THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: RNLSL:DHgl1563030

13 July 2018

The Hon. Dominic Perrottet MP
Treasurer and Minister for Industrial Relations
GPO Box 5341
SYDNEY NSW 2001

Dear Treasurer,

NSW Test Case Litigation Funding Program

The Law Society of NSW considers there is a strong case for the introduction of a test case funding program for NSW taxation laws. Such a program would target matters where there is uncertainty or contention about how the law operates and so have value as legal precedent. With the increased complexity of NSW taxation laws in recent years, this would provide a taxpayer with an avenue for review, where the cost of litigating relative to the amount in dispute might otherwise mean that it is not considered commercially viable.

The Law Society members of the Revenue NSW/ Law Society Liaison Committee ("Revenue Liaison Committee") have contributed to this submission.

1. The Problems

The operation of NSW taxation laws effectively favour the Chief Commissioner of State Revenue ("CCSR") over the taxpayer where there is a genuine dispute as to the interpretation of the laws. The issue by the CCSR of an assessment (and the disallowance by the CCSR of any objection by the taxpayer) creates a liability to tax, and is determinative of the dispute, unless the taxpayer successfully challenges the assessment through Court or tribunal proceedings. The onus is on the taxpayer to prove the taxpayer's case under s 100 of the *Taxation Administration Act 1996*.

The jurisdiction of the Civil and Administrative Tribunal of NSW ("NCAT") to review decisions of the CCSR is designed to provide a low cost forum as an alternative to the high cost of litigation through the traditional channel of the Supreme Court. However, the taxpayer who is considering an application for review of an assessment or decision of the CCSR in the NCAT usually faces:

- The CCSR being legally represented by the Crown Solicitor's Office and at least one barrister.

- The prospect that even if the taxpayer is successful in the NCAT, there will be no recovery of costs for the taxpayer and the decision may be appealed, as the CCSR is well placed to pursue such an appeal, or appeals if necessary.

Given that the amount that is in dispute may not be very large, it may be a significant financial risk for the taxpayer to seek legal representation, in what is designed to be a low-cost jurisdiction, or otherwise to seek to challenge an assessment or decision in either the NCAT or the Supreme Court. Under the Premier's Memorandum 2016-04 Core Legal Work Guidelines,[1] the CCSR is required to refer State taxation appeals (including advice before an appeal has formally commenced) to the Crown Solicitor's Office. The retention of the Crown Solicitor's Office and counsel by the CCSR in NCAT and Court matters is understandable given the potential impact of an adverse decision affecting other tax assessments and the CCSR's obligation to protect the revenue base.

We submit that NSW taxation laws have become increasingly complex. Despite the intended simplification of NSW stamp duties through the introduction of the *Duties Act 1997* on 1 July 1998, uncertainties remain. Legislative amendments (such as those relating to landholder duty and surcharges) have increased the complexity of that Act, and the likelihood of taxpayers requiring professional legal advice in seeking clarification of the law, through objection and review procedures. Similar complexities now exist in relation to other NSW taxation laws, such as the *Land Tax Act 1956,* the *Land Tax Management Act 1956* and the *Payroll Tax Act 2007*.

Given the imbalance of resources, legal representation and incentives between taxpayers and the CCSR in litigating decisions of the CCSR, and the increasing need to seek legal advice because of the complexity of NSW taxation laws, it is our view that a test case litigation funding program for NSW taxation laws is justified.

2. History

2.1 Our prior advocacy

In 2010 the Law Society advocated for the introduction of a test case litigation funding program for NSW taxation laws. However, the Government did not pursue that proposal. We understand from informal feedback that the Government considered that a test case program was a costly way of resolving NSW taxation issues and that court cases did not necessarily resolve issues definitively. We understand that it was also suggested that with the likely harmonisation of taxation laws amongst the States, it was considered that taxpayers would increasingly be able to rely on interstate decisions.

In 2013 the Law Society submitted a revised proposal to the Government consisting of two suggestions:

- the funding by the then NSW Office of State Revenue of the legal costs of a taxpayer where the CCSR appeals against a favourable decision obtained by the taxpayer in the then Administrative Decisions Tribunal; and

- a greater utilisation of the "stated case" procedure available under the relevant legislation.

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[1] NSW Premier's Memorandum of 1 July 2016, M2016-04 NSW Government Core Legal Work Guidelines, Annexure A, paragraph 4. https://arp.nsw.gov.au/m2016-04-nsw-government-core-legal-work-guidelines.

The Government declined to support this revised proposal, citing that unambiguous legislation and the obtaining of public rulings was a preferable means of resolving areas of complexity and contention.

In our view, significant areas of complexity and contention remain, and existing methods for resolving them have not proved sufficiently effective.

2.2 The emergence of the ATO test case litigation funding program

In considering whether a test case litigation funding program is appropriate for NSW, it is helpful to consider the background and rationale for the implementation of the ATO test case litigation funding program.

On 17 November 1993, the Joint Standing Committee on Public Accounts tabled its report entitled "326th Report: An assessment of tax – An inquiry into the Australian Taxation Office"[2] ("JSC Report"). Recommendations and observations from the Report formed the basis for the establishment of the ATO test case litigation program. For example, paragraph 11.154 of the JSC Report includes the following:

> The Committee concludes that the ATO needs to establish a program for litigating major points of dispute and grey areas of the law. This program should be established by the group responsible for making decisions on audit cases and should be without expense to the taxpayer whose case has been selected as a 'test' case.[3]

The JSC Report also identified the financial strength of the ATO as a litigant as part of the rationale for establishing a test case program. At paragraph 14.45 the JSC Report states:

> Given the financial strength of the ATO as a litigant, the Committee considered whether particular rules were necessary for the determination of a decision to litigate issues. Where a large amount of revenue is at stake, whether in an individual taxpayer's case or for the totality of taxpayers, the Committee agreed that the charter of the ATO dictated that issues should be litigated as test cases.[4]

The ATO test case litigation funding program commenced operation in the 1995-96 financial year.

3. Our Proposal

3.1 Main features of a NSW Test Case Litigation Funding Program

To help address the problems, we propose the introduction of a test case litigation funding program for NSW taxation laws closely modelled on the ATO program.

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[2] Joint Standing Committee on Public Accounts, House of Representatives Committees, 326th Report: An assessment of tax – An inquiry into the Australian Taxation Office, 336. https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=reports/1993/1993_pp213report.htm

[3] Ibid, 280.

[4] Ibid, 336.

We suggest that the NSW test case litigation program comprise two streams, following a similar approach in the ATO program:

- The funding by Revenue NSW of the taxpayer's reasonable costs in a case which a selection panel considers involves an uncertain question of law which it is desirable to have clarified by the NCAT, the Supreme Court of NSW, the NSW Court of Appeal or the High Court of Australia.

- The funding by Revenue NSW of the taxpayer's reasonable legal costs in defending an appeal by the CCSR against a decision favourable to the taxpayer in the NCAT (at first instance or Appeal Panel), the Supreme Court of NSW or the NSW Court of Appeal. Such funding would generally be provided, subject to the exercise of discretion by the CCSR, similar to the ATO test case litigation program. Although this is outside what would be considered as the natural meaning of a test case, it is included in the ATO program and we consider that a NSW program should similarly include such cases.

The program would not involve a means test, or operate on a *pro bono* basis. The program should not lead to a proliferation of litigation or to an increase in unmeritorious cases run by taxpayers as only those cases determined as suitable by an appropriately qualified panel, or involving an appeal by the CCSR, would be eligible for funding. Matters solely involving questions of fact would not be eligible for the program.

Details of the ATO program guidelines are set out in Annexure 1, but we outline the main features of the ATO program below as we submit that NSW should adopt a similar approach.

3.2 Main features of the ATO Test Case Litigation Program

The ATO test case litigation program funds cases that have broader implications beyond the individual dispute with the ATO. The basic criteria for the ATO program are that the cases which are funded need to involve issues where there is uncertainty or contention about how the law operates, and it must be in the public interest for those cases to be litigated.

'Uncertainty or contention about how the law operates' is defined in the guidelines as:

> that the law is ambiguous, with little or no judicial clarification on the issue, or there is disagreement on what the law means or how it operates. It does not include disputes that depend solely on questions of fact.[5]

To qualify for the test case program, amongst other things, the case must:

> ...have significance to a substantial section of the public or have significant commercial implications for an industry; and
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> ...must be likely to provide legal precedent....[6]

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[5] See Annexure 1, the ATO Test case litigation program, under the heading "Criterion".
[6] See Annexure 1, the ATO Test case litigation program, under the heading "Expectations".

There are two ways in which cases are considered for funding:

- based on applications received by the ATO; and
- cases identified by the ATO itself.

In the first case, applications from taxpayers are considered based on guidance obtained from the recommendations of a panel, consisting of accounting and legal professionals and senior ATO officers.

The panel generally meets five times a year and will consider applications received up to three weeks prior to each meeting. However, if an application is urgent, then a decision may be made by the panel outside of these scheduled meetings.

In some circumstances, the ATO makes a decision about providing funding without receiving an application from the relevant taxpayer. These cases generally cover:

- Where the ATO appeals a decision of the Administrative Appeals Tribunal ("AAT") to the Federal Court or Full Federal Court, normally where an important issue needs to be clarified. Similarly, the ATO will usually fund an appeal to the High Court. In both of these situations, a decision will usually be made by the deputy chair or chair of the panel, and funding will be offered without referring the case to the panel.

- The ATO may also extend funding to appeals by the ATO or by the taxpayer in cases already funded where the criteria and expectations are still met. This funding will generally be offered without referring the case to the panel.

- Finally, the ATO may of its own initiative identify a case that meets the test case funding criteria and expectations and may refer it to the panel for consideration.

If funding is approved, a test case funding deed, being a formal agreement between the taxpayer and the ATO, is entered into. Funding will extend to the reasonable legal costs incurred by the taxpayer.

The operation of the ATO's test case program, which was established in the 1995-96 financial year, is a very useful case study on how such a program can work. The guidelines and principles that inform the operation of the ATO test case litigation program could be adopted for a similar NSW program. Given the respective number of taxpayers affected by Commonwealth taxation laws when compared to taxpayers affected by NSW taxation laws, the scale or size of a NSW test case program is unlikely to be as large as the ATO test case program. However, the same principles underpin the justification for a NSW test case program and in our view make such a program worthwhile.

4. The benefits of a test case litigation funding program

We suggest that the introduction of a test case litigation funding program could deliver a number of benefits to the NSW Government, Revenue NSW and the taxpayers of NSW.

4.1 Time to reconsider a test case litigation funding program

In our view it is timely to give fresh consideration to the development of a test case litigation funding program for NSW taxation laws for the following reasons:

- The number of new measures that have been introduced into NSW taxation laws since the Government last considered the merits of a test case litigation funding program, such as surcharge duties, surcharge land tax, and the considerable number of amendments that have been made to legislation such as the *Duties Act 1997*, the *Land Tax Management Act 1956* and the *Payroll Tax Act 2007*, all of which have increased the complexity of NSW taxation laws.

- The apparent imbalance in the legal representation of the CCSR as compared to applicants in the NCAT. We have reviewed the first instance decisions in the Revenue List of the NCAT since it was established on 1 January 2014 to date and note that the CCSR is always represented by the Crown Solicitor's Office and in addition, is routinely also represented by Counsel, whereas taxpayers are frequently represented by agents, or are self-represented.

4.2 Facilitates the clarification of uncertain questions of law

A key benefit of a test case litigation funding program is the clarification of uncertain questions of law. This is one of the primary objectives of such a program and was one of the reasons for the formation of the ATO test case litigation funding program. The JSC Report includes the following at paragraph 11.154:

> As the onus has been placed upon the taxpayer to 'get the law right', it seems incongruous to the Committee that the ATO should penalise a taxpayer in the event that the ATO was not absolutely clear about the application of a provision. If the organisation responsible for administering the law is not clear about the implication of the law itself, in the Committee's view, it is appropriate to have the matter settled by the Court.[7]

The clarification of uncertain questions of law continues to be a core objective for the ATO's program. The glossary of the ATO's 2016-17 Annual Report defines the ATO test case litigation program as a program which:

> Provides financial assistance to taxpayers who are litigating matters that will clarify the tax and superannuation laws we administer. By developing legal precedent, we seek to ensure we are providing the community with clear principles on how to apply the law.[8]

The ATO's Annual Reports consistently comment on the benefit of its ATO test case program through clarifying the law:

> We focus on ensuring we are litigating the right cases, including through our Test Case Litigation Program. Completed test cases clarify the law and provide precedential certainty. In consultation with external stakeholders, our program has been reviewed and updated to ensure all cases are funded in the interests of the wider community.[9]

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[7] Joint Standing Committee on Public Accounts, above n 3.
[8] ATO Annual Report 2016-17, 251
[9] ATO Annual Report 2014-15, 61.

A test case litigation funding program for NSW taxation laws would similarly benefit Revenue NSW and taxpayers by allowing a means of obtaining clarification of uncertain questions of law through the appropriate selection of test cases by the panel appointed under the program.

4.3 Allows for the clarification of appropriate questions of law without being constrained by the individual taxpayer's financial resources

The financial resources of the taxpayer and the amount in dispute affect whether an individual taxpayer will commence litigation, and if successful, defend further appeals. Where there is genuine uncertainty or contention about the operation of a particular law, but the amount in dispute is small, the taxpayer will often regard it as a simple commercial decision about the amount at stake and the prospects of success. The taxpayer will often make a commercial decision not to object or to appeal.

Law Society members of the Revenue Liaison Committee are aware of cases where a taxpayer has decided not to make an application for review, because the costs involved in making the application relative to the amount at stake means that it is not commercially viable to pursue the matter, even though the taxpayer received professional advice that they had an arguable case or better.

From the CCSR's point of view, the issue might affect a large number of taxpayers, and the amount at stake for Revenue NSW might be substantial.

It is important to note that the ATO program, and this proposal for a NSW program, does not involve a means test. It is not intended to be a *pro bono* program where taxpayers are funded on the basis merely that they may not have the financial resources to litigate. The selection criteria are described above and are based on involving important and unresolved questions of law, or appeals by the CCSR. Whether the case satisfies the criteria is considered by the panel, including whether it is in the public interest to pursue the matter.

The ATO's superior resources and ability to appeal an unfavourable decision as compared to most taxpayers was recognised by the JSC Report at paragraph 14.46:

> However, in the case of a small representative taxpayer, the Committee considered it appropriate that the ATO should fund both the Commonwealth and the taxpayer's case where the circumstances were such that the taxpayer had been successful in any prior competent judicial forum. It was considered inappropriate that the ATO should be able to utilise its financial strength to effectively wear down a taxpayer where the maximum benefit to the taxpayer was far less than the potential revenue benefit to the Commonwealth.[10]

Accordingly, the ATO states in its policy that when it appeals against a decision of the AAT, it is usually because an important legal issue needs to be clarified. For this reason, the ATO:

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[10] Joint Standing Committee on Public Accounts, above n 2.

> ... will generally offer funding of the taxpayer's reasonable costs of the appeal without reference to the panel.[11]

Similarly, the ATO policy states that the ATO:

> ....will usually fund an application that we make to the High Court and any subsequent decision by the High Court to grant the application for special leave.[12]

This funding is generally offered without referring the case to the panel. The same approach should apply in a NSW program such that there is a presumption of funding where the CCSR appeals against a decision of the NCAT (at first instance or Appeal Panel), the Supreme Court or the Court of Appeal.

In the context of funding both the bringing of an initial action by the taxpayer and the defending by the taxpayer of an appeal by the CCSR against a decision favourable to the taxpayer, a test case litigation program can, in appropriate selected cases, allow for the clarification of important questions of law without being constrained by the resources of an individual taxpayer.

4.4 Delivers time and cost savings for the NSW Government and Revenue NSW in the conduct of litigation

We understand that the ATO experience has been that, where test case funding is provided, it promotes time and costs savings and efficiency in the conduct of the relevant litigation. The ATO and the taxpayer work co-operatively to refine the issues and the evidence so that both sides of the arguments can be presented fairly and efficiently to the Tribunal or Court for an efficient resolution of the uncertain question of law.[13] The ATO's Annual Reports consistently refer to the efficiency and utility of the test case program:

> We engage with taxpayers at all stages in the process, to see if we can resolve the dispute or narrow the issues that proceed to litigation. We focus on ensuring we are litigating the right cases, including through our Test Case Litigation Program. Completed test cases clarify the law and provide precedential certainty.[14]

4.5 Fairer administration of NSW taxation laws and better public perception of the fairness of the administration of NSW taxation laws,

A test case litigation funding program will lead to fairer administration of NSW taxation laws, and better public perception of fairness because it will help address the imbalance between the legal representation of the CCSR and the taxpayer. The administration and dispute resolution process will be fairer by increasing the ability of a taxpayer whose case satisfies the eligibility criteria, to obtain legal representation in cases where this would not otherwise occur.

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[11] https://www.ato.gov.au/Tax-professionals/TP/Test-case-litigation-program/?page=2#How_cases_are_considered_for_funding

[12] Ibid.

[13] The Revenue Liaison Committee wish to acknowledge the assistance provided to it by officers of the ATO responsible for the administration of the ATO Test Case Litigation Program. Please note that those ATO officers have not reviewed the submission and do not express any opinion on it.

[14] ATO Annual Report 2016-17, 66.

Although the NCAT is a Tribunal where legal representation of the parties is not required, as mentioned earlier, under the NSW Premier's Memorandum of 1 July 2016,[15] the CCSR is required to refer all State taxation appeals to the Crown Solicitor's Office (including advice concerning taxation assessments before an appeal has formally commenced).

As noted above, in practice, referrals by the CCSR of State taxation appeals to the Crown Solicitor's Office means that the Crown Solicitor's Office is always the legal representative for the CCSR in the NCAT and usually, with Counsel. This, and the fact that even if an applicant to the NCAT is successful, costs will not be awarded except in special circumstances, contributes to the imbalance of legal representation. That said, we note that the NSW Model Litigant Policy for Civil Litigation[16] specifically requires State agencies such as the CCSR not to take advantage of a claimant who lacks the resources to litigate a legitimate claim.

5. Comments on arguments against a test case litigation funding program

A number of arguments have been raised opposing the introduction of a test case litigation funding program. We comment on some of the main arguments below.

5.1 Too expensive to run a test case litigation funding program

We understand that the current annual budget provided for the ATO program is $2 million. We would anticipate that a NSW program would operate on a smaller budget given the number of taxpayers it would serve.

A test case program addresses access to justice issues and is an efficient way of resolving uncertainty in NSW taxation laws, given that part of the criterion for selection under the program will be that cases chosen must be likely to provide legal precedent.

As mentioned at paragraph 4.4, we understand the experience of the ATO Test Case Litigation Program to be that it promotes time and costs savings and efficiency in the conduct of the relevant litigation.

5.2 It will open the floodgates to litigation

The criteria applied for the ATO test case litigation funding program by the appointed panel ensures that the program does not provide funding to all applicants. Any perception that a NSW program would open the floodgates to a substantial increase in litigation is ill founded as the panel will operate as a gatekeeper on the number of applications that receive funding. The fact that, in some cases, the ATO offers to fund a taxpayer's reasonable costs of an appeal when an important legal issue needs to be clarified, without going through the usual panel approval process, further suggests that concerns about opening the floodgates are unwarranted.

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[15] NSW Premier's Memorandum of 1 July 2016, M2016-04 NSW Government Core Legal Work Guidelines, above n 1.

[16] M2016-03-Model Litigant Policy for Civil Litigation

5.3 Not enough cases to justify the program

It might be suggested that the costs of establishing the program could not be justified by the number of relevant cases that could be referred to it. However, the utility of the program should not be considered simply on the number of cases funded by the program. If the numbers are small, it will result in a relatively small cost for the program. The fact that taxpayers with genuine and eligible disputes who would not have been able to litigate but for the funding will be able to proceed is, in itself, a strong access to justice argument in support of establishing the program.

5.4 A private ruling is a better approach

We acknowledge the important role the private ruling system plays in providing taxpayers with the opportunity to clarify the operation of certain laws in their particular circumstances. However, not all taxpayers have the resources to utilise the private ruling system and this is where a test case litigation program can assist.

Further, a private ruling will not assist a taxpayer who has a genuine dispute with the CCSR as to the interpretation of the law or the application of the law to the particular circumstances. There is no right of appeal where the private ruling is adverse to the taxpayer.

5.5 Legislative amendment is a better approach

While there are appropriate situations for an uncertain area of the law to be clarified by legislative amendment, this approach has its limitations. For example, unless a particular amendment is given retrospective operation (which is not recommended policy for the imposition of tax), it may have limited application for taxpayers already affected by the issue.

We support clarity in legislation and note that taxation legislation is continually refined to deal with new circumstances or commercial developments. The progressive removal of areas of ambiguity or uncertainty in legislation should and does occur. However, some issues might not be capable of simple legislative amendment, for example, the scope and meaning of 'artificial, blatant or contrived'[17] in the general anti-avoidance provisions in the *Duties Act 1997*. Some issues are better resolved by the provision of guidance from the NCAT or the Courts. The ATO clearly recognises this under its program.

5.6 Other States and Territories do not have test case funding programs

It is a matter for NSW to determine what is appropriate for its taxpayers, irrespective of what other States or Territories may or may not be doing.

NSW is encouraged to be a leader in introducing a test case funding program that could be a model for other States and Territories to follow.

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[17] Section 284D(1).

6. Conclusion

The Law Society considers that there is a strong case for the introduction of a test case litigation funding program in NSW, particularly given the increased complexity of NSW taxation laws in recent years.

We would be pleased to meet with your representatives to discuss the matters raised in this submission. Any questions should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours sincerely,

Doug Humphreys OAM
President

Cc Mr Cullen Smythe, Commissioner of State Revenue, Revenue NSW

Annexures

1. The ATO guidelines on the test case litigation program.

Test case litigation program

- https://www.ato.gov.au/Tax-professionals/TP/Test-case-litigation-program/
- Last modified: 26 Mar 2018
- QC 27175

Test Case Litigation Program

The Test Case Litigation Program funds cases that have broader implications beyond the individual dispute with the ATO. The program provides financial assistance to taxpayers to help them meet some or all of their reasonable litigation costs.

In some instances, the program will consider funding cases before the Administrative Appeals Tribunal (AAT), particularly if the case is to be heard by a presidential member.

In limited circumstances, it can also include pre-litigation costs associated with clarifying tax, superannuation and debt-related issues.

The following information and practical examples may assist you decide whether to make an application for test case funding and explain:

- how to apply for test case funding
- what happens if you are declined funding
- what to expect if funding is approved.

Criterion and expectations

Before deciding to make an application for funding you should view the following:

- criterion and expectations
- Test Case Litigation Program video which gives an overview of how to apply for funding.
- examples of cases we may and may not fund
- Test Case Litigation Register which contains information on cases we have declined and approved for funding.

Next steps:

- To make an application for funding you need to fill in the Test case funding application form.
- Please note that applications close three weeks prior to each panel meeting
    - 8 May 2018 meeting - closing date for applications is 17 April 2018
    - 17 July 2018 meeting - closing date for application is 26 June 2018
    - 25 September 2018 meeting - closing date for applications is 4 September 2018.

Criterion

Cases we fund need to involve issues where there is uncertainty or contention about how the law operates and must be in the public interest to be litigated.

Uncertainty or contention about how the law operates means that the law is ambiguous with little or no judicial clarification on the issue, or where there is disagreement on what the law means or how it operates. It does not include disputes that depend solely on questions of fact.

Expectations

The case is in the public interest to be litigated, and in addition to meeting the test case funding criterion:

- Your case must have significance to a substantial section of the public or have significant commercial implications for an industry.

This means that there should be a number of taxpayers affected or there are industry and or community views that the issue is uncertain or contentious.

- You must demonstrate willingness to progress the dispute in a timely manner by cooperating with us to avoid delays - any indication that this may not occur (based on past or current behaviour) will be considered before an application is approved.
- Your case must be likely to provide legal precedent as a principle of law capable of being used to decide other cases with similar facts giving certainty and clarity for taxpayers.
- Your case must not involve a tax avoidance scheme unless it tests the proper meaning within the legal framework of the anti-avoidance provisions.
- Your case must not appear to be an attempt to gain a windfall or an outcome contrary to the intent of the legislation and public policy.

Examples of cases that we may fund

Example 1

The issue is whether goods and services tax (GST) is payable on properties that were leased before being sold. This issue was uncertain after a judicial decision was handed down which led to law clarification being required. The issue affects a significant section of the public and the case is likely to

provide precedent as it is in the High Court.

Example 2

The issue is what 'direct aid' for fringe benefits tax (FBT) means. There is contention as to the meaning in the relevant FBT provision between the taxpayer and the ATO and there is no relevant judicial precedent.

Example 3

The issue is the application of civil penalties in relation to promotion of tax schemes. There is no judicial precedent in relation to this new legislation and despite it involving a tax avoidance scheme; it will test the proper meaning of the provision.

Examples of cases that we may not fund

Example 4

The issue is whether the taxpayer has demonstrated special circumstances regarding their liability to pay superannuation excess contributions tax (ECT). A decision will be limited to the specific facts of the taxpayer and therefore would not affect a significant section of the public.

Example 5

A taxpayer has applied for test case funding but has failed to comply with court timetables and/or has engaged with processes that seek to delay the progression of the case. This would indicate an unwillingness to progress the dispute.

Example 6

This issue is the exemption of capital gains tax (CGT) on the sale of a property claimed as a main residence. The taxpayer's CGT liability will be determined on the facts of the case and therefore will not provide judicial guidance that will assist in other CGT cases.

Example 7

A taxpayer is seeking funding for an issue but has raised arguments that contradict the intent of the relevant legislation which if accepted, would result in an outcome that was not intended and or may appear to be seeking a windfall gain.

The Test Case Litigation Panel

- https://www.ato.gov.au/Tax-professionals/TP/Test-case-litigation-program/?page=2
- Last modified: 26 Mar 2018
- QC 27175

The panel considers applications for funding. It is made up of the chair and deputy chair who are senior ATO officers, and external members from the legal and accounting professions. In certain instances, cases will be considered for funding without an application being submitted. These cases will generally be considered separately by the chair or deputy chair of the panel.

We are guided by their recommendations. The panel was formed to provide independent views on the merits of the cases seeking funding and on the significance of issues to the community.

In certain instances, cases will be considered for funding without an application being submitted. These cases will generally be considered separately by the chair or deputy chair of the panel.

The current panel members are:

- Debbie Hastings – Deputy Commissioner, Review and Dispute Resolution and Chair, ATO
- Grahame Tanna – Assistant Commissioner, Review and Dispute Resolution and Deputy Chair, ATO
- Hon Kevin Lindgren AM QC – former Judge of the Federal Court of the Australia
- Peter Poulos – Partner, Tax Controversy, Minter Ellison
- Graeme Wade – President of CPA Australia and Consultant, Hamilton Morello Accountants

How cases are considered for funding

There are two ways cases are considered for funding.

Applications we receive

If you send us an application for funding we will first check you have provided all the information we need to consider. We will then seek comments from internal stakeholders and provide these comments with the application and any other information required for the panel to consider.

After the panel considers the application against the funding criterion and expectations, it then recommends whether funding is appropriate.

The chair of the panel makes the final funding decision.

The panel generally convenes five times a year. The program accepts applications received up to three weeks prior to each panel meeting. Applications received after

this date will be considered at the next meeting. However, should an application be urgent, we will consider making a decision outside of scheduled meetings, usually by seeking the panel's comments on that application.

Cases we identify

Should we consider funding your case without requesting an application, it will be because your case may meet one of our funding policies, criterion and expectations. The funding policies are:

- We appeal against an AAT decision
    - When we appeal an AAT decision to the Federal or Full Federal Court it is usually because an important issue needs to be clarified. This ensures that you can take your case to the AAT at minimal cost without a significant risk that you will need to pay all the associated costs of a court appeal.
    - We will generally offer this type of funding without referring the case to the panel. A decision will usually be made by the deputy chair or chair.

- Continued funding for a case already funded
    - We may extend funding to appeals by the ATO or by you in funded cases to the Full Federal Court or equivalent Court of Appeal if the criterion and expectations are still met. We may require a new application explaining how the criterion and expectations are still met if we think the decision of the lower Court has achieved the law clarification that the program has been established to obtain.
    - We will generally offer this type of funding without referring the case to the panel. A decision will usually be made by the deputy chair or chair.

- We make an application for special leave to the High Court
    - We will usually fund an application that we make to the High Court and any subsequent decision by the High Court to grant the application for special leave.
    - We will not fund applications for special leave by a taxpayer unless we do not agree with the decision of the Full Federal Court or Court of Appeal of a state or territory. This is because we consider the decision of the Full Federal Court or Court of Appeal by a state or territory achieves the level of law clarification that the program has been established to obtain.
    - If you obtain leave to appeal to the High Court, we will consider providing funding as the High Court view of the importance of the case may provide strong reasons for it. If funding is provided, the costs of the appeal would also usually cover the cost of the application for special leave.
    - We will generally offer this type of funding without referring the case to the panel. A decision will usually be made by the deputy chair or chair.

- Where we identify a case that meets the criterion and expectations, but does not meet one of the above funding policies, the chair or deputy chair may refer the case to the panel for consideration.

If you are approved for funding we will contact you to discuss your case.

See also:

- Cases that are approved for funding

Cases that are declined for funding

We will notify you on the day the panel makes the decision on funding. We will also send a letter outlining the reasons why funding was declined.

If you do not agree with our reasons for declining your application, you can ask for a review of the decision by completing the request for review of funding decision form. You should provide any additional information (that you have not previously submitted with your application for funding) that you would like the reviewing officer to consider.

A senior ATO officer, who did not make the original decision to decline funding, will conduct the review. The officer will make a recommendation to the panel or the chair at the conclusion of their review.

We will give you the review decision with reasons in writing, within two weeks of receiving the request form.

Next steps:

To request a review, complete the Request for review of funding decision (PDF, 219 KB) .

Cases that are approved for funding

Expectations

Funding is only approved for the specified issue or proceedings. We will discuss with you which expenses may or may not be funded by the program.

Regardless of whether you submit an application or we make a decision to provide you with funding without an application, funding will cover your reasonable legal costs.

Importantly, acceptance of your case into the program is not an undertaking to meet your full legal costs. Costs paid by the program are a contribution towards your legal costs.

Test case funding deed

The test case funding deed is a formal agreement between you and the ATO to provide funding subject to specified terms and conditions. All cases approved for funding will require a deed. We will send you the deed relevant to your case once funding is approved. The deed will contain information about:

- the funding issue

- the requirement of a costs estimate
- terms of funding and payment.

Tax consequences

There may be tax consequences in relation to payments made to you under the program as reimbursement of expenditure, or payments made to third parties in respect of services provided to you.

If you are approved for funding, we recommend that you obtain advice from your legal representative.

Costs

We will contact you about what reasonable legal costs you can claim if your case is approved for funding.

If approved for funding, you will need to provide a costs estimate for your case to allow the program to track expected costs.

What is the date that funding begins?

In most instances costs will be paid from the date of the appeal or application to the Court or AAT.

How often will I be paid?

You can choose to submit your invoices monthly. We will seek to pay your invoices within 30 days of receipt. If we are unable to pay your invoices within this timeframe, we will let you know.

Large or complex invoices may be referred to an independent cost consultant for review which the program will pay for.

What costs do we pay?

- We pay your reasonable legal costs according to the venue or, if the case is pre-litigation, at a rate capped under the deed.
- Solicitor's fees will be payable with reference to the Federal Court or High Court rules. The amount we pay for solicitor's fees may be less than the rates they may charge.
- Counsel fees will be payable with reference to the *National Guide to Counsel Fees*. The amount we pay for counsel fees may be less than the commercial rates counsel may charge.
- Disbursements including expenses such as photocopying, transcripts, couriers and some travel costs where appropriate.
- Other costs for those cases approved for pre-litigation such as tax agent costs in relation to preparing an objection or private ruling will be capped under the deed.

If you are unsure about what costs you can claim you should contact us to discuss

before incurring the cost.

What costs don’t we pay?

Examples of costs we don't pay for are:

- expenses that relate to the administration of the program as it is applicable to the matter approved for test case funding
- costs that relate to the preparation of bills of costs for reimbursement
- costs that are incurred prior to the funding date or after termination of the deed (for example the commencement and conduct of any appeal)

A full explanation of what costs we do and don’t allow will also be provided in the deed.

How do I submit a claim for funding?

You should provide all your invoices for solicitors, counsel and disbursements for the relevant period together if possible which will assist with the payment of all your invoices together. Invoices should be itemised and provide an explanation of the expense so that they can be assessed properly. Information about what is required in the invoices can be found in the deed.

What if I disagree with the assessment of my costs made by the program?

We will try to resolve any dispute regarding costs with you and may seek further information about the costs you have claimed. We may refer the dispute to an independent cost consultant to resolve. The costs of engaging consultant will be met by the program.

If you disagree with an assessment of costs, you should contact us.

The following table shows the funding process once you are approved for funding.

Step	Action	Further information
1	A decision is made to fund a case	
2	Test Case Litigation Program (Program) advises the court or AAT that the matter is funded	
3	The Program makes contact the with the taxpayer or their representative	A letter is sent advising funding is approved, enclosing a deed and requesting a costs estimate Program will call the taxpayer or their representative and discuss funding explanations
4	Taxpayer signs the deed	If the taxpayer does not sign the deed the matter is finalised.

5	Taxpayer submits invoices to the Program	
6	Program reviews the invoices	
7	Program makes a payment or adjusted payment and advises the taxpayer	
8	Funding claim is finalised	
9	Program seeks feedback from the taxpayer	

The following table shows the process followed if a taxpayer disputes a payment.

Step	Action	Further information
1	Taxpayer disputes payment or adjusted payment received from Program	
2	Program discusses with taxpayer	If the Program and taxpayer discuss the invoice and come to a mutual agreement the funding claim is finalised
3	Cost consultant reviews bills	If the Program and taxpayer are still in dispute over the invoice the matter is referred to a cost consultant
4	Outcome of review	Pursuant to the deed the cost consultant will provide their Opinion to the Program and the Program will provide this to the taxpayer
5	Payment is made to the taxpayer	
6	Funding claim finalised	
7	Program seeks feedback from the taxpayer	

Confidentiality

- https://www.ato.gov.au/Tax-professionals/TP/Test-case-litigation-program/?page=3
- Last modified: 26 Mar 2018
- QC 27175

Information about cases considered for funding may be published on our web page and our Test Case Litigation Register

The register includes information about applications we receive for funding and approved cases. the particulars of each case is not published on the register unless the information is in the public domain.

Contact us

For more information about the program:

- Phone 13 28 69 between 8.00am and 5.00pm Monday to Friday and ask for the test case litigation program
- Email Test Case Litigation Program
- Write to

Test Case Litigation Program
Australian Taxation Office
GPO Box 4889
Sydney NSW 2001

If you do not speak English well and need help from the ATO, phone the Translating and Interpreting Service on 13 14 50.

If you are deaf or have a hearing or speech impairment, phone us through the National relay service (NRS) on the numbers listed below:

- TTY users, phone 13 36 77 and ask for the ATO number you need
- speak and Listen (speech-to-speech relay) users, phone 1300 555 727 and ask for the ATO number you need
- internet relay users, connect to the NRS on relayservice.com.au and ask for the ATO number you need.

Our commitment to you

We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we will take that into account when determining what action, if any, we should take.

Some of the information on this website applies to a specific financial year. This is clearly marked. Make sure you have the information for the right year before making decisions based on that information.

If you feel that our information does not fully cover your circumstances, or you are unsure how it applies to you, contact us or seek professional advice.

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