



AUSTRALIAN TAXATION OFFICE (ATO) SUBMISSION

PRODUCTIVITY COMMISSION REVIEW: ACCESS TO JUSTICE ARRANGEMENTS

DISPUTE MANAGEMENT IN THE AUSTRALIAN TAXATION OFFICE

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1. Introduction

1. The Australian Taxation Office (ATO) welcomes this opportunity to contribute to the Productivity Commission's Inquiry into Access to Justice Arrangements. We note that the inquiry has a focus on constraining costs and promoting access to justice and equality before the law. We have provided our submission under headings which reflect the issues raised in the Productivity Commission's Issues Paper of September 2013.

1(a). *Australian Taxation Office at a glance*

2. The Australian tax and superannuation systems are self-assessment systems where most of the 47 million forms submitted every year are not adjusted by the ATO. The overwhelming majority of interactions with the ATO are not disputed, however where a dispute does arise, most are resolved early and quickly through direct communication and negotiation. Direct negotiation is the ATO's preferred approach however, where appropriate, alternative dispute resolution (ADR) techniques including conciliation, mediation, facilitation, early neutral evaluation and case conferencing, are routinely used to resolve disputes.
3. A dispute occurs where a taxpayer disagrees with an opinion or decision of the ATO. One avenue for the dispute to be addressed is for the taxpayer to lodge an objection. There are three main sources that give rise to objections, these are:
 - ATO compliance activities including audits and reviews
 - Taxpayer initiated objections
 - Private rulings
4. Disputes are not common. They are received from a very small percentage of the taxpayer base: for example, for the 2012-2013 financial year 16.2 million tax returns were lodged and only around 26,500 objections were received, this is less than 0.2%. In the same period only 962 matters proceeded to litigation and of these only 185 were the subject of court or tribunal decisions, the majority being in the AAT. This highlights that the ATO is focused on early resolution of disputes, including the use of Alternative Dispute Resolution (ADR) where appropriate.
5. The ATO is a key participant in Australia's civil justice system. The ATO is a party to tax disputes in federal jurisdiction (High Court, Federal Court, Administrative Appeals Tribunal and Small Tax Claims Tribunal) pursuant to Part IVC of the *Taxation Administration Act 1953*, and in applications pursuant to the *Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903*. The ATO is also a party to debt related actions in various state courts and sometimes in the family courts. Disputes range from higher volume low complexity disputes on



mainly factual issues such as penalties and valuations to legally complex disputes with very high levels of tax in dispute. The taxpayers range from self represented litigants to large Corporations and high wealth individuals in complex disputes relating to hundreds of millions of dollars of tax represented by sophisticated tax law experts..

6. Over the last few years the ATO has completely reviewed and updated our approach to dispute management. We have made concerted efforts to analyse different types of disputes, to identify opportunities to resolve them earlier and to remove any unnecessary blockers to their earlier resolution. We have also initiated a range of project work to implement these changes. Our aim is to resolve disputes earlier, to reduce legal costs for taxpayers and the ATO and reduce the resources devoted to management of disputes in the ATO and in the community. We recognise that inevitably there will be some of these tax disputes that will go through to hearing however to the extent possible we want to free up the courts to review the most strategically important issues. We also recognise that the earlier disputes are resolved the lower the expenditure on legal costs and resources by both parties.
7. We have increased our emphasis on earlier resolution of disputes including by utilising ADR. This has been a consistent topic in speeches of Tax Commissioner Chris Jordan¹ since his appointment at the start of last year, and many changes to the organisational structure of the ATO have been to give effect to this aim including by better consultation and engagement with the tax profession and the community.
8. Consultation has played an important role over several years in helping us to refine and improve our approaches to ADR. Between 2011 and 2013 the former Dispute Resolution subcommittee of the National Tax Liaison Group made a very significant contribution on a number of ADR issues. It was established to foster continuous improvement of dispute resolution strategies.
9. The Dispute Resolution Working Group was formed in December 2013, to consult on specific strategies around dispute prevention and early resolution of disputes. Representation in this consultative group includes the main tax professional associations including the Law Council of Australia, the Federal Court, the Administrative Appeals Tribunal (AAT), and Professor Tania Sourdin.
10. Since 2009 the ATO has initiated, chaired and hosted the ADR Inter-Agency Group. The ATO chairs quarterly meetings of the Group, which has members from over 20 federal government agencies (including the Attorney-General's Department, Defence, ACCC, Finance, Immigration, and Customs) and representatives from the former National Alternative Dispute Resolution Advisory Council [NADRAC], Federal Court, and the AAT. Major government

¹ <http://www.ato.gov.au/Media-centre/Speeches/Commissioner/Tax,-the-way-ahead/>;
<http://www.ato.gov.au/Media-centre/Speeches/Commissioner/It-s-about-time/>



initiatives in ADR are addressed at the meetings and we have the benefit of hearing directly from those responsible for identifying and implementing various ADR initiatives across government including the Attorney-General's Department. Discussion follows which allows members to raise directly issues and provide valuable feedback and confer on possible solutions or improvements to initiatives.

2. Avenues for dispute resolution and the importance of access to justice

2(a) *Organisational restructure*

11. A restructure of the ATO earlier last year reshaped the role of Second Commissioner Law to be responsible for the Law Design and Practice Group comprising Integrated Tax Design, Tax Counsel Network and Review & Dispute Resolution. Review & Dispute Resolution, led by the First Assistant Commissioner, has a particular focus on delivering new ways of doing specific activities that include ATO wide responsibility for

- resolving disputes earlier;
- championing the use of ADR to resolve disputes;
- establishing an independent review process for large business;
- managing and improving the objections function for large business.

2(b) *Independent Review for large business income tax disputes*

12. Independent Review is a new function we have offered to Large Business taxpayers since 1 July 2013. It provides an opportunity for an internal review on the technical merits of an income tax audit by a senior technical adviser from our law area who has had no previous involvement in the audit. This new function provides large business taxpayers an option for a 'fresh set of eyes' to consider how the law applies based on the facts provided to our auditors. The reviewer will make a written recommendation to the taxpayer and the audit team at the end of the review.

13. The review is part of our aim to introduce dispute resolution opportunities into all stages of a tax dispute and to encourage our auditors and taxpayers to collaborate early to resolve disputes or to narrow and better understand the issues in dispute.

14. An Independent Review must be requested in writing within two weeks of the receipt of the *statement of audit position*. Reviews are required to be completed within 12 weeks. The reviewer will hold a case conference about three or four weeks into the review, bringing together the audit team and the taxpayer's representatives who have been involved in the audit. The case conference is an integral part of the review process and helps the reviewer



understand the facts and technical issues and improves transparency. A very important qualification is that this is a review and not an audit, if *new* facts, evidence or arguments are provided during the review the Independent Review will be closed and the additional material will be referred back to the auditor for consideration. No further Independent Review will then be available.

15. If the reviewer does not support the audit position and is not able to resolve the matter with the audit team, the Chief Tax Counsel will determine our position. The taxpayer is asked to provide feedback at the conclusion of the review, and we use the feedback to continually improve the independent review service.
16. While this review process is currently only offered for Large Business taxpayers on income tax matters, we are currently considering whether to extend it to other taxpayers and taxes.

2(c). *Early engagement for large market taxpayers*

17. A new process has been deployed to provide large market taxpayers with an opportunity to meet and discuss potential amendment or objection requests they are planning to lodge². We expect this process will assist with faster resolution by enabling discussions on how best to deal with the correction or change required. This will include objections, correcting errors on previously lodged returns and changing a technical position taxpayers had previously adopted on a lodged return.

3. Effective matching of disputes and processes

3(a). *ATO approach to Dispute Management and the ATO Dispute Management Plan*

18. The ATO was the first agency to release a Dispute Management Plan³ and supporting Dispute Management Policy⁴ in October 2012.
19. The inaugural Dispute Management Plan 2012-2013 focussed on tax and superannuation disputes. The latest Dispute Management Plan 2013-14 continues the approach and strategies in the first plan and places special emphasis on resolving disputes relating to debt.
20. Our Dispute Management Plans set out the following key dispute management principles:
 - a. avoid disputes where possible;
 - b. resolve disputes in the simplest and most cost-effective manner taking into account the merits and the risks;

² <http://www.ato.gov.au/Business/Large-business/In-detail/Compliance-and-governance/Amendments-and-objections---early-engagement/>

³ <http://www.ato.gov.au/General/Correct-a-mistake-or-dispute-a-decision/In-detail/Information-for-your-objection/ATO-approach-to-dispute-resolution/Dispute-management-plan-2012-13/>

⁴ <http://www.ato.gov.au/General/Correct-a-mistake-or-dispute-a-decision/In-detail/Information-for-your-objection/ATO-approach-to-dispute-resolution/Disputes-policy/?page=1>



- c. resolve disputes as early as possible;
 - d. clarify disputes by listening to each others' views and considering all resolution options;
 - e. manage disputes in a courteous and fair manner.
21. The Plan is the cornerstone for dispute management across the ATO and applies to all disputes at any stage within the ATO, and is not confined to litigation.

Annexure 1: *Dispute Management Plan 2012-13*

Annexure 2: *Dispute Management Plan 2013-14*

3(b). *Inspector General of Taxation's Review into the ATO's use of EDR (early dispute resolution) and ADR*

22. In 2012 the Inspector General of Taxation (IGT) carried out a review into the ATO's use of EDR and ADR⁵. The review included consideration of ATO policy and procedure relating to dispute resolution and ADR, what steps the ATO takes to avoid unnecessary disputes, who generally initiated ADR discussions or processes, the level of engagement in ADR and the independence of reviews.
23. The IGT found the ATO was managing dispute resolution well and noted
- 'During the investigation I observed that, at a high level, the ATO is committed to engaging with taxpayers to resolve disputes earlier. I have noted some examples in which the ATO's early engagement and appropriate use of ADR has assisted to resolve matters in dispute either wholly or partly without the need for litigation.
24. The IGT made 22 recommendations and the ATO agreed in full or part with all except one which related to the restructure of the appeals area. The last recommendation required a legislative amendment and was a matter for government.
25. The recommendations of the IGT which were either agreed with in full, part or in principle included:
- a. Open and continuous communication with taxpayers during risk reviews and audits, prior to undertaking detailed application of the law;
 - b. Provide opportunity to discuss the scope, appropriateness and relevance of information requests;

⁵ http://www.igt.gov.au/content/reports/ATO_alternative_dispute_resolution/ADR_Report_Consolidated.pdf



- c. Improve training to officers on early identification of potential issues and negotiation/conflict management skills;
 - d. Adopt the principles espoused by AAT and NADRAC that all disputes are suitable for ADR except where it would be clearly inappropriate (ie cost and delay disproportionate to benefit, clear benefit in judicial determination, genuine concern due to serious criminal fraud or evasion);
 - e. Increase scope of the test case program where there is a public benefit in a judicial determination;
 - f. Consult on consideration of making increased use of declaratory proceedings;
 - g. Make more use of third party or joint appointments of valuers where the dispute relates to valuation issues;
 - h. Record data on who initiated ADR processes, who attended (and their roles) and the authority of attendees to settle disputes;
 - i. Inclusion of discussion and authority of settlement of debt in ADR relating to tax disputes;
 - j. Establish an independent feedback system on effectiveness of ADR.
26. The ATO has implemented the recommendations set out in the review.

3(c). *Practice Statement 2013/3 ADR in ATO Disputes & Plain English Guide to Alternative Dispute Resolution*

27. The ATO has published a Plain English Guide to ADR⁶, which provides in simple language an explanation of dispute resolution, ADR and the types of ADR processes that are used in tax and superannuation disputes. This was published in response to a recommendation by the IGT.
28. The ATO first published a Law Administration Practice Statement on ADR in 2007. In 2013 we reviewed and reissued our Law Administration Practice Statement⁷ which relates to our policy and approach on use of ADR in tax disputes. This practice statement contains more detail on use of ADR, when it is appropriate or not appropriate to use ADR in tax disputes, and the respective roles of parties in ADR. These documents are published on our external website to inform and assist the community, the tax profession and our staff of our approach.

⁶ <http://www.ato.gov.au/About-ATO/About-us/In-detail/Key-documents/ATO-plain-English-guide-to-alternative-dispute-resolution/>

⁷ <http://law.ato.gov.au/atolaw/view.htm?DocID=PSR/PS20133/NAT/ATO/00001&PiT=99991231235958>



Annexure 3: Practice Statement 2013/3 ADR in ATO Disputes

4. Preventing issues from evolving into bigger problems

4(a). Litigation Risk Indicator

29. Our officers reviewing and making decision on objections have over several years applied a 'litigation risk matrix' to objections to assist in identifying whether a decision to disallow an objection is likely to result in litigation. The matrix is regularly reviewed and has variable levels of success in predicting litigation in particular kinds of disputes. Those cases identified by the matrix and which are considered by the objections officer to be a genuine risk of litigation, undergo some additional reviews to identify whether there are further steps which could be taken to resolve the dispute, whether the evidence available is sufficient to support a litigation case and whether further evidence or legal assistance is required. These matters may also be referred to technical and specific issue experts in the business line where the dispute arose, to the ADR Network. They may also be referred to our Dispute Resolution area (formerly the Legal Services Branch) for legal assistance and advice on the proposed objection decision.

4(b). Early Assessment and Resolution process in AAT disputes

30. The Early Assessment and Resolution (EAR) process was introduced in July 2013 in response to analysis that showed up to 85% of taxation matters at the Administrative Appeals Tribunal (AAT) were finalised prior to a hearing. The focus of the EAR process is to identify cases that are likely to settle without a hearing and take steps as soon after they are lodged as possible to work with the taxpayers on options to resolve. Our primary objective in this process is to bring forward the resolution to an earlier point and prior to intensive and costly preparation by both parties.

31. Upon receipt of new AAT applications, senior officers in Dispute Resolution consider each application and supporting information to identify any opportunities to resolve the matter. They contact the taxpayer or their representatives promptly to gather further information and review evidence, contentions and options to resolve. Dispute Resolution solicitors collaborate with taxpayers and their representatives, the objections officer, and Debt officers if the tax has not yet been paid, so that options for payment can be put to the taxpayer when options for resolution are considered.

32. We propose to provide feedback to those managing disputes and AAT litigation on which approaches have been used successfully so that ATO staff are able to recognise opportunities for earlier resolution of disputes and AAT litigation.



33. Although this initiative is at quite an early stage the results so far have revealed that taxpayers have a strong preference for staff at these earlier stages to contact them by telephone or meeting to seek further information and explain the current position. We find direct engagement between the parties is a much more effective approach than exchanges of letters and is conducive to identifying opportunities for resolution of disputes at the earliest possible stage.
34. We are also working with various registries of the AAT to accommodate early negotiations with taxpayers on particular matters. The AAT's Brisbane Registry is preparing a report on the approaches being taken to resolve matters. Following discussions with the AAT's Sydney Registry, in-principle agreement has been reached to granting of extensions of time for lodging Section 37 documents⁸ ('T-Docs') where all parties agree there is a good chance of an early resolution.
35. The aim of EAR is to meet with the taxpayer as early as practicable and to resolve the case by direct negotiation before either party has had to spend money on preparing the case for hearing.
36. Dispute Resolution is asking its staff to set up a face to face meeting with the taxpayer on all matters referred to DR. The purpose of the meeting is to explore ways to resolve the case as early as possible; discuss obstacles to settlement, such as a debt repayment plan, narrow the issues in dispute; agree facts and streamline the case so it is efficient and less costly to run to hearing. By establishing an early rapport and conversation between the parties both sides benefit from the good relationship and the trust established. Formal ADR processes can also be considered where direct negotiation has not resolved the matter.

4(c). *Use of In-house facilitation to resolve disputes*

37. In 2013 we undertook a pilot program involving a small number of GST disputes where an in-house facilitator who had not been involved in the dispute facilitated a dialogue between the taxpayers and the ATO to attempt to reach an outcome about some or all of the objection issues.
38. The results of the pilot were positive with 41% of matters being fully resolved. In most of the remainder the facilitation was still viewed as a valuable exercise as it led to narrowing/clarification of the issues and/or agreement on how to move the case forward.
39. The pilot has recently been evaluated to determine whether there would be a benefit in rolling it out more broadly. As a result of the evaluation we have decided to make in-house facilitation

⁸ Section 37 *Administrative Appeals Tribunal Act 1975*



available from 1 April 2014 as an additional means of resolving disputes in income tax and GST audits of small businesses.

4(d). *Large/High Risk ADR matters*

40. Since 1 August 2013 a small team of senior lawyers has started to closely manage, monitor, review and report on ADR in tax disputes that are considered to be high risk (involving large business or high wealth individuals or their private groups). We hope by this close management to ensure the best use is made of ADR processes and to maximise the chances of resolving the dispute by the ADR.
41. Currently a review of best practice in ADR in these types of disputes is underway, with internal and external stakeholders including former judges, senior ADR practitioners, legal practitioners and senior ATO officers who are regularly involved these processes being consulted.

4(e). *Australian Centre for Justice Innovation feedback survey*

42. Following a recommendation by the IGT, the ATO engaged the Australian Centre for Justice Innovation (ACJI) at Monash University to design and implement a mechanism for independently evaluating our use of alternative dispute resolution (ADR) in tax disputes. The evaluation process will run between 1 July 2013 and 30 June 2014, analysing all responses to finalised ADR processes during that period to:
 - assess the effectiveness of current processes
 - identify opportunities to improve future processes and enhance our dispute resolution capability⁹.
43. De-identified information is provided to ACJI by the ATO, and ACJI then seek feedback on the ADR process from the taxpayer, the taxpayer's representative, the ATO officer, ATO representatives and the ADR practitioner.
44. The research will consider people's experiences in ADR in tax disputes across a range of processes including conciliation, mediation, neutral evaluation, case appraisal and facilitation, whether conducted in the AAT or Federal Court or by a private mediator such as a retired judge or counsel. We will use the review to analyse the effectiveness of the ADR processes we currently use and identify opportunities to improve the processes and the way we engage in them. This will enhance the ATO's dispute resolution capability.
45. Participants in the feedback survey are given information about the review process at the time of the ADR occurring. In the weeks after the ADR process concludes, ACJI staff contact the

⁹ <http://www.ato.gov.au/General/Correct-a-mistake-or-dispute-a-decision/In-detail/ATO-approach-to-dispute-resolution/Evaluating-alternative-dispute-resolution-in-taxation-disputes/>



participants to further explain the process and ask them to complete a telephone or on-line survey. Participants are given the option of 'opting out' of the process if they do not wish to be involved. Participants who agree to take part in the survey are asked a series of questions common to all participants plus questions that are specific to the role they undertook in the ADR (practitioner, as solicitor etc).

5. Effective and responsive legal services

5(a). *ATO Engagement of solicitors or counsel*

46. The ATO has negotiated parcelling arrangements with sixteen firms on the Legal Services Multi Use List (LSMUL). Prior to allocation of a matter to one of these firms, approval must be obtained from a regional manager in the Dispute Resolution branch.
47. The ATO may engage counsel (senior or junior) to represent the ATO in court or tribunal matters. In complex matters one of the legal firms from the LSMUL may also be engaged and therefore instruct counsel. However the ATO makes extensive use of direct briefing of counsel by its Dispute Resolution staff.
48. LSMUL firms or counsel are only engaged where there is a valid reason to do so, generally due to complexity of the matter. Staff within the Dispute Resolution branch working on litigation matters are legally qualified and hold practising certificates¹⁰, and therefore much of the litigation is conducted in house.
49. Approval must be obtained from an Assistant Commissioner, Dispute Resolution prior to engaging counsel on a particular matter.
50. Both counsel and LSMUL firms must provide an estimate of their cost to conduct the case prior to their engagement. The approval to engage includes the estimated cost, and if the cost is likely to be exceeded, an explanation for the change must be provided promptly and a revised estimate must be approved by the Assistant Commissioner or regional manager respectively prior to the work being undertaken.

¹⁰ The requirement for staff to be legally qualified was brought in from 1 July 2012. There are a small number of experienced staff who are not legally qualified but who were 'grandfathered' due to their experience in conducting ATO litigation.



5(b). *Representation in tax disputes*

51. Taxpayers may represent themselves in disputes or they may be represented by their accountant at the AAT or lawyer in AAT or Federal Court. In large or complex disputes taxpayers may be represented by a legal team including solicitors, senior and junior counsel.
52. Where taxpayers are representing themselves, ATO staff endeavour to provide sufficient assistance to ensure a balanced case is put to the court or tribunal. For example we do not resist reasonable requests for adjournment if the self-represented taxpayer needs a little more time to assemble their case. In accordance with the ATO's model litigant obligations, ATO staff do not rely on overly technical points that may cause a disputant to spend more time and effort than is necessary.
53. The ATO do not consider that there should be any changes to the current rules regarding representation in tribunals. Although many matters in the AAT and STCT are relatively straightforward, there are some disputes which have a degree of complexity that means representation (including counsel) on both sides is prudent. The AAT may be attractive to the particular disputant due to its ability to stand in the shoes of the decision-maker rather than rule on points of law. The parties however may consider it necessary to engage counsel, including senior counsel, to persuade the AAT on the correctness of their perspective.

6. Better measurement of performance and cost drivers

6(a). *Record keeping in ADR*

54. The ATO keeps data relating to its participation in ADR in a standalone system called the ADR Register. This system provides raw data for analysis on factors including
 - a. Type of dispute (tax dispute or debt dispute);
 - b. Whether the matter is in litigation or at an earlier stage such as objection or audit;
 - c. The market segment of the taxpayer;
 - d. Whether the ADR was conducted by a private ADR practitioner or by an officer of the court or tribunal ;
 - e. The cost of engaging the ADR practitioner;
 - f. The number and roles of attendees at the ADR;
 - g. Whether ADR resolved the matter, or if not, whether it clarified the issues or facts in dispute.
55. Legal costs, such as engagement of counsel or firms under the LSMUL are recorded in a separate system. If the engagement of counsel or firm solely relates to the ADR process then



information on the legal costs is available. However if the engagement is part of an existing litigation matter, data is not maintained separately on the legal costs attributable to the ADR process specifically, as it can be difficult to attribute costs solely to the ADR process.

7. Conclusion

56. The ATO has a strong commitment to the use of ADR to resolve disputes without recourse to litigation. ADR is not our first option to resolve disputes. We prefer to exhaust direct engagement and negotiation as a means of resolving the dispute with the taxpayer before considering ADR. Engaging an external ADR practitioner will not be a proportionate response to most smaller high volume disputes prior to litigation commencing. We are increasingly using ADR at early stages of our large business and high risk disputes. Our dispute management plan sets out our approach to management of disputes and ADR. Although not all disputes are suitable for ADR, ADR should be considered in all disputes to assist in resolving disputes earlier and to minimise cost.