



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: sw:cl:ATO EDR/ADR
Direct Line: 9926 0214

9 September 2011

Mr Ali Noroozi
Inspector-General of Taxation
GPO Box 551
Sydney NSW 2001

Dear Mr Noroozi,

Review into the ATO's use of Early and Alternative Dispute Resolution

Thank you for the opportunity to comment on the *Review into the ATO's use of Early and Alternative Dispute Resolution*. The Law Society's Business Law Committee and Dispute Resolution Committee have considered the Terms of Reference and Submission Guidelines.

The Business Law Committee endorses the submission of the Law Council of Australia, dated 31 August 2011.

The Dispute Resolution Committee (Committee) provides the following comments for your consideration.

General Comments

The Committee commends the ATO on its review of the use of ADR processes.

Please note that for the purposes of this submission the term "ADR" encompasses both Early Dispute Resolution and Alternative Dispute Resolution.

In light of the enactment of the *Civil Dispute Resolution Act 2011* (Cth) the Committee is of the view that it is important that ADR becomes part of the culture of the ATO. If ADR becomes embedded in the compliance and process models that the ATO adopts, rather than being viewed as an adjunct to already existing processes, best outcomes will be achieved.

It is also important that ATO officers receive adequate training and experience in using ADR and that they understand the difference between determinative and facilitative processes for resolving disputes.

Further, ATO officers should be given sufficient authority when participating in non-adversarial ADR processes to allow them to effectively engage in discussions and the resolution of disputes.

As a final general comment, the Committee suggests that the ATO consider abolishing the use of the acronym “EDR” as it no longer has any currency and can lead to confusion with processes of “External Dispute Resolution”. The Committee believes that the activities described in the ATO’s definition of EDR (early intervention, conferences prior to litigation, processes employed prior to litigation, etc) can legitimately be encompassed by the term ADR.

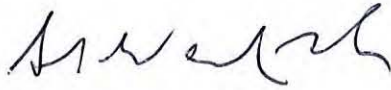
Opportunities for Improvement

The Committee makes the following comments in relation to paragraph 1.32:

- The ATO should consider the resolution of disputes as early as possible, recognising that it is necessary for all parties to have sufficient information about the dispute in order to engage in meaningful discussions during the ADR process.
- It is the opinion of the Committee that rather than the ATO considering whether a case is suitable for ADR, it should assume that all cases are suitable for some form of non-adversarial ADR process. The Committee believes that the assessment of a case should focus on whether it is not suitable for ADR, and as such should be fast tracked to litigation. Officers should be required to justify the use of litigation and why ADR is not suitable before filing a claim or defence.
- The Committee suggests that the choice of an appropriate facilitator for any given dispute depends largely on the circumstances of the case and what skills are needed to assist the parties with their discussions. However, regardless of which type of facilitator is chosen, the Committee submits that the facilitator should be accredited in their field of specialty so as to ensure that they have the relevant skills and training to assist with the resolution of the dispute. For example, if mediation is the process, the mediator should be accredited under the National Mediation Accreditation System.
- It is the opinion of the Committee that it is not appropriate that the facilitator be an ATO officer. The facilitator, should as far as possible, be independent and impartial.
- It is the opinion of the Committee that it is not necessarily the case that ADR is more effective when conducted under direction from a Court or Tribunal. By the time the parties are engaged in the court process, they have already engaged in some adversarial behaviour and this often makes resolution more difficult.
- The Committee suggests that cases should only be litigated where a judicial determination is needed to clarify the law and where the parties have made genuine attempts to resolve the dispute and have been unable to do so. Even cases that might clarify the law can benefit from informal discussions and negotiation to narrow issues and ensure that there is no better way for the issues of principle to be determined.

The Committee thanks you again for the invitation to comment on the ATO's review of the use of ADR processes. Any queries in relation to this letter should be directed to the Executive Officer for the Dispute Resolution Committee, Ms Carina Lofaro on (02) 9926 0214 or via email carina.lofaro@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Stuart Westgarth', written in a cursive style.

Stuart Westgarth
President