to Treasury in situations where it is necessary to bring to their attention issues that are significant, will impact on the reputation of the Tax Office or government, will have an impact on the revenue, or may require a consideration of a change to the law. In this situation, the BSL (assisted by the Tax Counsel on the litigation team) should contact Treasury at the earliest opportunity. Any concern about the operation of the legislation would ordinarily be a matter that should be risk assessed for potential escalation as a separate PTI. This type of advice must be cleared by the appropriate National Program Manager (NPM) or DCTC, who must then notify the First Assistant Commissioner, Policy Management Division prior to the issue of the advice.
6. If issues arising from a decision or anticipated decision give rise to a need to provide advice to Treasury or government, the relevant BSL has primary responsibility to prepare the advice consistently with Tax Office corporate policies. LSB and TCN will provide assistance in the preparation of this advice.
7. Similarly, LSB officers must be aware, and if necessary, assist the BSL to follow the procedure outlined in Law Administration Practice Statement PS LA 1998/3 concerning communication to Government about strategically important litigation matters. The practice statement primarily relates to the timeliness of communication to Government.
8. On a monthly basis, the STC (Strategic Litigation) will provide Treasury with a report of strategically important litigation and the decisions regarded as the most significant to the Tax Office. Similar reports are provided at the same time to the Commissioners, CTC, DCTCs and NPMs.

Media strategy

9. The LSB officer must inform relevant Senior Executive Service officers in LSB and the BSL of any Court hearing or judgment likely to attract media attention, giving these officers as much notice as possible. The Media Unit must then be informed and briefed by the most appropriate senior officer involved. This will usually be an Assistant Commissioner in Legal Services Branch.
10. Except for media comments provided by the Commissioner, a Second Commissioner, CTC or DCTC, all other media responses relating to Court or Tribunal decisions must be cleared by the relevant STC (Strategic Litigation).

Collaborative approach to decision management

11. The LSB officers managing the litigation should convene a Strategic Internal Litigation Committee (SILC) at every critical stage of Part IVC and strategically important litigation. The SILCs discussed below focus on the possible consequences of a Court or Tribunal decision.

Post-hearing SILC

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

Notification that a strategically important decision is to be handed down

13. Indicators for cases which are strategically important are listed in Attachment A.
14. When the LSB officer receives notification from a Court or Tribunal that a decision will be handed down in respect of a strategically important case they should provide immediate advice of this to the persons listed in Attachment B.
15. Where appropriate, because of the importance of the decision, the relevant STC (Strategic Litigation), or the General Counsel will ensure that early advice of the pending decision will be provided as necessary to any or all of the relevant DCTC, the Commissioner, Second Commissioners, the Chief Tax Counsel and the Government.

Pre-decision SILC

16. Where there is sufficient notice that a decision is imminent, a Pre-decision SILC should be held prior to the decision being handed down. A meeting at this time will allow the litigation team to review and put into place a strategy to address and mitigate any potential risks arising from the decision; or to review an existing mitigation strategy (which may have been considered and drafted following the Post-hearing SILC in anticipation of a potentially adverse or partially adverse decision).
17. The litigation team should agree at this time (or at the Decision SILC if there was not sufficient time to organise a Pre-decision SILC) who is responsible for delivering aspects of the strategy. Where the case is of strategic importance, the STC (Strategic Litigation) and if relevant to the particular case, the STC (Strategic Litigation) Aggressive Tax Planning or STC (Strategic Litigation) Indirect Taxes should be involved in the development of this strategy.

Circulation of decisions

18. Where a decision is of strategic importance the LSB officer must provide a copy of the decision to appropriate stakeholders on the day the decision is received. Similarly, adverse or partly adverse decisions must also be distributed to relevant stakeholders on the day the decision is received. Stakeholders for this purpose must include the persons listed in Attachment B.
19. The BSL officer will also need to consider the circulation of the decision and how widely the decision should be distributed within their BSL, such as the BSL's risk and intelligence team.
20. The litigation team will also need to consider if there are any cross BSL implications, and accordingly circulate the decision to all potential stakeholders. For example, in Part IVC matters, it may be necessary to notify the Debt business line to commence recovery action or pay claims that may have been held pending the litigation outcome.
21. For all other decisions, the LSB officer must provide a copy of the decision to the relevant stakeholders listed in Attachment B no later than 7 days after the decision is received.
22. In all cases, the LSB officer must also copy the message to the strategic litigation mailbox at strategiclitigationunit@ato.gov.au.

Decision SILC

23. A Decision SILC must be convened:
    - within one business day of any adverse or partially adverse decision, or
    - within one business day of a decision of strategic importance, or
    - within 28 days of a decision favourable to the Commissioner, where the decision is in line with the Tax Office view and there are no policy implications arising from the decision. Where there are implications for the Commissioner, the Decision SILC should be held earlier than the 28 days.
24. Ordinarily the Decision SILC is convened to discuss the decision generally, and to commence work on the issues that need to be addressed in the Decision Summary and the Adverse Decision Report. It also provides an opportunity to discuss the need to obtain opinions from counsel and other stakeholders.
25. Where a decision, including an interlocutory decision, has unexpected and significant consequences, it must be brought to the immediate attention of the Part IVC Stream leader or the relevant STC (Strategic Litigation).
26. The SILC members will carefully consider the implications of the decision, and ensure that the perceived policy implications (if any) are explained in the Decision Summary or Adverse Decision Report. If a technical issue in the decision relates to an existing PTI, the issue and risk owners will be responsible for managing the effect the decision has on resolving the underlying issue. This may, for example, involve reviewing any existing precedential ATO view or liaising with Treasury on the implications for the legislation.

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

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

Decision Summaries

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

30. Where a decision is of strategic importance the LSB officer must prepare and email to their LSB Stream Leader[8] the Decision Summary within two business days of the decision being handed down. In interlocutory matters where the relevant appeal period is seven days or less, the LSB officer must also send the Decision Summary within two business days. For all other decisions, the Decision Summary should be sent within seven days.

31. LSB Stream Leaders[9] are responsible for emailing a copy of the Decision Summary as soon as it becomes available to the relevant stakeholders set out in Attachment B and to Information Management Systems, ATOlaw at NAT.ATOBSS@ato.gov.au.

[8] For Part IVC matters, this will be the responsibility of the Business Managers.
[9] For Part IVC matters, this will be the responsibility of the Business Managers.

Post-decision SILC

32. A Post-decision SILC must be convened:
    - within five business days of an adverse or partially adverse decision being handed down
    - within five business days of receiving notice that a taxpayer has lodged an appeal, or
    - within 28 days of a decision in favour of the Commissioner being handed down, where the taxpayer does not lodge an appeal against the decision and there are no policy implications arising from the decision. Where there are implications for the Commissioner, the Post-decision SILC should be held earlier than the 28 days.
33. Detailed consideration of opinions obtained from counsel and other stakeholders will be necessary for the SILC. In every case consideration must be given to whether, as a result of the decision:
    - there are any flow on effects in relation to the taxpayer
    - any wider risks arise for the Tax Office – where a risk arises a strategy must be developed to manage the risk
    - any legislative deficiencies are identified
    - any new public rulings should issue, and
    - any existing document setting out the Commissioner's view of the law for the community should be reviewed, amended or withdrawn. This may include public rulings, taxation determinations, or major publications, such as Tax Pack. Where a precedential ATO view, such as an ATO Interpretative Decision, a publication or a Taxation Ruling, is to be reviewed, the relevant Centre of Expertise must be contacted and made aware of the issues.
34. The Post-decision SILC must identify each necessary action arising from the decision and allocate responsibility for it. The Adverse Decision Report will then set out each of the identified risks and the person responsible for managing that risk. The person responsible for managing the risk will maintain that responsibility after the litigation is finalised, unless and until any formal escalation process alters the responsibility. The SILC will also finalise any recommendations to be made in the Adverse Decision Report.
35. Any technical issues arising from the decision which do not align with an existing precedential ATO view, and for which there is no existing PTI, must be referred to the BSL for risk assessment using the matrix referred to in Corporate Management Practice Statement PS CM 2003/2 Risk and Issues Management. (For example where a decision calls into question a position taken in a Public Ruling issued before the PTI process commenced.) Where a new PTI is identified, the manner of dealing with the litigation and associated risks must be dealt with in accordance with Law Administration Practice Statements PS LA 2003/10 The management of 'Priority Technical Issues' and PS LA 2005/22 Litigation and priority technical issues. Any implications for existing PTIs must continue to be managed by the Risk and Issue owners, in accordance with the law administration practice statements mentioned.

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

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

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

Adverse Decision Reports

39. Where a decision is wholly or partly adverse, the LSB officer is to prepare and send an Adverse Decision Report to the relevant LSB stream leader[10] within 7 days of the decision being handed down. In interlocutory matters where the relevant appeal period is seven days or less, the LSB officer must send the Adverse Decision Report within two business days.

40. The purpose of the Adverse Decision Report is to provide a corporate record of the consideration of the decision about whether an appeal should be made to a decision of a Court or Tribunal. The final report must be a robust technical analysis and commentary of the perceived correctness of the decision, from the standpoint of the various stakeholders. The Adverse Decision Report assists the relevant STC (Strategic Litigation) in making a final recommendation about whether the decision should be appealed.

41. In order for the implications of the decision to be properly considered the Adverse Decision Report must set out:

    - an analysis and commentary on the correctness of the decision. The report should provide sufficient detail of the facts and issues involved to assist the reader to understand the analysis, but should never be simply a further summary of facts, issues and outcomes of the case (that is the role of the Decision Summary)

[10] For Part IVC matters, the responsibilities of the LSB stream leader relating to Adverse Decision Reports will fall on the Business Managers.

- an analysis of any basis on which an appeal is justified:
  - for an adverse decision of the Tribunal, whether a question of law involved in the decision is sufficiently significant to justify an appeal to the Federal Court
  - for an adverse decision of the Federal Court or a state Supreme Court, the errors that would justify an appeal to the Full Court
  - for an adverse decision of the Full Federal Court or state Court of Appeal, whether there is a question of sufficient public importance that would give the Commissioner reasonable prospects of securing the grant of Special Leave by the High Court, or
  - if it is considered that an appeal is justified, identification of the question of law and/or grounds or appeal that should be relied on.
- whether any action needs to be taken to draw the case to the attention of Treasury, to vary Tax Office compliance approaches or to remedy any deficiencies in the conduct of litigation
- whether the decision is inconsistent with a published Tax Office view of the law
- where appropriate, commentary on the conduct of the litigation that led to the adverse decision, such as any difficulties with evidence, witnesses, or any interlocutory decisions of the Court that may have adversely influenced the outcome, and
- the views and perspectives of the various stakeholders, including where appropriate the business line, Tax Counsel, external solicitor and counsel. These may be provided under separate headings or may be incorporated in the body of the report, where there is consensus. Although a consensus view and recommendation is ideal, each stakeholder must be prepared to provide their own, objective and professionally expressed views in the Adverse Decision Report about the decision.

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

43. Apart from relying on the recommendation of the relevant STC (Strategic Litigation), the decision maker (refer to paragraph 9 to determine who is the relevant decision maker) may also have regard to the detailed comments in the report and may add to them. The decision maker is responsible not only for making the decision on whether an appeal is to be filed but also for ensuring allocation of responsibility for any necessary strategy to address risks arising from the decision. It is for this latter reason that the unique perspectives of each stakeholder will be of use in determining the strategies necessary to manage the outcomes of the decision.

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

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

46. For the purposes of proper record keeping, all communication regarding the Adverse Decision Report should be copied to the strategic litigation mailbox at strategiclitigationunit@ato.gov.au. This should include the final Adverse Decision Report as well as all relevant comments from appropriate stakeholders.

Involvement of Tax Counsel in the Adverse Decision Report

47. Tax Counsel involved in the conduct of the litigation must be involved in preparing recommendations to appeal (or not appeal) adverse decisions of the Tribunals and Courts.

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

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

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

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

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

Finalisation of Adverse Decision Report and circulation

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

54. The LSB officer must send the finalised Adverse Decision Report to the relevant LSB stream leader. The LSB stream leader will review the report and ensure it is correct, before forwarding it on to relevant stakeholders listed in Attachment B. The relevant STC (Strategic Litigation) will forward the Adverse Decision Report to the appropriate decision maker with a recommendation on whether or not an appeal is to be made.

55. Once the Adverse Decision Report has been cleared by the relevant STC (Strategic Litigation), the LSB Stream Leader will be responsible for emailing a copy of the finalised report to Information Management Systems, ATOLaw at NAT.ATOBSS@ato.gov.au.

56. LSB Stream Leaders are also responsible for emailing the finalised Adverse Decision Report to all officers in the relevant LSB stream/s.

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

Appeal SILC

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

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

60. Relevant matters for consideration will include:

- whether the matter on which the Commissioner may decide to appeal involves a question of law
- what action is necessary to protect the Commissioner's position in the event that an appeal is lodged for example, not implementing the decision pending the appeal,[11] and
- whether further evidence should be filed in the Federal Court in an appeal from a decision of the Administrative Appeals Tribunal.[12]

Decision Impact Statements

61. In all adverse decisions and other significant Court and Tribunal decisions, a Decision Impact Statement will need to be published. This document is a succinct statement of the Commissioner's response to adverse and significant decisions. It should be published as soon as possible but not later than eight weeks after the Court or Tribunal decision has been handed down. Where it is not logistically possible to do so within eight weeks, for example, some may require longer consideration (and consultation) where the possible application to other cases is uncertain, an interim statement should be prepared.
62. The purpose of publishing these statements is to communicate to the community the Tax Office view on the implications of the Court or Tribunal decision. Court and Tribunal decisions themselves are already published on the external Tax Office website. However, changes to the system will now automatically insert a link from the decision to the Decision Impact Statement.
63. It will be necessary to identify whether the Decision Impact Statement is 'current' or 'resolved'. A 'current' case is one where we need to update a Public Ruling or ATO Interpretive Decision or there is some other form of administrative action that needs to be taken. A 'resolved' case is one where no further action is needed to be taken by the Tax Office as a consequence of the decision (other than giving effect to it for that particular taxpayer). The statement will contain the following information:

- details of the case including venue, date of decision, and whether or not an appeal has been lodged
- a brief summary of the relevant facts
- a summary of the issues decided by the Court or Tribunal
- the Tax Office's perception of the implications of the decision, and
- whether there are any implications in regard to current Public Rulings. The template should include a list of all precedential ATO view documents which may be affected and are being reviewed as a result of the decision. If there is any uncertainty surrounding a Court or Tribunal decision the Decision Impact Statement will explain how the Commissioner will administer the law pending any review of a published Ruling.

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

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

64. The LSB officer, in consultation with the business line and Tax Counsel, will be responsible for preparing the *first* draft of the Decision Impact Statement. Brevity is a key concept. It is not necessary to restate all of the facts or to repeat Tax Office arguments in these statements.

65. The business line is responsible for the mitigation strategy following the finalisation of litigation. This may require continued work in line with an existing priority technical issue or may require a new priority technical issue to be created.[13] The business line, in consultation with Tax Counsel, will need to advise LSB whether the Decision Impact Statement should include comment on how the decision will be applied to other similar cases.

66. The Decision Impact Statement must be prepared and sent under a covering Minute to the Minister's office four business days prior to it being published.

67. The relevant business line will draft the Minute to the Minister. The business line will work collaboratively with Tax Counsel or where Tax Counsel is not involved, the STC (Strategic Litigation) to prepare the Minute for approval by a DCTC.

68. The impact statements will form a part of the Tax Office's externally accessible Legal Database. The Decision Impact Statement requires a contact officer at least for the initial eight weeks from the time the Decision Impact Statement was published. The contact officer will ordinarily be the Tax counsel involved in the case. Where Tax Counsel is not involved, the STC (Strategic Litigation) will ordinarily be listed as the contact officer.

69. The contact officer (usually Tax Counsel) will be responsible for providing any necessary updates once a Decision Impact Statement is posted on the web site, such as the status of the review of impacted Public Rulings. After the updated Decision Impact Statement has been approved, the Decision Impact Statement should be sent directly to NAT.ATOBSS@ato.gov.au and copied to strategiclitigationunit@ato.gov.au and the relevant Assistant Commissioner in LSB. A judgment call will need to be made by Tax Counsel as to whether or not the updated Decision Impact Statement is sufficiently significant as to warrant also being sent to the Minister's office. In these circumstances the revised Decision Impact Statement should also be sent to the Minister's office four business days prior to it being published.

70. As point of first contact for at least a period of eight weeks, the relevant Tax Counsel must either respond to any external representations themselves or ensure that the representations are referred to the relevant business line or Centre of Expertise. The primary expectation of tax counsel is to manage the response to representations made by interested taxpayers, industry groups and media and to ensure that if there are any consequences for precedential views or the law not previously identified that they be actioned or referred to an appropriate area for action. It is expected that in a majority of cases, it will be appropriate for these representations to be referred to the relevant business line or Centre. There may be reason to extend the eight week period while mitigation strategies are being implemented, such as the revision of Public Rulings. Where appropriate, the contact officer will issue an updated Decision Impact Statement and reflect that it is to be shown as 'resolved'.

71. Unless there is reason to extend the existing arrangements beyond eight weeks, the Decision Impact Statement should reflect a generic Centre of Expertise mailbox

[13] Refer to PS LA 2003/10 and PS LA 2005/22.

(ato.coenmt@ato.gov.au) for external communication after the expiration of the eight week period. This mailbox will be managed by the National Management Team for the Centres of Expertise. The purpose of this is to provide an opportunity for the community to advise the Tax Office of any precedential view warranting review as a consequence of the decision that has not already been identified. The National Management Team will ensure that the appropriate Centre, and business line are involved as necessary, and that processes relating to risk assessment, prioritisation and escalation are appropriately followed.

72. The Decision Impact Statement does not constitute a Public Ruling itself and no comment made in the Decision Impact Statement should be written or read as replacing a published Tax Office view.

73. The Assistant Commissioners, Litigation are responsible for ensuring that initial statements are completed in appropriate cases and cleared at the appropriate levels before being sent to Information Management Systems, ATOlaw at NAT.ATOBSS@ato.gov.au.

Challenging a final court decision

74. In administering the law there will be rare instances where the Tax Office will maintain a position that is contrary to an existing Court or Tribunal decision. A decision to not follow a prior decision of a Court that was not appealed will rest with the Chief Tax Counsel or Second Commissioner (Law). In such cases, the Chief Tax Counsel or Second Commissioner (Law) must:

    - have obtained legal advice
    - as soon as possible, put those affected on notice of this view, and
    - offer test case funding in an appropriate case that will test the Commissioner's position.

75. The requirement to have credible legal advice that a decision is wrong is intended to ensure that any such decision would be defensible from the perspective of good administration.

76. The nature of the legal advice that is required will vary depending on the nature of the Tribunal or Court whose decision is to be challenged. The level or extent of legal advice required to challenge a Tribunal decision is likely to be quite different from that appropriate where a challenge is made to an appellate Court's decision.[14] Depending on the circumstances of the case, the legal advice can be sought from external counsel, solicitor or from internal Tax Office sources.

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

78. It is important in this regard to distinguish between the policy decision to pursue a challenge to a legal decision and the provision of legal advice to support that decision. The policy decision will need to be made at least at the level of the DCTC

[14] See Opinion from Henry Burmester QC, Acting Solicitor-General '*Application of Precedent to Tax Cases – Further Opinion*', 16 January 2006.

or First Assistant Commissioner (Aggressive Tax Planning), or higher, reflecting the nature of the decision, the likely impact that the challenge to an earlier decision may have on other taxpayers and broader tax policy. In making the policy decision, legal advice supporting a challenge is an important element but not the only element to be considered. The legal advice is concerned only with whether there are reasonable legal arguments for a particular interpretation which justify a challenge to a previous decision that, for good reasons, was not appealed from at the time. The policy decision needs to consider broader issues. For this reason, it will usually be undesirable for the legal advice to be given by the person making the policy decision.

79. In many ways the decision to challenge an earlier decision is not that dissimilar to the decision that might have been taken when the original decision was handed down as to whether an appeal should be pursued. The Attorney-General's Legal Services Directions require that an appeal not be pursued unless an agency believes that it has reasonable prospects for success or that the appeal is otherwise justified in the public interest. The same requirement needs to be met where an earlier decision is to be challenged in another case. The legal advice obtained for this purpose needs to be sufficiently robust and credible to ensure the decision can be seen as consistent with the same principles so as to determine whether an appeal is justified.

80. Once legal advice has been received confirming an earlier decision is wrong, and the Tax Office has an appropriate vehicle to test the same issue, the LSB officer must contact the Test Case Litigation Program (via the STC (Strategic Litigation) or the Test Case Litigation Secretariat) so that appropriate funding can be arranged.

81. Once legal advice has been received, and the decision has been made to challenge an earlier Court or Tribunal decision, the litigation team should consult with each other to decide on the most appropriate way to communicate the Tax Office view to the public. It may be appropriate for example, for a Decision Impact Statement to be prepared and published onto the Tax Office's external website (see paragraphs 69 to 81 of this practice statement) or it may be appropriate to develop a media strategy (see paragraphs 17 to 18 of this practice statement).

Subject references	Procedures for managing all Court and Tribunal decisions and risks arising from those decisions
Legislative references	Administrative Appeals Tribunal Act 1975 44(8) Administrative Appeals Tribunal Act 1975 44(7) ANTS(GST)Act 1999 Div 165 Constitution 75 ITAA 1936 Judiciary Act 1903 39B TAA 1953 Pt IVC
Related public rulings	IT 2250
Related practice statements	PS CM 2003/2; PS CM 2003/13; PS CM 2003/14; PS LA 1998/1; PS LA 1998/3; PS LA 2003/10; PS LA 2005/22
Case references	N/A
Other references	Opinion from Henry Burmester QC, Acting Solicitor-General 'Application of Precedent to Tax Cases – Further Opinion', 16 January 2006
File references	05/3969
Date issued	15 February 2007
Date of effect	15 February 2007
Other Business Lines consulted	All
Amendment history	**7 August 2008** Business line updated

ATTACHMENT A

INDICATORS FOR STRATEGIC LITIGATION CASES

General

A. Cases which relate to priority technical issues.

B. Cases where test case funding has been granted.

C. Where revenue at risk is $50 million or more.

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

E. All cases coming before the High Court.

F. Any case involving an issue which provides a strong possibility that special leave may be sought from the High Court. This will include issues that will provide law clarification opportunities for the Tax Office. Some cases may emerge which give the Tax Office an opportunity to challenge past decisions of the Full Federal Court or High Court which are, with respect, not seen as correct.

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

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

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

Tax cases

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

K. Aggressive Tax Planning issues.

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

M. Any matter where there are difficulties in supporting an expressed ATO view.

N. Any matter where an ATO view is being challenged and there is a reasonable possibility that the challenge would be successful. This will include any view expressed by Tax Counsel or other Tax Office peak technical body such as a Rulings Panel or the General Anti-avoidance Review Panel. It will include any forum where a Commissioner, Second Commissioner, Chief Tax Counsel or Deputy Chief Tax Counsel has provided a considered view.

O. Any case where our external counsel has advised that our legislation is defective and the intent of the law is unlikely to be enforced by the Court or Tribunal (especially so for recent tax reform measures).

Debt cases

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

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

Other cases

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

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

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

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

ATTACHMENT B

DOCUMENT DISTRIBUTION

- STC Strategic Litigation
- Assistant Commissioners Litigation [North/South] (tax law)
- the BSL case officer
- the BSL litigation co-ordinator
- any other Tax Counsel involved in the case

And as appropriate to:

- other LSB Stream Leaders (for example Part IVC, Debt, FOI, Commercial & General, Government Law & Practice)
- STC (Strategic Litigation) Aggressive Tax Planning
- STC (Strategic Litigation) Indirect Taxes
- ATO General Counsel (debt, commercial and general, administrative law and FOI issues), or
- National Debt Adviser.