

**SESSION 4 - DISPUTE RESOLUTION - PANELS,
THE PREAMBLE, AND A CONCIERGE**

1 Panels

1. GAAR Panel:

- (a) Evolving role and functions - changes to avoid factually incomplete matters.
- (b) Function - not a decision-making body but rather a consultative role.
- (c) Width of provisions considered - whether it extending to other provisions eg s100A.
- (d) Advocacy before the panel – approach of the advocate;¹ whether to turn up; personnel supporting.

2. Fraud and Evasion Panel:

- (a) Sits privately, without input from the taxpayer or taxpayer representatives.
- (b) That may be inevitable in cases where risk of asset dissipation.
- (c) *Moreau v FCT (1926) 39 CLR 65, 68 Isaacs J:*
Fair play would, of course, usually induce him [the Commissioner] to give the taxpayer the fullest opportunity to explain, but that is not legally inexorable."
- (d) Context in *Moreau* - an allegation of fraud or evasion, and the taxpayer had not been given an opportunity to explain. See DW Marks "[Fraud and evasion](#)" (2019) 22(5) *The Tax Specialist* 190-200 (link to earlier conference paper).

3. Settlement Panels:

- (a) Query currency of Dispute Resolution Instruction Bulletins:
 - (i) [DR IB 2013/6](#) authorisation of certain dispute resolution officers to settle tax resolution ("formerly Part IVC") matters;
 - (ii) [DR IB 2013/7](#) settlement of debt recovery proceedings.

¹ Personal experience - agonised for 2 weeks before each appearance about most useful way of presenting. Concentrated on purpose, as it's central to Attachment 2 to [PSLA 2005/24](#). Able to cut to the chase given the rapport and respectful relationships the Panel can foster. I found the appearances to be stimulating and enlightening discussions (I hope mutually). I expect others have different approaches and experiences.

- (b) Important documents to understand before negotiation, eg ADR.
- (c) No references to settlement panel.
- (d) Current website information simply says that: “In some ATO business areas, settlement panels provide advice to ATO officers on reasonable parameters for settlement negotiations and decisions.”

2 Preamble

4. DR IB 2013/18 concerns “Appeal Statements and onus of proof in Part IVC litigation”, and states that the ATO’s “current approach” of preparing an appeal statement is to include standard paragraphs in the preamble”. It sets out a familiar example.

5. Practice again questioned now. How it sits with:

- (a) Sections 37M-37P Federal Court of Australia Act 1976.
- (b) Tribunal seeking assistance from both parties: ss33(1AA) & (1AB) Administrative Appeals Tribunal Act 1975.
- (c) FCA Central Practice Note, CPN1, para 7.2:

“The parties and their lawyers are expected, and have a statutory duty to co-operate with the Court and among themselves to assist in achieving the overarching purpose and, in particular, in identifying the real issues in dispute early and in dealing with those issues efficiently. There are no exceptions to this expectation because of the size or nature of the matter.”

- (d) Ethical obligations of legal practitioners have evolved over the decades in light of the above developments. Wasted costs orders against lawyers personally are happening. I will look at the overseas examples, eg *Le Brocq v Liverpool Crown Court* [2019] 4 WLR 108 (overturned by this appeal, but worthy of note).
- (e) Recent *ex cathedra* statements known to some present questioning appropriateness of the preamble (except possibly in cases, for example, of a default assessment on a lump sum basis).
- (f) Effectiveness of the preamble in warning under-represented taxpayers of their responsibilities:
 - (i) Eg a case of husband & wife tax agents, *Abichandani* [2019] AATA 4296:

[3] ... Mr Abichandani, who represented both himself and his wife, did not grapple with the curiosities that are involved in matters like this one. The Commissioner is not required to prove his case: it is Mr and Mrs Abichandani that must prove that the Commissioner was wrong, or, more accurately, excessive, in his assessment and what would have been the correct result for the Commissioner to have arrived at.

- (ii) Whether the objective evidence supports an “educative” function”.

6. Whether DR IB 2013/18 remains current?

3 A Concierge

7. Australian Small Business and Family Enterprise Ombudsman website:

Our Assistance Team comprises small business specialists and case managers who respond to requests for assistance from small business taxpayers who have received a negative decision from the ATO.

The small business specialists and case managers will provide:

- *information on the AAT procedures for reviewing a decision*
- *access to legal advice before and after an application is lodged with the AAT*
- *access to support including a reduced AAT application fee and fast tracked processing*
- *ongoing support and assistance until a decision is reached.*

8. Small Business Division of the AAT, is created by regulation and given life through a practice direction and guide. The name is not strictly accurate. It will handle large and complex disputes. Eg:

- (a) Whether you try and determine whether it is a “small business” at the time of application or the time of the incurrance of tax.
- (b) May be a much-diminished business at application, if in dispute with the ATO (and potentially other creditors) for some time.

9. Division has these features:

- (a) Triage procedure in AAT.
- (b) Concierge procedure with small business ombudsman.
- (c) Provision of funding - for representation before the AAT if ATO briefs out. DR IB 2019/1 says as a general rule ATO will not be represented by external legal counsel in Small Business Division.
 - (i) What upskilling of internal staff and recruitment?
 - (ii) What should be highlighted to ATO, if taxpayer wants funding?

10. The role of ADR?

- (a) What I call a “triage procedure” in the practice direction –
 - (i) officially “early case assessment conferencing process”, heading 4 of PD “Review of Small Business Taxation Decisions”
 - (ii) AAT will manage the matter up front, trying to identify what the real dispute is and difficulties that parties might respectively face along the way.
- (b) *ex cathedra* statements that there will be an increased use of neutral evaluation, separate from the triage procedure.

4 ADR

11. Official government documents encourage use of ADR. For example the [OLSC Guidance Note No. 12 “Use of Alternative Dispute Resolution \(ADR\)”](#) echoes the fact that ADR has been “strongly encouraged by successive Governments”.
12. My impression - the experience in ADR for the taxpayer depends on personalities involved.
13. There is a tension here between protecting public money (and several other public goods such as horizontal equity), and adopting a view to litigation which considers each matter on its merits and looks to see whether that particular dispute can be resolved.
14. See more generally DW Marks [“Not my money to give away”](#) (2018) 22(1) *The Tax Specialist* 18-29 (link to earlier conference paper).
15. Looking forward - arbitration between States under investment, trade & tax treaties. Experience in Australia is rapidly expanding. Most well-organised barristers’ chambers and lists are promoting their arbitration experience. As NZ examples, links to [Shortland Chambers](#) and [Bankside Chambers](#).

5 Bosanac

16. At time of dictating, pending in the Perth Registry of the HCA, is a matter between Mr Vlado Bosanac, and as respondents: Commissioner of Taxation, the Federal Court of Australia and the Full Federal Court of Australia.
17. The taxpayer did not file tax returns for many years. The procedural confusion seems to lie in the decision-making sequence. There is an interesting point reserved before Nettle J, relating to the nature of the Part IVC appeal.
18. Conventional understandings embodied in the Full Court’s judgment are said to be wrong.
19. Cf [\[2019\] HCATrans 209](#) and [\[2019\] FCAFC 116](#).

6 Other?

20. Questions and comments.

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David W Marks QC

Chambers

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