THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: MM:lb:testcaselitigationfunding
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The Hon Eric Roozendaal MLC
Treasurer
Level 36, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2001

Dear Treasurer

Test Case Litigation Funding Program

The Law Society members of the Law Society / Office of State Revenue Liaison Committee ("Committee") consider that the introduction of a test case litigation funding program in New South Wales for NSW taxation laws would lead to a significant improvement in the administration of justice in taxation laws in New South Wales.

The Committee seeks the in-principle agreement of the New South Wales Chief Commissioner of State Revenue ("OSR") and New South Wales Treasury to the introduction and development of such a program.

This submission sets out the reasons in favour of the establishment of a test case litigation funding program. Once in-principle agreement has been obtained for such a program, the specific details of the program can then be developed separately.

Summary of submission

At the Federal level, the Australian Taxation Office ("ATO") has successfully run a test litigation program for a number of years. All of the reasons behind the ATO program apply equally at the State level for New South Wales.

There are important differences between the perspectives of the OSR on the one hand and of a taxpayer on the other hand to litigation in respect of State taxation laws, with the taxpayer being at an unfair disadvantage or handicap compared to the OSR:

1. The assessment or decision/objection/review process gives the OSR a natural advantage over the taxpayer. Once the OSR issues an assessment or makes a decision, a liability to the tax is created or other outcome is determined. It is then the taxpayer who must object and, if necessary, litigate in order to attempt to have the relevant issue resolved in the taxpayer's favour.

2. For a taxpayer, the amount at stake might not justify the costs of litigation. By contrast, the OSR might have to deal with the same issue across a large number of other taxpayers ("the Flow-on Factor"), so that the amount at stake for the OSR is substantial and justifies litigation.

3. The OSR has access to the NSW public purse which a taxpayer does not. A taxpayer may not be able to afford or to justify legal representation. Even though legal representation is not required in the NSW Administrative Decisions Tribunal ("ADT"), because of the Flow-on Factor, the OSR is usually always legally represented (often by experienced Counsel) in the ADT. Even where the taxpayer does or is required to (i.e. in the Courts) have legal representation, in many cases the taxpayer cannot afford the same standard of representation as the OSR.

4. A taxpayer who commences the review process and who even succeeds at first instance, can be faced with on-going costs of having to defend appeals by the OSR in circumstances where but for the Flow-on Factor, an appeal would not be commercially justifiable.

5. The uncertainty and increasing complexity of the NSW taxation laws which requires many taxpayers to incur the costs of obtaining professional advice.

This imbalance applies equally at the Federal tax level, and has at least been partly addressed by the ATO test case litigation funding program. The introduction of a test case program in New South Wales would help address the imbalance at the State tax level. It would lead to a significant improvement in the administration of justice in taxation laws in New South Wales.

Such a program would benefit the OSR as well as taxpayers, as it would allow the courts to resolve a greater number of issues where there is uncertainty or contention about how the law operates.

Legislative amendment is not the answer. Even if the OSR is able to have the law changed to remove any uncertainty in its construction or application, it would be too late for any unresolved dispute which is in place at the time of amendment, unless the amendment applies retrospectively. And many issues are not capable of a simple legislative fix, but require the guidance of the courts.

Annexures

Annexed for reference are copies of:

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

2. The New South Wales model litigant policy for civil litigation by the State and its agencies. It is noted that amendments to the policy are proposed.

Why a test case funding program is desirable for New South Wales

The Committee considers that there are several broad reasons why a test case funding program is desirable for state taxes in New South Wales:

1. The natural advantage of the OSR under the tax administration system;

2. The different perspectives of the OSR and the taxpayer to tax litigation;

3. The imbalance between the financial capacity of the OSR to fund and to justify funding of legal representation out of the NSW public purse and the limited private capacity of an individual taxpayer.

4. The capacity of the OSR to fund and to justify funding of appeals out of the NSW public purse in situations where often the taxpayer does not have the financial capacity or commercial justification to engage in such appeals.

5. The uncertainty and increasing complexity of the NSW taxation laws which requires many taxpayers to incur costs of obtaining professional advice.

Each of these reasons is dealt with in turn below:

The natural advantage of the OSR

The administrative regime for assessment and litigation of tax disputes is similar at the State and Federal levels.

In each case, the OSR has a natural advantage in that the OSR issues an assessment that creates or confirms a liability for the taxpayer or makes a decision that determines an outcome. The onus is then on the taxpayer to object, and if necessary apply for review of the assessment or decision in order to reverse the starting position and remove the liability or outcome.

In a situation where, for example, the amount in dispute is $1,000, the issue of the assessment by the OSR creates a liability for the taxpayer. That amount does not justify litigation for the taxpayer. The taxpayer makes the 'commercial decision' simply to pay the amount of the assessment, rather than make an application for review.

The Committee members have seen numerous examples where a taxpayer decides not to make an application for review, because the costs involved in making the application relative to the amount at stake make it uncommercial to pursue the matter, even though the taxpayer receives advice that it has an arguable case or better.

In such a situation the OSR collects the tax the subject of the assessment by default, without having its view tested. The OSR has a natural advantage.

Of course, the jurisdiction of the ADT to hear revenue disputes 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 in the ADT faces:

- the OSR being legally represented on the other side and therefore, to balance the representation, needs to fund the cost of his or her own legal representation; and

- the serious prospect, even if successful, of an appeal by the OSR to an Appeal Panel of the ADT, and then of an appeal on questions of law to the Supreme Court. If the taxpayer is successful in the Supreme Court, the OSR could well appeal to the Court of Appeal, and then even seek leave to appeal to the High Court, if the Flow-on Factor or other considerations warrant it.

Therefore it is possible that the taxpayer would have to fund his or her own legal representation for up to five court cases (and numerous directions and other hearings along the way) before having its position vindicated. Of course if the taxpayer loses, it must bear not only its own costs but the costs of the OSR (at least in the Supreme Court or the High Court). Such a prospect is enough to dissuade many taxpayers from commencing proceedings in the ADT (or the Supreme Court) in the first place.

The ATO recognises and acknowledges this problem in its test case funding program. The ATO states in its policy that when it appeals against a decision of the Administrative Appeals Tribunal or the Small Taxation Claims Tribunal, it is usually because an important legal issue needs to be clarified. For this reason, the ATO ***will generally fund the taxpayer's reasonable costs of the appeal.*** This is to ensure that taxpayers can take a case to the AAT at low cost without a significant risk that they will then need to pay for a court appeal.

The same reasoning should apply in NSW where the OSR appeals against a decision of the ADT or the Supreme Court.

The different perspectives of the OSR and the taxpayer

Where there is a genuine uncertainty or contention about the operation of the 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. It will often make a commercial decision not to object or to appeal.

From the OSR's point of view, the issue might affect a large number of taxpayers, and the amount at stake for it might be substantial. To take a simple example, assume that 1,000 employers have an issue about the calculation of superannuation contributions that are included in taxable wages. For each taxpayer the amount in dispute is only $10,000 of payroll tax per annum. No taxpayer considers that the issue is worth litigating.

However for the OSR, since there are 1,000 such taxpayers with the same issue, the amount at stake is $10 million.

If no single taxpayer considers it worthwhile disputing its assessment, the OSR's position remains untested. If one taxpayer does dispute its assessment, the OSR might consider that it needs to fight the litigation as far as possible, even to the High Court. But the taxpayer will not be in a position to fund or to justify funding a number of court cases where the amount at stake for the taxpayer is only $10,000.

The financial capacity imbalance between the OSR and the taxpayer

In the majority of cases, the OSR will have a greater financial capacity than the taxpayer. This puts a taxpayer at a significant disadvantage to the OSR in the conduct of litigation.

However, the Model Litigant Policy for state agencies specifically requires the OSR not to take advantage of a claimant who lacks the resources to litigate a legitimate claim.

In addition the Model Litigant Policy specifically requires the OSR to:

- endeavour to avoid litigation wherever possible; and
- where it is not possible to avoid litigation, to keep the costs of litigation to a minimum.

There is an obvious tension between those obligations of the OSR and the following objectives of the OSR:

- to fully protect the Revenue;
- to have the law clarified where uncertain; and
- to be fully represented by counsel in conducting litigation.

A test case litigation funding program would ease this tension. It would allow the OSR to have uncertain or contended areas of the law resolved by the ADT and the courts, without taking advantage of taxpayers who lack the resources to litigate the legitimate issue in dispute.

Propensity of the OSR to justify appeals compared to the taxpayer

The Flow-on Factor of a case can sometimes justify the OSR making an appeal against a first instance (or later decision) in circumstances where the amount involved in the actual case would not otherwise commercially justify an appeal. Because the OSR is supported with access to the public purse, the OSR is in a position to make an appeal in such circumstances. This can result in the taxpayer effectively being held captive to litigation with the OSR, with the taxpayer being forced to fund the costs of defending an appeal, even in circumstances where the taxpayer would be prepared to settle or even waive its win, in circumstances where the costs of defending the appeal diminish or even worse, exceed the amount of its win. This is an unfortunate state of affairs and needs to be addressed. A test case program could be one way of doing so.

As noted above the ATO's policy is generally to pay the taxpayer's reasonable costs of an appeal by it against an AAT decision in favour of the taxpayer. In addition in relation to High Court appeals, the ATO's states in its policy that where it seeks special leave to appeal to the High Court, and the issues in the case justifies it, it may offer to meet the costs of the taxpayer of the special leave application, and of the appeal if leave is granted.

Uncertainty and Increasing Complexity of Taxation Laws

Notwithstanding intended simplification of NSW stamp duties through introduction of the *Duties Act 1997* ("Duties Act") on 1 July 1998, uncertainties continue to exist and legislative amendments (such as those relating to mortgage duty and landholder duty) have increased the complexity of that Act, requiring many taxpayers to incur costs in obtaining professional advice and in seeking clarification of the law, through objection and review procedures. Similar comments apply in respect to other taxation laws, such as the *Land Tax Management Act 1956* and the *Payroll Tax Act 2007*.

In these circumstances, it is only fair and reasonable that a test case funding program should be made available to taxpayers.

Is legislative amendment the answer?

While there are appropriate situations where an uncertain area of the law can be resolved by legislative amendment, there are obvious limitations.

First, where the issue in dispute affects a number of taxpayers in respect of existing liabilities, such an amendment would have to be retrospective to clarify the position. Of course it is widely accepted that retrospective legislation is generally undesirable.

Secondly, it is somewhat heavy-handed for OSR to adopt the attitude that it can simply procure amendment of the law in its favour whenever there is a genuine area of uncertainty or where taxpayers demonstrate (such as in the Qantas case) that there is a deficiency in the legislation.

As a practical matter, it might not always be possible for the OSR to persuade Parliament to make the necessary amendment (particularly where the Government does not control the Upper House).

Finally, some issues might not be capable of simple legislative amendment, for example, the scope and meaning of 'artificial, blatant and contrived' in the general anti-avoidance provisions in the Duties Act.

Would there be enough cases to justify the program?

It might be suggested by the OSR that there would not be many issues to litigate. With respect, this would overlook the fact that the program is not intended to be one-sided. That is, it is not intended only for the benefit of the OSR in picking and choosing issues it would like to have clarified. As is demonstrated by the ATO program, which allows applicants to identify issues and raise them with the ATO, there are many issues of which the OSR might not be aware, but which taxpayers would be prepared to test a contended view if the amount at stake were sufficient, or, alternatively, if test case funding were available.

In many cases, the amounts in dispute may be small but affect a large number of taxpayers.

Statistics sourced from the ATO website as to the number of cases approved for funding are summarised in the following table:

Year	Number of Approved Cases
2000 – 1	6
2001 – 2	5
2002 – 3	5
2003 – 4	5
2004 – 5	8
2005 – 6	19
2006 – 7	20
2007 – 8	14
2008 – 9	14

This demonstrates that the ATO program has been well used and successful. It is submitted that even if in New South Wales a similar program only funded say, 3 or 4 cases a year, this would be sufficient to justify its existence.

Conclusion

The Committee considers there is a strong case for the implementation of a test case funding program which would significantly improve the administration of justice in taxation laws in New South Wales.

A letter has also been sent to the Chief Commissioner of State Revenue, in the same terms, seeking in-principle support for the introduction of such a program.

The Committee looks forward to confirmation of the in-principle agreement it has sought from both the OSR and Treasury. The Committee members would be very happy to assist in developing the detail of such a program once this approval has been obtained.

Yours faithfully

Mary Macken
President

Model Litigant Policy for Civil Litigation

Introduction

1.1 This Policy has been endorsed by Cabinet to assist in maintaining proper standards in litigation and the provision of legal services in NSW. This Policy is a statement of principles. It is intended to reflect the existing law and is not intended to amend the law or impose additional legal or professional obligations upon legal practitioners or other individuals.

1.2 This Policy applies to civil claims and civil litigation (referred to in this Policy as litigation), involving the State or its agencies including litigation before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes.

1.3 Ensuring compliance with this Policy is primarily the responsibility of the Chief Executive Officer of each individual agency in consultation with the agency's principal legal officer. In addition, lawyers, whether in-house or private, are to be made aware of this Policy and its obligations.

1.4 Issues relating to compliance or non-compliance with this Policy are to be referred to the Chief Executive Officer of the agency concerned.

1.5 The Chief Executive Officer of each agency may issue guidelines relating to the interpretation and implementation of this Policy.

1.6 This Policy supplements but does not replace existing Premier's Memoranda relating to Government litigation, in particular Premier's Memoranda nos. 94-25, 97-26, and 95-39.

The obligation

2. The State and its agencies must act as a model litigant in the conduct of litigation.

Nature of the obligation

3.1 The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards.

3.2 The obligation requires that the State and its agencies, act honestly and fairly in handling claims and litigation by:

a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;

b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;

c) acting consistently in the handling of claims and litigation;

d) endeavouring to avoid litigation, wherever possible. In particular regard should be had to Premier's Memorandum 94-25 Use of Alternative Dispute Resolution Services By Government Agencies and Premier's Memorandum 97-26 Litigation Involving Government agencies;

e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:

   i) not requiring the other party to prove a matter which the State or an agency knows to be true; and

   ii) not contesting liability if the State or an agency knows that the dispute is really about quantum;

f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;

g) not relying on technical defences unless the interests of the State or an agency would be prejudiced by the failure to comply with a particular requirement and there has been compliance with Premier's Memorandum 97-26;

h) not undertaking and pursuing appeals unless the State or an agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable; and

i) apologising where the State or an agency is aware that it or its lawyers have acted wrongfully or improperly.

3.3 The obligation does not require that the State or an agency be prevented from acting firmly and properly to protect its interests. It does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made.

3.4 In particular, the obligation does not prevent the State or an agency from:

a) enforcing costs orders or seeking to recover costs;

b) relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;

c) pleading limitation periods;

d) seeking security for costs;

e) opposing unreasonable or oppressive claims or processes;

f) requiring opposing litigants to comply with procedural obligations; or

g) moving to strike out untenable claims or proceedings.

Australian Government
Australian Taxation Office

Test case litigation program

Foreword

We have a responsibility to administer a range of laws fairly so as to ensure that taxpayers have access to their entitlements and comply with their obligations. This seeks to achieve a level playing field for taxpayers in accordance with the legislative intent. We make decisions based on our view of the law that sometimes people disagree with. In these circumstances taxpayers have a right to have the matters reviewed by the Administrative Appeals Tribunal (AAT) or the courts.

Part of our role is to help people understand their rights and responsibilities in relation to the laws we administer. We do this by offering advice and guidance that give our view of how these laws apply. Sometimes people disagree with our understanding of the law. Ultimately, it is the courts that have the final say in determining what our laws mean.

Usually the funding of a taxpayer's litigation is a matter for them, although taxpayers who are proven right may be reimbursed for their legal costs. In relation to small claims, taxpayers can seek to have matters reviewed by the less expensive small claims process of the AAT.

There are however some issues where it is in the public interest to have the law clarified through litigation. It is only the taxpayers that can commence such litigation.

Under the test case litigation program, the ATO provides financial assistance to taxpayers whose litigation is likely to be important to the administration of Australia's revenue and superannuation systems. The aim of the program is to develop legal precedent – that is, legal decisions that provide guiding principles on how specific provisions we administer should be applied more broadly.

We are guided in the decision to fund such cases by the criteria contained in this guide and by a test case litigation panel. The panel includes members of the accounting and legal professions, to ensure that we fund issues of importance to the community.

This guide explains how you can apply for test case funding in relation to such issues.

Michael D'Ascenzo
Commissioner of Taxation

About the test case litigation program

Purpose

The purpose of the test case litigation program (the program) is to clarify the operation of laws administered by the Commissioner of Taxation where there is uncertainty or contention.

Funding criteria

Cases selected for funding need to involve issues where:

- there is uncertainty or contention about how the law operates
- the issue is of significance to a substantial section of the public or has significant commercial implications for an industry, and
- it is in the public interest for the issue to be litigated.

The following principles are a guide to applying these criteria:

- Cases involving questions of fact where there are established legal principles will generally not meet the criteria for funding.
- Our appeal against a decision of a court or tribunal usually indicates that an important issue is involved. If it is also in the public interest that the issue is clarified we may provide funding.
- Most cases accepted under the program involve reviews of our decisions on objections to assessments or private rulings. These can be applications to the Administrative Appeals Tribunal (AAT) to review a decision or appeals to the Federal Court, including further appeals from an AAT or Federal Court decision. However, we will consider other cases on debt-related issues, applications for declaratory relief and judicial review issues where clarification of the law is important.
- We prefer to fund cases that are brought before the Federal Court, rather than the AAT, because they are more likely to provide legal precedent to clarify issues. However, we still consider funding cases before the AAT or Small Taxation Claims Tribunal, particularly where the case is to be heard by a presidential member.
- As it is important to clarify uncertainty in the law as quickly as possible, we expect applicants to cooperate to achieve an early hearing.
- We take into consideration an applicant's financial capacity to pursue litigation, although we may still approve funding for applicants who have the capacity to fund their own case.
- We do not usually fund cases that we consider involve tax avoidance schemes or attempts to gain a benefit clearly not intended by the law. However, we will consider these cases for funding if they test the proper meaning of anti-avoidance provisions or if funding the

case is in the public interest.

How cases are identified

Most applications for funding come from taxpayers who have begun litigation in a court or tribunal.

We also get applications from taxpayers who are considering litigation, asking for in-principle approval for the funding of their case. These applications can also be made, for example, by professional or industry bodies seeking to test a significant issue for their members (see Applications for funding).

We can agree or offer to fund a case under the program without an application for funding being made if it is in the public interest. If we decide an issue needs testing, we may ask a taxpayer to proceed with a test case on an agreed basis with funding.

We may also ask a professional or industry body for help to identify a suitable case.

How applications are considered

Although we make the final decision on test case applications, we are guided by recommendations of the test case litigation panel (the panel). The panel was formed to provide independent views on the merits of cases and on the significance of issues to the community.

The panel consists of accounting and legal professionals and senior tax officers. The panel considers applications in light of the program's criteria and recommends whether or not funding is appropriate. The Chief Tax Counsel chairs the panel and makes funding decisions.

The panel generally convenes four or five times a year and usually considers an application at the next meeting after we receive it.

If we decide an issue needs testing and, without reference to the panel, we identify a test case, we let the panel know of our decision.

Selection of cases

Cases can be identified and considered for funding under the program in a number of ways. However, no matter how a case is identified, the same criteria are used to decide if it should be funded.

Applications for funding

You can apply for funding under the program for:

- a case which has commenced or is about to commence
- in-principle approval to develop a case
- in-principle approval for an issue.

How to apply for test case funding explains what your application needs to cover.

We will check that you have provided all the information needed to consider your application. If we need more information we will contact you and give you the opportunity to present your best case.

Once we have all the information, we ask for comments from our experts and include their comments with the papers considered by the panel.

Where we refer your application to the panel, they will consider if your case meets the criteria, based on your written application and supporting documentation. The panel then makes a recommendation to the panel chair to either approve or decline funding. The chair then makes the decision.

Generally, a decision will be made within three months of us receiving an application, although it may take longer if we need more information. We will give you the decision in writing, with reasons.

If we approve your application, we will then agree with you how that funding will be provided (see Funding arrangements). The most common arrangement is a formal agreement under a test case funding deed. In these cases, we will send you a draft deed setting out the terms and conditions. You will need to consider that offer carefully before responding or accepting.

If we decline your application and further developments in your case mean the reasons for refusal no longer apply you can re-apply for funding.

If you think your application has not been properly considered, or you do not agree with our reasons for declining funding, you can ask us to review the decision. A senior tax officer who did not make the original decision will conduct the review. We will give you the review decision, and our reasons for it, in writing. The review process usually takes about six weeks.

Application for funding where we appeal against a court decision

If we appeal against a decision of a court, you still need to lodge an application to apply for funding for the appeal case. We will consider your application under the usual criteria, but we will take into account that we appealed against the decision.

We do not offer funding for all cases where we have lodged an appeal against a court decision.

Application for approval in-principle to develop a case

Sometimes a case has the potential to test an important issue but more work is needed before it can be litigated.

We may agree to provide funding for the costs (including non-legal costs) of developing the case, such as preparing an objection or private ruling request.

You need to apply for in-principle approval for funding to develop a case for litigation before you incur the expenses. Your application needs to include details of how the case will be developed so that it can be brought before a court or the AAT.

If you are seeking funding to prepare an objection or a private ruling request, the application will need to show there are special circumstances to justify funding – for example, where clarification of the issue would be of significant benefit to the community, but the cost to an individual of running a case would be disproportionate to the amount of tax in dispute.

You will also need to provide details of a proposed work plan and budget for developing the case before we give in-principle approval.

The work plan needs to describe each item of work, the person who will perform the work and their qualifications, and the proposed timeframe for completing the work.

The budget should show the number of hours or days expected to be spent on each item in the work plan and the hourly and daily rates to be charged.

Application for approval in-principle for an issue

Although applications for in-principle approval can come from taxpayers they would usually be made by an association on behalf of its members.

If an association has a tax issue of importance to its members, the association may seek in-principle approval for the issue to be funded. The association may do this before it incurs the expense of finding a case that will test the issue.

As the panel will not have an actual case to consider, it is particularly important to explain the legal principles that will be tested.

If we accept an issue for resolution under the program, we may identify a suitable existing case or identify a case jointly with you. You will then need to send us an application for test case funding.

If we give in-principle approval for your issue, we will advise you in writing and allocate a funding contact officer to help you with your case and funding options.

An approval in-principle does not automatically entitle you to a reimbursement of costs. We will only reimburse costs if this has been agreed to in a formal written agreement – for example, in an executed test case funding deed (see Funding arrangements).

We usually send a letter of offer and draft test case funding deed to the taxpayer whose case is being used to test the issue.

Test cases we initiate

We identify issues that need to be tested – for example, through the public rulings program. Issues may also emerge in meetings with industry and professional associations.

For these issues we identify an appropriate case, sometimes with the help of a professional or industry body, and offer funding without the need for an application.

Although they are an important part of the program, these cases usually only go to the panel for information.

Appeals against AAT decisions

When we appeal against a decision of the AAT or the Small Taxation Claims Tribunal it is usually because an important legal issue needs to be clarified. For this reason we will generally fund the taxpayer's reasonable costs of the appeal. This is to ensure that taxpayers can take a case to the AAT at low cost without a significant risk that they will then need to pay for a court appeal.

We take into account the capacity of the taxpayer to meet legal costs in deciding whether to fund these cases.

We generally offer funding without referring the case to the panel. It is usually provided by consenting to the court awarding costs against the Commissioner. If we continue to appeal subsequent decisions, we will continue to pay reasonable costs, subject to agreement at each appeal stage about the terms of funding.

You may still apply for test case funding under the usual criteria in this situation, as the funding provided under a test case funding deed may be more than the amount that would be paid under a costs order.

If you appeal against an AAT decision, or any subsequent decision of a court, we will not usually offer funding. You would need to submit an application for test case funding which would be considered through the normal panel process.

High Court cases

When we seek special leave to appeal to the High Court, and the issues in a case justify it, we may offer to meet your costs of the special leave application and the appeal if leave is granted. This is often done without referring the case to the panel.

These cases are usually funded by us consenting to the court ordering costs against the Commissioner. The costs provided are the usual reasonable 'party/party' costs calculated under the High Court's rules. However, if we are given leave to appeal, we would normally give you the option of having your costs paid under a test case funding deed rather than through an order for costs.

Appeals in funded cases

Given the purpose of the program, we will generally extend funding to appeals either by you or by us in funded cases, at least to the Full Federal Court, provided the criteria for funding are still met. Where cases are approved for funding in state or territory courts, we will generally extend funding to the Court of Appeal or equivalent in the relevant Supreme Court.

We do not generally agree to continue funding when you are seeking special leave to appeal to the High Court. This is because we consider that a decision of the Full Federal Court (or the Court of Appeal of a State or Territory) achieves the level of law clarification that the program has been established to obtain.

However, if you obtain leave, the High Court's view of the importance of the issue may provide strong support for an application to fund the substantive appeal under the program. If we agree to fund the appeal, the funding deed or the order for costs will usually cover the costs of your special leave application.

You do not usually need to lodge a new application for funding. We will make a decision on funding taking into account the issue being tested on appeal. In some cases we may ask you to provide further submissions as to why funding should be continued for the next stage of the appeal process.

Funding arrangements

If we approve funding for your test case we will let you know the name of your funding contact officer. This officer can help you with any questions about funding. They will not be involved in the conduct of the case – a different officer handles this.

There are three types of funding arrangement under the program:

- a court order under which we agree to pay your costs
- a formal agreement to provide funding under a test case funding deed (the most common arrangement)
- a written offer to reimburse your costs on specified terms.

Cost orders

We may meet your costs by consenting to the court awarding costs against us. When a court makes a cost order in tax matters it is generally taken to be 'party/party' costs (unless the court specifies otherwise). Our liability for costs in this situation will follow the ordinary court process, such as taxation of costs where necessary.

Generally, we will meet the costs on the basis of an itemised account submitted to our solicitor, or they may be settled by agreement.

Cost orders are made through the relevant court process. If you need more information about such orders, you should get advice from your solicitor or counsel.

Written offers

In some situations we will send you a letter offering to reimburse specific costs – for example, we may do this if we provide funding retrospectively after a review process.

Test case funding deed

The test case funding deed is a formal agreement to provide funding subject to specified terms and conditions. We will usually send you a

draft deed shortly after advising you that your application has been approved.

You should consider the deed carefully. You should not rely on this guide to understand the particular deed that has been sent to you – you should get independent legal advice about the content of the deed.

Generally, when the case goes to hearing we will ask the court or tribunal to note that we have provided you with funding under the program.

In court cases, by consent the court will make no orders as to costs. Your costs will be assessed under the terms of the deed rather than the usual rules of the court. This is usually done directly between our funding contact officer and your solicitor.

In the event of a dispute or doubt, we may get advice from an independent cost consultant. If costs cannot be agreed, the deed provides that the costs will be determined by an independent arbitrator whose decision is binding on all parties.

Costs covered by the deed

If you decide to accept the offer by executing and returning the deed, our funding contact officer will contact you or your legal representative to discuss the funding arrangements.

The deed will specify rates at which we will reimburse your costs for the members of your legal team. It will also detail the basis for reimbursing the cost of disbursements.

The deed generally offers funding for reasonable costs incurred at the approved stage of litigation on a solicitor-client basis, subject to certain limits. We will only provide funding for legal teams of a size that is reasonable for the complexity of the case.

Costs calculated under the deed are generally higher than costs calculated on a 'party/party' basis under the rules of the Federal Court. However, the rates specified in the deed for solicitors and counsel may be less than the commercial rates they charge. As we will only reimburse the amounts specified in the deed, you may need to pay the balance of your legal advisers' costs.

Subject to the terms and conditions of the deed, you can be reimbursed for:

- solicitor's fees
- counsel's fees
- disbursements.

The deed will require your legal advisers to submit a detailed account for each item of work, including the hourly or daily rate charged. Disbursements must also be itemised clearly, in the same way as a bill of costs submitted in taxable form.

We may ask a cost consultant to review invoices if it is not clear that we should reimburse the costs. You should make sure that all invoices submitted meet the requirements set out in the deed to avoid delays in payment.

Solicitor fees

We will reimburse solicitor's fees up to the rate specified in the deed. These rates are based on the rates we pay for legal services.

Counsel fees

We will only fund you for the same number and seniority of counsel that we engage to conduct the case. For example, if we brief one junior counsel, we will only reimburse you for the cost of engaging one junior counsel to represent you.

We will reimburse you for counsel fees at the rate approved for your counsel by the Attorney-General's Department. Before briefing a barrister your solicitor must approach the Office of Legal Services Coordination (OLSC) in the Commonwealth Attorney-General's Department to find out if they have already set a rate for your counsel. If not, then your solicitor, or the barrister they propose to brief, must apply to OLSC for a rate to be set.

There is an application form on OLSC's website at www.ag.gov.au/olsc

If the fee payable to your counsel is higher than the rate approved by OLSC we will not reimburse you for the balance.

Disbursements

Normal disbursements (such as photocopying, facsimiles and telephone costs) are limited to $500.

The deed may also set limits for other disbursements, such as filing fees and witnesses' expenses.

If your costs are likely to be higher it is important to discuss these limits with our funding contact officer before the deed is executed. You should also contact the funding contact officer if you find, after the deed has been executed, that your costs will exceed these limits.

We can agree different funding arrangements if the costs are reasonable and necessary for the conduct of the case. But you should contact us before you incur the costs.

Funding under the program may not cover all of the expenses that you have to pay in running the case.

Costs that are not covered

We will not cover fees and disbursements that:

- are unreasonably high
- are not reasonably incurred for the conduct of the case
- are higher than the rates or amounts provided for in the deed
- are not directly related to the test case
- relate to your application for funding
- are incurred after the decision is handed down for the test case
- relate to some travel costs
- are for the litigation of issues which were not agreed as a basis for funding
- relate to the preparation of bills of costs.

Non-legal costs

Generally, test case funding is limited to legal costs – that is, the costs of preparing and conducting a case for litigation. However, when funding has been approved to develop a case for litigation, we will consider funding the costs of preparing objections and private ruling requests. This would usually be the fees that you have to pay to your accountant or tax agent.

This funding is generally capped at a specified amount and the deed will contain conditions on the funding. If the case goes to litigation we will not usually cover the costs of your accountant or tax agent as you should be adequately represented by solicitors and counsel.

If you seek this type of funding, you should include with your application a list of the types of costs you expect to incur and an estimate of the cost of the total work to be done. Any costs that are agreed will be set out in the draft deed we send to you.

Funding review

We may suspend or terminate funding at any time if you do not meet any condition of the funding offer as set out in the deed.

Conditions of funding

There are many conditions and obligations set out in a deed. You need to consider these carefully before agreeing to them. Key conditions and obligations include:

- You are expected to take the stage of the case that we have funded to its conclusion. You may need to supplement the cost of litigation with your own funds to do this if the funding provided does not fully cover your costs.
- If the case does not proceed on the issues agreed to in the deed due to actions by you or your legal representatives, we will not provide funding for the case. We may also ask you to refund money that has already been paid to you.
- Any claim made by you or your representatives under the program must be in respect of the agreed expenses for the conduct of your case.
- If you are successful in the test case, you will not seek an order for costs against us, other than orders in the form set out in the deed.

How to claim reimbursement

The terms of the deed specify how and when you can make claims for reimbursement.

Generally, once funding has been agreed, claims can be made every six months, or immediately after each significant court or tribunal appearance. We may consider alternative payment arrangements. These should be discussed with the funding contact officer when we make an offer of funding.

Tax consequences

There may be tax consequences if you claim an income tax deduction for legal costs incurred in objecting or appealing against an assessment or determination we make.

Any money you receive under the program to reimburse deductible expenditure is assessable income.

How to apply for test case funding

Your application must:

- be in writing
- be signed and dated
- include the name and contact details of the person or organisation lodging the application
- include the name of the taxpayer who will be party to the case, if the case has been identified
- be sent to:

  Test case litigation program
  Legal Services Branch
  Australian Taxation Office
  GPO Box 9990
  Sydney NSW 2001

Your application needs to address the funding criteria. The following points will help you do this. Make sure you answer these questions carefully so the panel can fully appreciate the strength of your application against the criteria for funding.

- What is the issue to be tested?

  Provide a brief summary of the issues for which you are seeking funding.

  Identify the area or areas of law that you expect your case to consider, and specify the particular provision or provisions.

- How does the issue relate to an area of tax law where there is uncertainty or contention?

  It is important to explain the particular point of contention or uncertainty and the legal principles to be tested. Issues involving questions of fact where there are established legal principles will not generally be funded.

- Is the issue of significance to a substantial section of the public or does it have significant commercial implications for an industry?

  Identify the industry or group of people who would be affected by this case, or who will benefit from the law you expect to be clarified.

- Why is it in the public interest for the issue to be litigated?

  Are there any other public interest issues that the panel should consider, other than those identified above?

- In which jurisdiction will your case be conducted?

  In order to develop a body of legal precedent we generally give preference to cases brought before courts rather than the AAT.

- Will your case be litigated through Part IVC of the TAA 1953?

  Most cases accepted under the program involve reviews of our decisions on objections to assessments or private rulings, which are litigated through Part IVC of the *Taxation Administration Act 1953*. These can be appeals to the AAT or Federal Court, including further appeals from an AAT or Federal Court decision. However, we accept other cases (for example, on debt-related issues) if the law involved needs to be clarified.

- Will you cooperate with us to achieve an early hearing?

- Do you have the financial capacity to pursue litigation without test case funding?

  While we take this into consideration, applicants with financial capacity will not necessarily be excluded.

- Does the Commissioner consider that your case involves a tax avoidance scheme?

  We do not, generally, fund cases involving tax avoidance schemes or attempts to gain a benefit clearly not intended by the law.

However, we will consider these cases for funding if they test the proper meaning of anti-avoidance provisions or if funding the case is in the public interest.

- How much tax is involved?

  Tell us the amount if this is known. Otherwise provide an estimate if possible.

- How much tax is involved in the relevant industry (if known)?
- What is the history of this dispute?

  You should tell us if the case is an appeal from an earlier decision.

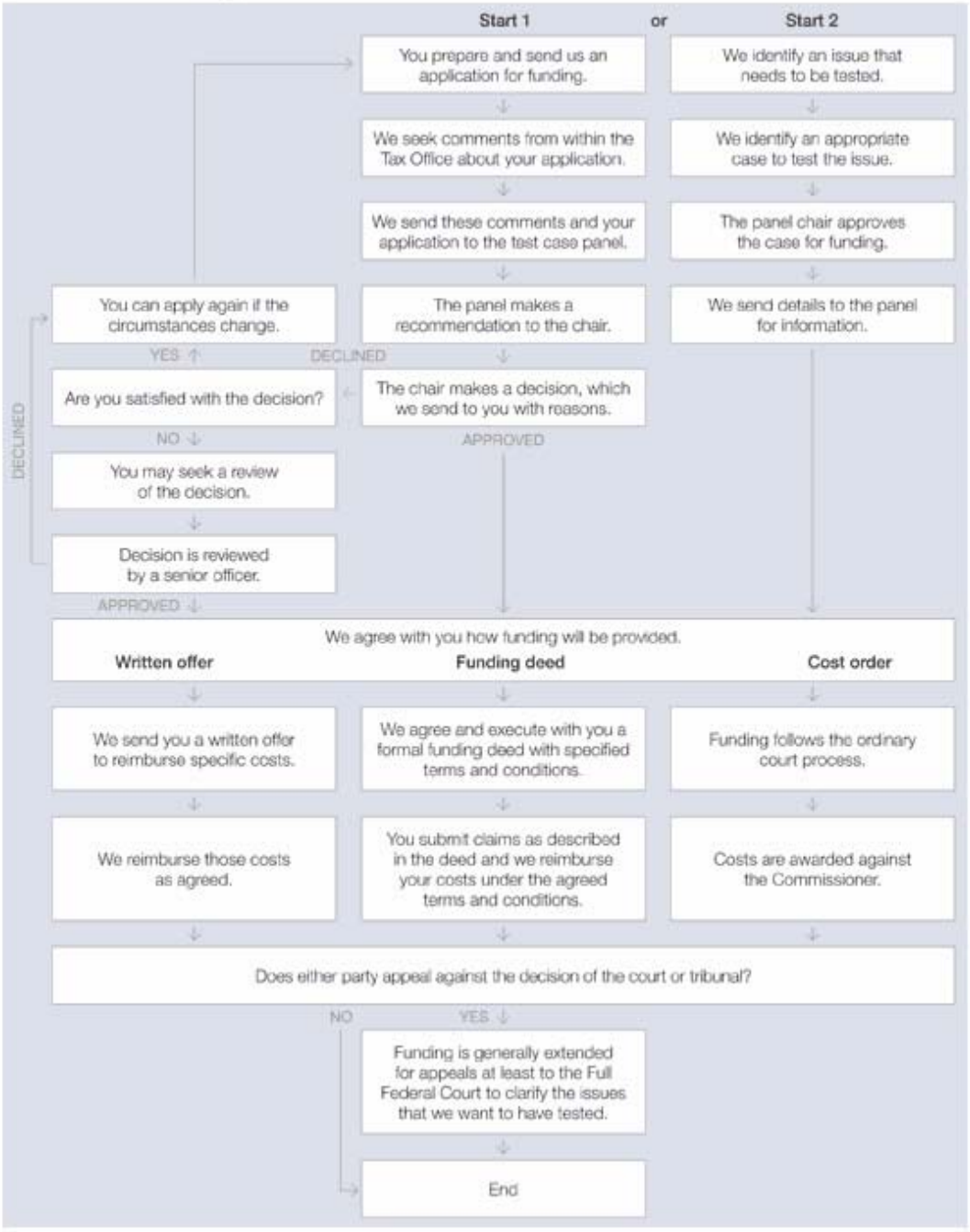
- Is there any other information you feel you should provide?

  Provide any other relevant information that you feel supports your application. For example, if you propose to seek in-principle approval for a case to be funded, you should set out how you propose to bring this issue forward for testing, an estimate of costs and what the costs will relate to.

Test case funding flowchart

Test case funding flowchart (PDF, 43KB)

DIAGRAM: Test case funding



More information and feedback

For more information or to provide comments on the test case litigation program:

- phone 13 28 69 between 8.00am and 5.00pm, Monday to Friday, and ask for the test case litigation program
- email strategiclitigationunit@ato.gov.au
- write to:

Test case litigation program
Legal Services Branch
Australian Taxation Office
GPO Box 9990
Sydney NSW 2001

If you do not speak English well and want to talk to a tax officer, phone the Translating and Interpreting Service on 13 14 50 for help with your call.

If you have a hearing or speech impairment, phone the National Relay Service on 13 36 77.

Last Modified: Tuesday, 9 June 2009

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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