



## FEDERAL COURT OF AUSTRALIA

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### **Notice to Practitioners and Litigants (Taxation) issued by the Chief Justice Tax List Directions**

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#### **1. Conduct of tax proceedings in the Federal Court of Australia**

- 1.1 This notice sets out revised arrangements for the management of tax cases. These will be coordinated regionally, within a national framework, by designated Tax List Coordinating Judges.
- 1.2 This notice deals with:
- an improved approach to the national and regional management of tax cases;
  - the role of the Tax List Coordinating Judge in each region;
  - revised arrangements for the management of tax cases to promote the just and efficient determination of tax disputes in a timely manner.
- 1.3 These Directions operate concomitantly with the Federal Court Rules; that is, practitioners may expect that the judges will administer cases in the Tax List in accordance with these Directions.

#### **2. National and Regional Framework**

- 2.1 In each registry a judge has been appointed as the “Tax List Coordinating Judge”.
- 2.2 The initial Tax List Coordinating Judges are:

NSW & ACT	Edmonds J
Qld	Dowsett J
SA & NT	Mansfield J
Vic & Tas	Gordon J
WA	French J

- 2.3 Practitioners may expect that the Tax List Coordinating Judges will emphasise the national and regional management of tax cases with the aim that the progress of cases is coordinated and expedited nationally and also within regions.
- 2.4 The Tax List Coordinating Judges will examine all tax cases in their respective registries and will liaise with each other regularly so that:
- like cases are heard together;
  - common issues, wherever they arise, are heard together or sequentially;
  - information is disseminated, where appropriate, universally and uniformly to all judges hearing tax cases;
  - the work of the Court is undertaken efficiently and expeditiously.

### **3. Commencement of Proceedings**

- 3.1 *Application* – Except as otherwise provided in these Directions, proceedings are to be commenced by the filing of an application in accordance with O 52B r 4 of the Federal Court Rules. Save in a case to which O 52B r 4(4A) applies, a sealed copy of the application must be served within 5 days after filing the application.

### **4. Appeal Statements / O 52B r 5 documents / Pro Forma Questionnaire**

- 4.1 *Appeal Statements* – In addition to satisfying the requirements of O 52B r 5(2), any appeal statement shall, avoiding undue formality, state in summary form:
- (a) the basic elements of the party’s case or defence;
  - (b) where applicable, the relief sought;
  - (c) the issues the party believes are likely to arise;
  - (d) the principal matters of fact upon which the party intends to rely; and
  - (e) the party’s contentions (including the legal grounds for any relief claimed) and the leading authorities supporting those contentions.
- 4.2 *Time for Filing and Serving of Appeal Statements / O 52B r 5 documents / Pro Forma Questionnaire* –
- (a) *Commissioner’s Appeal Statement and O 52B Documents* – The Commissioner’s Appeal Statement (or Appeal Affidavit) and O 52B r 5 documents must be filed and served upon the Applicant within 28 days of the date on which the application was served on the Commissioner.
  - (b) *Applicant’s Appeal Statement* – The Applicant’s Appeal Statement must be filed and served upon the Commissioner within 40 days of the date on which the application was served on the Commissioner.
  - (c) *Pro Forma Questionnaire* – The attached Pro Forma Questionnaire must be completed, filed and served by each party within 40 days of the date on which the application was served on the Commissioner.
- 4.4 *Non-compliance* - Failure to adhere to these requirements may result in sanctions including adverse costs orders and, in exceptional cases, recourse to the remedies

available under the *Federal Court of Australia Act 1976* and the Rules by way of summary or default judgment.

## **5. Initial Directions Hearing / Scheduling Conference**

- 5.1 *Date for Scheduling Conference* – Save in a case to which O 52B r 4(5)(a) applies, an initial directions hearing, called the “Scheduling Conference”, will be set down not less than 45 days from the date of the filing of the application. In urgent cases, the Scheduling Conference may, subject to O 52B r 4(5)(b), be set down earlier.
- 5.2 *Endorsement* – The date for the Scheduling Conference must be obtained from the Registry and must be stated on the application.
- 5.3 *Attendance* – The lawyers acting for each party are expected to attend the Scheduling Conference.
- 5.4 *Scheduling Conference* – The Scheduling Conference will be conducted by the Tax List Coordinating Judge. At the Scheduling Conference, the parties will be expected to address the following:
- (a) *Narrowing of issues* – In clear outline, the issues and facts that appear to be in dispute;
  - (b) *Initial Witness List* – Each party must bring to the Scheduling Conference an initial witness list with the name of each witness the party intends to call at trial. The list must include a very brief summary of each witness’s expected evidence and, unless it is otherwise obvious, must state the relevance of the evidence. Each party must provide a copy of the initial witness list to the docket judge and to the other party. The initial witness lists will be combined to create the “Preliminary Witness List”. The parties have an ongoing obligation to update the Preliminary Witness List by adding any additional witnesses that are expected to be called, or removing witnesses that are no longer expected to be called. The parties must, in a timely manner, notify the Court and all other parties of any updates to the Preliminary Witness List. The judge will determine whether the trial will be a “trial by affidavit” or a “trial by witnesses” with summaries of the expected evidence of each witness;
  - (c) *Pre-Trial Schedule* – With the assistance of the lawyers, the docket judge will establish a pre-trial schedule for all interlocutory steps needed to bring the proceeding to trial including (when appropriate) a time by which the parties shall submit to and attempt mediation. The parties must adhere strictly to the timetable. Failure to adhere to the timetable may result in sanctions including adverse costs orders, rejection of late filings and, in exceptional cases, recourse to the remedies available under the Act and Rules by way of summary or default judgment.
  - (d) *Matters raised by the Pro Forma Questionnaire* – The parties will be asked to address any of the matters raised in the pro forma questionnaire including, in particular, any matter that either party considers will or may

affect the work of the Court either generally or in relation to the particular case being undertaken efficiently and expeditiously.

- (e) *Fixed Trial Date* – A trial date will be set for as soon as practicable but, in any event, for no later than 12 months from the date of the Scheduling Conference. For urgent cases the trial date will be much sooner.

5.5 *Reference to docket judge* – After the conclusion of the Scheduling Conference, the Tax List Coordinating Judge will refer the matter to the registry for allocation to a judge (“the docket judge”) in accordance with the usual procedure for further management and trial.

5.6 *Alteration of Dates* – Applications for adjournment of a trial or other hearing date or for an extension of time to comply with a timetable or the Federal Court Rules will not be granted merely on the agreement of the lawyers. No adjournment or extension of time will be granted other than for good cause and upon such terms as the Court may impose.

## **6. Discovery**

6.1 *Limited Discovery* – Except where expanded or limited by the Tax List Coordinating Judge at the Scheduling Conference or the docket judge, discovery in cases in the Tax List will be confined to documents in the following categories:

- (a) documents on which a party intends to rely;
- (b) documents that materially affect the party’s own case adversely;
- (c) documents that materially affect another party’s case adversely;
- and
- (d) documents that materially support another party’s case.

6.2 *Material Effect and Material Support* – Documents that materially affect or materially support a party’s case are documents that would enable a judge to reach a sound, complete and just decision in the case.

6.3 *Reasonable Search Effort* –

- (a) Parties are required to provide discovery of any document within the Limited Discovery categories that a party knows of at the time of the Scheduling Conference, or that the party becomes aware of at a later point in the pre-trial or trial process, or that the party discovers in the course of a good-faith proportionate search of its documents and records.
- (b) A “good-faith proportionate search” is a search undertaken by a party in which the party makes a good-faith effort to locate discoverable documents, while bearing in mind that the cost of the search should not be excessive having regard to the nature and complexity of issues raised by the case, including the type of relief sought and the quantum of the claim.
- (c) If requested by any party, a party must describe briefly the kind of good-faith proportionate search it has undertaken to locate discoverable documents.

6.4 *Additional Discovery* – A party may seek additional discovery in relation to discrete issues. In that event the judge will make a separate order for that

purpose. The order may include a requirement that discovery be by inspection alone.

- 6.5 *Discovery Disputes* – Before filing any application relating to a discovery dispute, the parties must meet and confer and attempt to resolve the dispute in good faith. If the parties are unable to resolve the dispute, any application to the Court must include a certificate by the moving party’s lawyer that the “meet and confer” requirement was completed, though unsuccessful. Failure to so certify will result in the application being immediately refused.

## **7. Interrogatories and Particulars**

- 7.1 *Elimination of Interrogatories* – Interrogatories will not be permitted other than in exceptional circumstances.

- 7.2 *Elimination of Requests for Particulars* – Requests for Particulars will not be permitted except in exceptional circumstances, it being expected that such questions will have been discussed at the Scheduling Conference.

## **8. Interlocutory Applications / Motions**

- 8.1(a) *Briefs Required* – Unless otherwise directed, interlocutory applications, whether or not made by motion must be in writing and must be accompanied by a written brief (not exceeding five pages) setting forth a concise statement of the facts (if necessary verified by affidavit) and supporting arguments, with a citation of the authorities upon which the moving party relies. The opposing party must file a responsive brief (not exceeding five pages) and such supporting documents as are appropriate within five days after service of the moving party’s brief. The moving party may file a short rebuttal brief within two days after service of the opposing party’s response brief.

- 8.1(b) *Exceptions to Brief Requirement* - Briefs need not accompany applications for simple directions.

- 8.2 *Determination of Applications Without Oral Hearing* – The general rule for interlocutory applications is that they are to be determined upon written briefs. A party may request an oral hearing but it is intended that the process for determination with written briefs will usually make an oral hearing unnecessary.

- 8.3 *Extensions of Time* - A request for an extension of time relating to an interlocutory application must be made in writing. It is intended that timetables be strictly adhered to and it may be expected that applications for extension of time will, generally, be looked upon with disfavour.

## **9. Pre-trial Conference**

- 9.1 *Time of Pre-trial Conference* – A pre-trial conference with the docket judge will be held approximately three weeks prior to the scheduled trial date. The conference must be attended by the lawyers involved in the case and a representative, with authority, of each party. The pre-trial conference is intended to provide an opportunity for the parties and the judge to deal with any outstanding matters or applications before the start of the trial. At the pre-trial conference:

- (a) *Agreed Facts* – The parties will be required to identify the material facts that are agreed and the material facts in dispute.
- (b) *Finalise Witness List* – The parties will finalise the list of witnesses to be called at trial. The judge retains the authority to revisit the final witness list at any time to discuss any issues or concerns arising during the trial. It may be expected that witnesses who are not on the final witness list will not, save in exceptional circumstances, be permitted to give evidence.
- (c) *Objections to Evidence* – The parties should be ready to deal with any objections to the evidence proposed to be tendered. The judge will rule on those objections, unless they are more conveniently dealt with at the trial.
- (d) *Joint Exhibit List* – The parties will jointly submit a numbered list of the exhibits the parties intend to use at trial. The list will include a copy of the exhibit and, where not obvious, a short description of the exhibit and a statement of its relevance. The judge will examine the list with the parties and discuss any perceived issues or concerns with the proposed exhibits. The judge retains the authority to revisit the joint exhibit list at any time to discuss any issues or concerns arising during the trial. Exhibits that are not on the joint exhibit list will not, save in exceptional circumstances, be permitted to be tendered at trial.

## **10. Judgment**

- 10.1 In accordance with the Court’s general protocol for the disposition of cases, the Court will endeavour to deliver judgment promptly, and in urgent cases very quickly. In urgent cases, if the circumstance make it desirable to do so, the Court may deliver a judgment with reasons to follow later.

M.E.J Black  
Chief Justice  
4 April 2008

**TAXATION LIST – PRO FORMA QUESTIONNAIRE**

<b>BACKGROUND</b>	
<b>Proceeding No</b>	
<b>Name of Applicant / Respondent</b>	
<b>Name of Solicitor and Counsel</b>	
<b>Summarise the administrative history of the dispute (eg was there an audit and, if so, how long was the audit)</b>	
<b>DETAILS OF TAX DISPUTE</b>	
<b>Year(s) in dispute</b>	
<b>Amount of Primary Tax in dispute (\$)</b>	
<b>Amount of Penalties, SIC or Interest in dispute (\$)</b>	
<b>Has tax debt been paid? If so, when was the debt paid. If not, what arrangements (if any) are in place for the payment of the tax debt.</b>	
<b>RELATED TAX MATTERS?</b>	
<b>Are there tax appeals filed or to be filed in the Federal Court or the AAT involving:</b> <b>(1) the same taxpayer and the same / related issues; or</b> <b>(2) a different taxpayer and the same / related issues?</b> <b>If so, outline the stage these matter(s) have reached?</b>	
<b>TEST CASE / FAST TRACK</b>	
<b>Is the application a test case?</b> <b>If so, how many other taxpayers and / or how much revenue is affected by the result of the test case?</b>	
<b>Should the application be fast tracked and, if so, why?</b>	

DATED:

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(Signed, party or party's solicitor)