



TAXATION PRACTICE NOTE (TAX-1)

National Practice Area Practice Note

1. INTRODUCTION

1.1 This practice note sets out arrangements for the management of tax cases within the National Court Framework (“NCF”). It:

- (a) is to be read together with the:
 - Central Practice Note (CPN-1), which sets out the fundamental principles concerning the NCF of the Federal Court and key principles of case management procedure. The Central Practice Note is an essential guide to practice in this Court in all proceedings; and
 - *Federal Court of Australia Act 1976* (Cth) (“**Federal Court Act**”) and the *Federal Court Rules 2011* (Cth) (“**Federal Court Rules**”);
- (b) takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing;
- (c) is intended to set out guiding principles for the conduct of tax cases and is not intended to be inflexibly applied.

1.2 These arrangements have as their objects:

- the uniform treatment and management of tax cases coming into the Court irrespective of the registry in which the proceeding is filed;
- to provide the just and efficient determination of tax cases in a timely manner;
- to facilitate the identification and development of alternative procedures with a view to expediting the resolution of tax cases where possible.

2. OVERVIEW AND DEFINITION

2.1 The Taxation National Practice Area (“NPA”) comprises any proceeding relating to:

- (a) tax appeals to the Federal Court pursuant to Part IVC of the *Taxation Administration Act 1953* (Cth) (“**Taxation Administration Act**”) that are relevant to decisions made by the Commissioner of Taxation (“**Commissioner**”) (see also Division 33.1 of the Federal Court Rules);
- (b) appeals from the Administrative Appeals Tribunal (“**AAT**”) which involve taxation dispute pursuant to s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (see also Division 33.2 of the Federal Court Rules); and
- (c) any recovery or other proceeding collateral to a tax dispute.

- 2.2 The Taxation NPA, as with all other NPAs, will be overseen and managed by a National Coordinating Judge and Registry Coordinating Judges. Parties and lawyers may expect that the coordinating judges will emphasise the national and harmonised case management of tax cases with the aim that the progress of cases is coordinated and expedited nationally.
- 2.3 The Taxation Registry Coordinating Judges will survey and examine all tax cases in their respective registries from time to time and will regularly liaise with each other and with the National Coordinating Judge so that, where applicable and appropriate, like-cases are heard together and common issues, wherever they arise, are heard together or sequentially.
- 2.4 The Court will seek to identify and develop appropriate processes and procedures for the just and efficient resolution of tax cases, both in terms of cost and time. For example, where the facts can be totally, or perhaps even substantially, agreed, and the only issue is whether a statutory provision or a general law principle applies to the facts as agreed, the Court may explore with litigants the advantages of different approaches to resolve disputes such as the use of Full Courts in the original jurisdiction, declaratory relief and stated cases, sometimes in conjunction with alternative dispute resolution (“ADR”).

3. COMMENCING PROCEEDINGS – PART IVC APPEALS

Notice of Appeal

- 3.1 Except as otherwise provided in this practice note, proceedings are to be commenced by the filing of an application in accordance with r 33.02 of the Federal Court Rules. Save in a case to which r 33.02(5) applies, a sealed copy of the application must be served within 5 days after filing the application.
- 3.2 In addition, so that the Court may better understand the nature of the case at an early stage, the applicant should file with the application a copy of the Commissioner’s objection decision, the subject of the appeal. However, in a case where the Commissioner has not made an objection decision (and the appeal is against an objection decision that is taken to have been made pursuant to ss 14ZYA or 14ZYP of the Taxation Administration Act), the applicant should file with the application a copy of the taxpayer’s objection(s), the subject of the appeal. In either circumstance, the Tax File Number should be redacted.

Appeal Statements

- 3.3 In satisfying the requirements of r 33.03 of the Federal Court Rules any appeal statement shall avoid undue formality and state in summary form the following:
 - (a) the basic elements of the party’s case or defence;
 - (b) where applicable, the relief sought;
 - (c) the issues the party believes are likely to arise;
 - (d) the principal matters of fact upon which the party intends to rely; and

- (e) the party's contentions (including the legal grounds for any relief claimed) and the leading authorities supporting those contentions.

Filing and Serving of Appeal Statements and r 33.03 Documents

- 3.4 *Commissioner's appeal statement, and r 33.03 documents* – the Commissioner's appeal statement, and r 33.03 documents must be filed and served upon the applicant within 28 days of the date on which the Notice of Appeal was served on the Commissioner.
- 3.5 *Applicant's appeal statement* – the applicant's appeal statement must be filed and served upon the Commissioner within 40 days of the date on which the Notice of Appeal was served on the Commissioner.
- 3.6 In all circumstances it is important that the parties exchange and file the above documents prior to the first case management hearing.
- 3.7 Special arrangements will be made for Private Ruling cases or cases requiring expedition. However, in those cases it is equally important that appeal statements, and r 33.03 documents are exchanged and filed, wherever possible, before any first case management hearing.

Filing and Serving of Pro Forma Questionnaire

- 3.8 The Commissioner must file and serve a completed Tax Pro Forma Questionnaire ("questionnaire") (in the form available on the Court's website) within 7 days of the date on which the Notice of Appeal was served on the Commissioner by the applicant.
- 3.9 The applicant may, but is not obliged to, provide a completed questionnaire 7 days after the Commissioner has served a completed questionnaire upon the applicant if the applicant disagrees with the information provided in the Commissioner's questionnaire or considers it necessary to add further information not contained in the Commissioner's completed questionnaire.
- 3.10 The information provided in any questionnaire should be non-contentious. The purpose of the questionnaire (including any responsive questionnaire) is to inform the Court and the parties of relevant information prior to the first case management hearing and to assist the Court in managing tax cases, including their allocation or reallocation.

4. COMMENCING PROCEEDINGS – APPEALS FROM THE AAT AND OTHER PROCEEDINGS

Notice of Appeal

- 4.1 Proceedings, being appeals from the AAT, are to be commenced by filing a Notice of Appeal in accordance with r 33.12 of the Federal Court Rules.
- 4.2 In addition, so that the Court may better understand the nature of the case at an early stage, the applicant should file with the Notice of Appeal a copy of the decision of the AAT, the subject of the appeal.

Originating Application

- 4.3 Any other proceeding is to be commenced by an originating application supported by an affidavit.

Declaratory Orders

- 4.4 Declaratory relief may be brought in the circumstances prescribed by s 21 of the Federal Court Act and r 8.03 of the Federal Court Rules. Such relief may be appropriate, but is not limited to, circumstances where the facts are agreed or are not in dispute.

5. CASE MANAGEMENT – ALL TAXATION CASES

- 5.1 Parties and their representatives should familiarise themselves with the guiding case management information set out in the Central Practice Note. This practice note should always be read with the Central Practice Note.

Approach to Case Management

- 5.2 In tax cases, in addition to considering the matters in Part 8 of the Central Practice Note, the parties should come to the first case management hearing prepared to address the following matters:

- (a) **Initial Witness List** – Each party must bring an initial witness list with the name of each witness the party intends to call at trial. The list must include a very brief summary of the expected evidence of each witness and the relevance of the evidence. The initial witness lists will be combined to create the “Preliminary Witness List”. The parties have an ongoing obligation to update the Preliminary Witness List by adding or removing witnesses as appropriate, and must notify the Court and all other parties promptly.
- (b) **Fixing Trial Date** – Given that the Docket Judge *may* list the proceedings for final hearing, appropriate hearing dates and an estimate of the length of the hearing.
- (c) **Taxation Case Management Conference** – whether it is desirable for a case management conference to be conducted for the more detailed management of the proceeding as outlined in paragraph 5.7 to 5.11 below.

Case Management of Concurrent Proceedings

- 5.3 From time to time a party will seek relief in this Court against adverse objection decisions on assessments of primary tax and concurrent relief in the AAT against adverse objection decisions on assessments of penalty tax relating to the same substantive issues.
- 5.4 The parties should notify the Court at the earliest possible opportunity (including before filing where possible) of the concurrent nature of the proceeding.
- 5.5 Where possible, the Court will seek to accommodate such situations by having the proceeding in this Court docketed to a judge who is a presidential member of the AAT so as to enable both proceedings to be heard by the same person at the same time.

Timing of the First Case Management Hearing

- 5.6 The first case management hearing will take place:
- (a) not less than 6 weeks from the date of the filing of the Notice of Appeal for Part IVC proceedings that are not “private ruling” cases;
 - (b) not later than 3 weeks after the filing of the Notice of Appeal for Part IVC proceedings that are “private ruling” cases;
 - (c) within 5 weeks from the filing of the Notice of Appeal or originating application, wherever possible, for appeals from the AAT and in any other matter.

The case management hearing may be set down earlier, however, in all cases that are urgent.

Taxation Case Management Conference

- 5.7 The Court may of its own motion, or in its discretion at the request of a party, hold a Taxation Case Management Conference (“**Taxation CMC**”) to manage a proceeding more intensively.
- 5.8 A Taxation CMC may be held in addition to, or instead of, a case management hearing and is to be attended by leading counsel responsible for the conduct of the proceeding for each of the parties who is expected to have the carriage of the proceeding at trial.
- 5.9 The Taxation CMC is expected to be conducted informally and, where possible, may be held in a conference room but will generally be recorded.
- 5.10 The lawyer for the applicant shall endeavour to produce and to file not less than 2 days before the day appointed for the Taxation CMC an agreed:
- (a) short and uncontroversial description of what the proceeding is about;
 - (b) short and uncontroversial summary of the material procedural history of the dispute; and
 - (c) draft working list of the facts and issues in dispute.
- 5.11 A Taxation CMC may be particularly useful in larger and more complex tax cases and its particular objective is for the early management of proceedings and the efficient allocation of resources of both the Court and the parties. This is to be achieved through the early identification of the issues and disputes and through the collaborative analysis and consultation between the individuals with the ultimate carriage of a party’s case and the judge.

6. ALTERNATIVE DISPUTE RESOLUTION

- 6.1 Parties and their representatives should familiarise themselves with the ADR information set out in Part 9 of the Central Practice Note.

- 6.2 The thoughtful and creative use of ADR techniques (including mediation and confidential conferences) for both substantive and procedural issues should be recognised by the parties as potentially very important in resolving or streamlining the running of tax cases. Parties should also consider the merits of the use of other ADR techniques particularly relevant to tax cases, such as “early neutral evaluation”.

7. DISCOVERY, EVIDENCE AND WITNESSES

Discovery

- 7.1 Generally speaking, in tax appeals, where the taxpayer has the burden of proof and the parties can be assumed to have the relevant facts and information arising from an audit or assessment process, parties should assume that discovery will not be necessary or that only limited discovery will be permitted and managed in a targeted manner.
- 7.2 Where limited discovery may be necessary, parties and their representatives should familiarise themselves with the procedure in relation to discovery set out in Part 10 of the Central Practice Note and, unless otherwise ordered, the procedures set out in the Central Practice Note will apply.

Evidence and Witnesses

- 7.3 Evidence will generally be by way of affidavit, but the parties should attempt to eliminate the use of unnecessary or prolix affidavits.
- 7.4 Expert Evidence can play an important part in tax cases. Parties should be familiar with the requirements and information relating to expert evidence set out in the *Expert Evidence Practice Note (GPN-EXPT)*, including with respect to the preparation of joint-reports. Questions forming the basis upon which any expert reports are prepared may be settled with the parties by the docket judge or a registrar of the Court.
- 7.5 The parties to tax cases can expect that the Court may generally order that expert witnesses prepare and file a joint-report through which they consider and clearly identify the issues that are disputed or not in dispute between them, with clear and concise explanations of any differences of opinion and the nature and significance of any such differences. It is intended that such a report, as a joint-report, will stand alone as the evidence of the experts in the proceeding without the need to refer to earlier reports or evidence from them.
- 7.6 Parties should otherwise familiarise themselves with the guiding principles and information relating to evidence and witnesses set out in Part 11 of the Central Practice Note.

8. INTERLOCUTORY STEPS AND URGENT APPLICATIONS

Interlocutory Applications

- 8.1 Parties and their representatives should familiarise themselves with the information set out in Part 12 of the Central Practice Note regarding further interlocutory steps.

- 8.2 Notwithstanding that interlocutory applications should be kept to a minimum, the Court seeks to facilitate parties adopting the most efficient mechanism possible for the making of any interlocutory application and the resolution or determination of such applications.
- 8.3 Where a party seeks only simple directions, such an application should be managed by way of proposed consent orders or an oral application, with notice, at a case management hearing or case management conference.

Urgent Applications

- 8.4 Parties and their representatives should also familiarise themselves with the information set out in Part 5 of the Central Practice Note regarding urgent applications.

Interrogatories and Particulars

- 8.5 Interrogatories will not be permitted.
- 8.6 Requests for particulars may be a matter for discussion at the case management hearing and will generally not be permitted outside any orders arising from the case management hearing. Nevertheless, parties are expected to provide or exchange information necessary for the conduct of proceedings in a co-operative and common-sense way.

9. PRE-TRIAL CASE MANAGEMENT HEARING

- 9.1 Parties and their representatives should familiarise themselves with the guiding pre-trial case management information set out in Part 13 of the Central Practice Note.
- 9.2 Additionally, in preparation for the pre-trial case management hearing, the parties should have:
- (a) identified the material facts that are agreed and the material facts in dispute;
 - (b) finalised the list of witnesses to be called at trial. Witnesses not on the final witness list will not, save in exceptional circumstances, be permitted to give evidence;
 - (c) prepared their objections to evidence proposed to be tendered; and
 - (d) collaborated and prepared a Joint-Exhibit List, which is to have numbered exhibits and will attach and describe (in brief form) each exhibit and a statement of its relevance. The judge will examine the list with the parties and discuss with them any perceived issues or concerns. The judge may require the parties to seek leave to tender at trial any exhibit that is not on the Joint-Exhibit List.

10. FURTHER PRACTICE INFORMATION AND RESOURCES

- 10.1 Further information about practice and procedure in this NPA can be found on the Taxation NPA “homepage” of the Court’s website. In addition, all General Practice Notes are available on the Court’s website, including the Expert Evidence Practice Note (GPN-EXPT), Subpoenas and Notices to Produce Practice Note (GPN-SUBP), Lists of Authorities and

Citations Practice Note (GPN-AUTH) and Consent Orders Involving a Federal Tribunal Practice Note (GPN-TRIB).

- 10.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

Enquiries and Contact Information

- 10.3 General queries concerning the practice arrangements in this NPA should be raised, at first instance, with your local registry. If a registry officer is unable to answer your query, please ask to speak to the NCF Coordinator in your local registry.

J L B ALLSOP
Chief Justice
20 December 2019