Law Council
OF AUSTRALIA
Business Law Section

The Hon Justice Tony Pagone
Federal Court of Australia
305 William Street
MELBOURNE VIC 3000
Via email: vicreg@fedcourt.gov.au | practice.notes@fedcourt.gov.au 27 November 2015

Dear Judge,

National Tax Practice Consultation Process: Draft Taxation National Practice Note

This is a submission made on behalf of the Taxation Committee of the Business Law Section of the Law Council of Australia (**LCA**).

The LCA represents a large proportion of the persons who advise and represent both taxpayers and the Commissioner of Taxation in proceedings in the Federal Court.

The LCA welcomes the opportunity to provide comments for the consideration of the Federal Court on the Draft Taxation National Practice Note (**Tax Note**) and the Draft Central Practice Note (**CPN**).

Summary of submission

The LCA wholly endorses the focus on early identification of essential issues with a view to facilitating both the early resolution of disputes and (if early resolution is not possible) the efficient and expeditious conduct of tax disputes.

The LCA submits that the Court should consider the following revisions to the Tax Note to better achieve those objectives:

1. Clarify the circumstances when the Court will consider hearing like cases together or sequentially.

2. More specific guidance on the form and content of appeal statements, whilst maintaining the flexibility of those documents having regard to the circumstances of each case. This would be of particular assistance to self-represented litigants, and advisers who do not regularly appear in the Federal Court tax list.

3. A requirement that the Commissioner file and serve within 14 days of receipt of the applicant's appeal statement a document stating in respect of each fact contended for by the applicant whether the Commissioner admits, does not admit, or denies that fact.

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4. The adoption of the current practice concerning discovery in tax matters as presently provided by para 6 of the Practice Note Tax 1.

5. Further guidance concerning the preparation of the Joint Exhibit List for consideration at the Pre-Trial Case Management Hearing.

6. Revisions to the Pro forma Questionnaire to reflect the Court's intention to identify and develop new alternative process and procedures for the just and efficient resolution of taxation disputation.

The LCA further submits that the Court should additionally consider excluding the application of para 8.5(l) of the CPN to tax disputation.

Principal concerns: maintaining consistency and flexibility

The principal concerns of the LCA are that:

(1) the Federal Court's practices and procedures in tax appeals are consistent within and between the various state and territory registries; and

(2) Docket Judges are encouraged to be flexible in their case management of each tax appeal to maximise the potential for early resolution and (if the matter cannot be resolved) to ensure that appeals are managed in a manner that results in essential issues being identified early in the process and costs and delays minimised.

There are a range of views within the membership of the LCA concerning the balance to be struck between consistency and flexibility in procedural matters. However, the focus and encouragement evident in the draft Tax Note (read together with the draft CPN) is on the identification of innovative procedures to address the principal concerns of the LCA, in particular the statement in para 6.6 of the draft CPN that: "*The key focus of the Court will be to ensure that the most appropriate and efficient mechanisms for case management, including appropriate mechanisms suggested by the parties, are adopted when considering the nature of each case and the needs of the parties*."

The LCA wholly endorses that focus, and also endorses the statements of practice and principle made in the two relevant draft practice notes to achieve those ends.

Achieving consistency

Reference is made to para 2.3 of the Tax Note (which is similar in form to the current Practice Note Tax 1 at para 2.3). The LCA suggests a revision to the text at the first bullet point of that paragraph to read:

- *like cases be heard together where there is an appropriate relationship between the taxpayers and the issues in dispute arise out of the same or similar facts;*

And a further bullet point added directly thereafter to read:

- *where there is no appropriate relationship between the taxpayers, where possible, consideration should be given to the hearing of like cases by the same judge.*

Further, the LCA suggests that where the Court proposes to hear like cases with similar issues together, or sequentially, the Court first seek the consent of the parties where such an approach may cause delay to the progress of one or more proceedings brought by those parties.

Additional guidance in relation to the form and content of appeal statements

With a view to better achieving the objective of early identification of the essential matters, LCA submits that the Court should consider providing additional guidance in the draft Tax Note in respect of the form and content of appeal statements.

Relevantly, FCR r 33.03 requires the Commissioner to file and serve within 28 days of service of the taxpayer's notice of appeal in a matter other than a matter involving a private ruling an "appeal statement", being a document that "outlines the Commissioner's contentions and the facts and issues in the appeal as the Commissioner perceives them", or in the alternative an "appeal affidavit"[1].

The Tax Note states at para 3.2 that (in terms similar to the current Practice Note Tax 1 at para 4.1):

> "*In satisfying the requirements of r 33.03 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.*"

In the words of Stone J in *BAE Systems Australia (NSW) Pty Ltd v FC of T* (2008) 59 ATR 567 at [19]: *"[T]he taxpayer, and the court, must be given a clear and succinct statement of the Commissioner's position without imposing any element of a burden of proof on the Commissioner. In substituting such a statement for pleadings the legislature has provided for a very practical approach to the unusual situation where the taxpayer bears the burden of proving that the Commissioner's assessment is excessive. In my view, such a statement should not be overly scrutinised in an attempt to find errors or inadequacies. The question is: does the statement give the taxpayer a practical understanding of the Commissioner's position?".* See also *Rio Tinto Ltd v Federal Commissioner of Taxation*

[1] The members preparing this submission are not aware of an "appeal affidavit" ever having been filed by the Commissioner.

(2004) 55 ATR 321; *McDonald's Australia Ltd v Cmr of Taxation (No 2)* (2008) 69 ATR 898 at [6];

Importantly, the purpose of an appeal statement "is to serve the ends of justice by ensuring procedural fairness": *Pacific Exchange Corp Pty Ltd v Commissioner of Taxation* (2009) 180 FCR 300 at [53].

The LCA submits that the Court should consider revising para 3.2 of the Tax Note to give more specific guidance to parties preparing appeal statements with a view to achieving the objective of early identification and narrowing of the key factual and legal issues in dispute. The guidance should also better assist self-represented persons, and persons represented by advisers who are not familiar with the Tax List, in relation to the form and content of an appeal statement. To that end, the LCA suggests that para 3.2 be revised to read as follows:

> *"In satisfying the requirements of r 33.03 any appeal statement shall avoid undue formality and state in summary form the following*
>
> *(a) the provisions of each taxation statute with which the proceedings are principally concerned;*
>
> *(b) the principal matters of fact which are relevant to the resolution of the dispute;*
>
> *(c) by reference to each identified statutory provision, the issues in contest between the parties - the issues identified should reveal the real contest between the parties and not conceal the issues by (for example) simply stating that the objection was correctly disallowed / incorrectly disallowed;*
>
> *(d) the party's contention, and the basis (both factual and legal) for the contention, in relation to each issue (including the leading authorities supporting those contentions); and*
>
> *(e) the relief sought."*

In particular, the revision suggested sub-para (c) above by the LCA is sought so it may provide greater clarity to the parties concerning the the issues in dispute and assist the parties *"to confine an appeal to a specific point of law or fact on which the amount of assessment depends"*: see *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614, per Brennan J, at p 624, see also Deane J at pp 626-627. The benefits of seeking greater clarity and certainty from the parties about the issues in dispute can be seen by considering the consequences of failing to confine an appeal to specific points of law or fact which can result in a taxpayer not being in a position to know the case he must meet in circumstances where the taxpayer bears the onus of proof (see also: *FCT v Dalco* at p.625, per Brennan J)

Which party should "go first" when filing an appeal statement?

The LCA supports the current practice as provided by Rule 33.03 of the *Federal Court Rules* that the Commissioner should continue to be obligated to be the party that file its appeal statement first, followed by the taxpayer.

The LCA feels strongly that it is important for the Commissioner to file his appeal statement first so as to assist the taxpayer to know the case which the taxpayer should meet.

Additional step prior to first case management hearing: admit / deny facts

The LCA also suggests that the Tax Note include an additional step to be taken prior to the first case management hearing, namely that the Commissioner file and serve a document, within 14 days of receipt of the applicant's appeal statement, informing the applicant of whether the Commissioner admits, does not admit, or denies each of the facts contended for in the applicant's appeal statement. Consistent with s.37M of the *Federal Court Act* this will likely save considerable time and expense in most cases in the applicant establishing the material facts, and enable the Court to deal with the matter without regard to unnecessary evidence of uncontested facts.

If this suggestion is adopted, a consequential revision should be made to paragraph 5.8(a) of the Tax Note to provide adequate time for this step to be completed in advance of the first case management hearing by listing this hearing not less than 8 weeks from the date of the filing of the notice of appeal.

Further, consideration should be given by the Court as to the status of this additional step. The LCA sees this step as being akin to that which is required by Rule 16.07 of the *Federal Court Rules,* rather than the status afforded by a Notice to Admit under Part 22 of the *Federal Court Rules*.

Case management of Concurrent Proceedings

With a view to better achieving the objective of the effective and expeditious resolution of disputes, the LCA endorses the proposal that the Court will use its best endeavours to docket such proceedings to a judge who is also a presidential member of the AAT and that submit that, *by default* where appropriate, such concurrent proceedings be heard by the same docket judge at the same time.

Further, the LCA submits that a party who seeks to have such matters heard *separately* should seek such directions at the first case management hearing. The TTI and LCA observe that the current procedure for seeking concurrent hearings is cumbersome and there is no observable preference for such an outcome, despite the efficiencies offered by this approach.

In the event such proceedings are listed, case managed and/or heard concurrently, the Court, when considering any question as to costs, should have regard to the fact that if the proceedings in the AAT were not heard concurrently with the Federal Court proceedings that those proceedings would have been brought in a no-costs jurisdiction.

Discovery

In preference to what is proposed by 7.1 of the Tax Note which adopts the CPN procedure for discovery, the LCA submits that the approach presently set out in the Practice Note Tax 1 at para 6 should instead be adopted as a more appropriate and reflexive approach to discovery in tax matters.

Pre-Trial Case Management

In preference to what is proposed by 9.2(d) of the Tax Note which adopts the approach presently set out in the Practice Note Tax 1 at para 9.1(d) the LCA suggests that sub-paragraph (d) be revised to read as follows:

> *"(d) Joint Exhibit List – The parties will collaborate and jointly submit a numbered list of the exhibits the parties intend to rely on at trial, ordered where appropriate in chronological order. Where it is not obvious from the description of a document in the Exhibit List, a statement of the relevance of one or more of the documents should be so included. The judge will examine the list [at the pre-trial case management hearing] with the parties and discuss with them any perceived issues or concerns. Exhibits not on the joint exhibit list will generally not be permitted to be tendered at trial."*

Pro forma Questionnaire

Under the proposed heading "Background" the question "Summarise the administrative history of the dispute …" should be excluded as this information will have already have been set out in each party's respective Genuine Steps Statement filed with the Court. Under the proposed heading "Related Taxation Matters?" should be amended to read "Procedural matters" and include the following additional questions:

- Is the matter appropriate to be referred to the Full Court in the original jurisdiction? If so, why?
- Have alternate dispute processes been utilised by the parties in respect to the issues in dispute? If yes, please outline each process that has been used and the date on which each process was used.
- Are there any alternate dispute processes which the party considers should be used in the future? Please detail which process and when such process is proposed to be used.

CPN – paragraph 8.5 (l), capping of costs

The LCA does not agree that para 8.1 of the CPN should apply to tax matters for the following reasons:

- the taxpayer bears the onus of proof and it would be inappropriate to limit the costs outlayed or recoverable in such circumstances;

- the test case funding regime applies to some matters brought in the Federal Court; and
- there is an alternate no-cost jurisdiction (in the AAT) for an initial review of the Commissioner's decision on objection. In appropriate circumstances appeals from AAT decisions to the Federal Court will receive test case funding.

If you have any questions regarding this submission, in the first instance please contact the Committee Chair, Adrian Varrasso, on 03-8608 2483 or via email: adrian.varrasso@minterellison.com

Yours faithfully,

Teresa Dyson, Chairman
Business Law Section