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"The Power to Audit is the Power to Destroy" (1)

A position and discussion paper to
reform the Australian Taxation Office with emphasis on
its treatment of small business people

"… Parliament surely did not intend to empower tax officials to victimize taxpayers through abusive audits…" (1)

The ATO is effectively police, investigator, prosecutor, judge, jury and financial jailer all in one. The evidence is that the ATO abuses those powers in relation to small business people and thereby victimizes them.

This paper calls for major reform of the structures within and around the ATO to ensure that the ATO exercises its powers ethically and within the law.

Facts

The ATO

- has powers that exceed those of Australian police forces;
- can require payment of alleged tax debts before appeals happen
- charges penalties of up to 90 per cent of alleged tax debts;
- can form an 'opinion' of fraud and taxpayers are thereby guilty

and

- taxpayers are guilty until they prove their innocence;
- essentially nothing on the ATO website is law.

(1) "The Power to Audit is the Power to Destroy: Judicial Supervision of the Exercise of Audit
https://www.dwpv.com/en/Insights/Publications/2013/The-Power-To-Audit-Is-the-Power-To-Destroy

The principles of reform

In a genuine 'rule of law' democracy, the protection of the people from bureaucratic abuse is heavily dependent on independent government bodies 'cross-checking' each other's actions.

For example, police must convince independent departments of prosecution of the police's case against an accused. One body checks the other. This leads to better quality policing and limits abuse of police powers.

It should be expected that where a government body has all the relevant power, as is the case with the Australian Taxation Office, that power will be abused. The abuse of power is commonplace where power is concentrated. Parliament should not be surprised that the ATO abuses it powers. The abuse is a consequence of the unchecked, concentrated powers that the ATO has been given.

This ATO reform program proposed and sought for in this paper does not seek to limit or stop the effective collection of tax in Australia. Quite the reverse! We seek better tax collection through a balance and diversification of powers. Just as policing is better because of institutional cross-checking of power, so too will the tax collection system become better through the institutional cross-checking of power.

The reason for this paper

Self-Employed Australia has long observed, been involved in and sought to assist self-employed people confronted by allegations of tax debt by the ATO. Where a debt is genuinely owed, we urge the debt to be paid.

However, we have repeated experience of the ATO raising alleged debts against self-employed people where no tax is owed. In these instances (and there have been quite a number) the actions and the behaviour of the ATO have formed a pattern of abuse. The self-employed people have been victimised by the ATO. We have undertaken considerable analysis of the ATO's abuse, published the analysis and sought media attention for the cases. It is as a result of these cases that we been able to identify where reform of the ATO is required.

Summary of reforms

The process of challenging tax assessments has not undergone any significant reform since 1936 following the introduction of the first Income Tax Act. In the 81 years since, other areas of government decision-making have been reformed, but not the ATO. It is now time for change.

1. ATO accountability

Reform the existing ATO into two separate authorities, namely:

- One authority to collect tax and undertake audits.
- A separate authority to manage taxpayers' objections and appeals.

2. Access to justice for small business people

Create a Small Business Tax Tribunal to provide small business people with a genuinely cheap, efficient, accessible and non-legalistic appeals process.

3. ATO transparency on disputed debts

ATO to separately record, account for each individual and report in total on:

- Undisputed tax debts.
- Disputed tax debts.
- Interest charged on disputed tax debts.
- Penalties charged on disputed tax debts.

4. ATO transparency on model litigant obligations

The ATO to list every case against every small business taxpayer in which the Commissioner has suffered an adverse judgment but despite which the case is continuing. Such lists to specify:

- The number of adverse judgments.
- The number of days the matter has been outstanding since the first adverse judgment.
- Whether the case is being continued for strategic reasons and what those reasons are. If not, to state the reasons for continuing with the case.

5. Reasonableness in ATO powers

- Mechanisms are required to put disputed debts on hold until they are resolved.
- Penalties capped at 25 per cent unless there is independent approval.
- ATO cannot act on an opinion of 'fraud and evasion' without independent approval and judicial oversight.

6. Strengthen the AAT and the Courts

- The Administrative Appeals Tribunal have state-based Vice-Presidents to manage appeals.
- State Supreme Courts to be acceptable as first 'port of judicial call' for tax disputes.

Reform Program

Reform One: ATO accountability

Objective

To break up the existing ATO into two separate independent authorities, namely:

- One authority to collect tax and undertake audits.
- A separate authority to manage taxpayers' objections and appeals.

Problem

Since at least with the introduction of the Tax Administration Act 1953, if a taxpayer is unhappy with an ATO audit decision, the taxpayer must 'object' to that assessment, which is often known as an amended assessment. This is done by lodging an objection in writing with the ATO.

To understand the scale of the process, in 2016-17 the ATO raised 253,000 additional debt notices through audits. 24,490 objections were lodged and 456 cases lodged with the Administrative Appeals Tribunal and the Federal Court. (ATO annual report 2016-17 https://www.ato.gov.au/About-ATO/Annual-report-2016-17/Part-2-Performance-report/2-1-Fostering-willing-participation/Resolving-disputes/)

However, even if a taxpayer objects to and disputes a debt, the debt is at law immediately payable. This is often enforced by the ATO through garnishees and a writ for judgment. We understand that the ATO issues some 15,000 garnishee against small business persons a year and bankrupts some 37 small business people a week. Conceptually, this power of the ATO may be necessary to stop people avoiding their tax debts.

But there is a massive problem in the way the ATO administers this process, a problem that results in abuse of taxpayers. This happens as follows:

- The alleged debt is calculated and raised by an ATO 'audit' officer.
- When a taxpayer lodges a dispute/objection, the ATO must allocate an 'objection' officer to the case. This can take, and often does take, in excess of two months.

This process whereby the ATO both raises the debt and handles the objection leads to internal conflict.

a) How can the objection be handled 'objectively' when the same organisation is assessing an objection to its own decision?
b) The ATO has a vested self-interest in being slow to allocate an objections officer. By delaying this process the ATO can move to collect the debt. The ATO would most likely say this does not occur. We disagree.
c) Once an objection officer is allocated, there is internal conflict with the audit officer who raised the assessment/debt. For example an audit officer would not want to be shown to be wrong as this can be career damaging. The structural process causes the tension. For the objections officer it is easier not to finalise the objection, because to do so would reduce the amount of the debt on the books and create tension with the auditor. The ATO would probably say this does not occur. We disagree.

d) The ATO objection officer must follow the interpretations of law adopted by the Tax Commissioner even if the interpretations are completely wrong. This means there is no independence in the application of the law.
e) If a taxpayer's objection is incorrectly disallowed by the ATO and the taxpayer appeals to the Administrative Appeals Tribunal or the Federal Court, the ATO itself then runs its defence and experience tells us that the ATO 'digs in'—even in the face of obvious error and wrongdoing by the ATO.
    - Take one such example, the *Shord v Commissioner of Taxation* case. The AAT ruled incorrectly against the small business taxpayer even when the ATO had admitted the taxpayer was correct. Yet the ATO did not correct the AAT error and persisted with action to the Full bench of the Federal Court where the Federal Court severely chastised the ATO.

Solution

Separate out from the ATO a new, independent agency whose purpose is to manage objections and appeals to ATO audits. It would be the respondent in appeals to the AAT or the courts. The new agency would be funded from the ATO's existing budgetary allocation and perhaps be called the *Commonwealth Director of Tax Disputation (CDTD)*

- This would create consistency with the modern divide between the police who bring the charges and the prosecutorial agencies who prosecute the offences.
- Such an agency could be built from the ground up using the best-known practices of elite Commonwealth agencies such as the Australian Consumer and Competition Commission (ACCC) and the Commonwealth Director of Public Prosecutions (CDPP). It would be built up with highly competent objections and appeals officers with tertiary qualifications in accounting and/or law. Australia should look to the UK for the way it trains it's appeals officers.
- A new Act would be required to create the agency along with amendments to the *Taxation Administration Act 1953 (Cth) ("TAA")* so as to place the responsibility for objections and appeals to the AAT and Federal Court in the hands of the new agency. There would be strong reasons to place the new agency under the control of the Attorney-General's department to ensure the right culture is achieved.
- Both the new agency (CDTD) and the changed revenue/audit agency (ATO) would need to be structured along the lines of the ACCC, for example, with separate 'boards' to whom the CEO was responsible. That is, the existing model of the ATO being headed by an all-powerful Commissioner would need to be abolished.

Reform Two: Access to justice for small business people:

Objective

To create a Small Business Tax Tribunal (SBTT) to provide small business people with a genuinely cheap, efficient, accessible and non-legalistic review process.

Problem

In their dealings with the ATO, big business and wealthy individuals can afford to pay for their defence through well-connected and specialist tax lawyers and accountants. Small business people cannot afford that sort of defence. Moreover, the amounts in

dispute for small business people are frequently less than the cost of a defence action. For example, to take a matter to the AAT or the courts a small business person is facing a legal and accounting bill of, say, $10,000 as a starting point and could quite easily reach $30,000 for just a basic defence effort.

The outcome is that access to the justice system is not practical. And justice that cannot be accessed is justice denied. This needs to be fixed.

Solution

Create a Small Business Tax Tribunal (SBTT) as a low-cost, non-adversarial, independent, tax dispute-resolution procedure for small business people. The proposal below is modelled on the first-tier Immigration Tribunal.

The Tribunal would be independent from the current ATO (and/or the sought-after restructure above) and made up of tax and legal specialists.

- A Small Business Tribunal determination would be required before a matter could go to the AAT or the courts.
- A small business applicant would pay a modest fee (say, $1,600) for a hearing.
- Lawyers or accountants could not represent either the Tax appeals agency or the small businessperson in any hearings.
- The Tribunal would review the ATO's allegations against the small businessperson with a view to a correct application of tax law.
- The small businessperson could present his or her case.
- The SBT Tribunal would make a decision binding on the tax department.
- If the Tribunal made a decision in favour of the small businessperson, the person would receive a rebate of (say, $800) on their lodgement fee.
- If the Tribunal made a decision against the small businessperson, the person would retain the right to judicial review to a court.

A specialist division could be established for example within the current Australian Small Business and Family Enterprise Ombudsman.

Reform Three: ATO transparency on debt amounts

Objective

ATO to separately record on their systems, account for and publicly report, not identifying individuals on:

- Undisputed tax debts.
- Disputed tax debts.
- Interest charged on disputed tax debts.
- Penalties charged on disputed tax debts.

This could be called the 'Disputed Debt Account and should appear on the taxpayers tax account.

Problem

The ATO currently operates in a statistical 'fog' in its management of debts. At the moment, when the ATO creates a debt that is subsequently disputed, there is no separate accounting for it. The debt is allocated to one of two accounts operated by the ATO, the Income Tax Account (for income tax debts) and the Running Balance

Account (for PAYG, provisional income tax and GST). It is 'sloppy' accounting which results in a lack of transparency and understanding:

- The actual tax debt is not separately identified.
- Penalties imposed are not separately identified.
- The interest accruing is not separately tracked.
- Any undisputed debt is lumped into the same account as disputed debts.

This has several problems.

- There are confusing messages being sent to the courts on what the ATO is actually seeking to collect.
- There is no ability to easily track the amount of a disputed debt and the interest accruing.
- There is no ability of a taxpayer who disputes a debt to say, 'well, I'll pay my normal debts but should not have to pay the disputed debt at the moment'.
- There is no reporting to Parliament and the public as to what debts outstanding to the ATO are disputed and what the break-up of those debts amounts to.

Solution

Legislation is needed to require the Commissioner to create a new 'Disputed Debt Account.' The moment an objection against an amended or default assessment is received, the debt must be moved across to the Disputed Debt Account. This should show the debt itself separated from penalties and separated from interest. This would be an accounting function readily handled by the sought-after *Commonwealth Director of Tax Disputation (CDTD)* as proposed above.

Such transparency would increase the Commonwealth government's capacity to understand revenue forecasts. It will also increase the ability of the Courts to understand what debts are disputed and undisputed.

Reform Four: ATO transparency on model litigant obligations

Objective

The ATO to list every case against every small business taxpayer, within privacy provisions in which the Commissioner has suffered an adverse judgment but despite which the case is continuing. Such lists to specify:

- The number of adverse judgments in the case.
- The number of days the matter has been outstanding since the first adverse judgment.
- Whether the case is being continued for strategic reasons and what those reasons are. If not, to state the reasons for continuing with the case.

Problem

The ATO is 'obligated' under the Commonwealth government's *Legal Services Directions 2017* to act as a 'model litigant'. (see Appendix A)

The obligations require, amongst others, obligations to:

- deal with claims promptly and not cause unnecessary delay;
- pay legitimate claims without litigation;
- act consistently;
- endeavour to avoid, prevent and limit the scope of legal proceedings;

- keep the costs of unavoidable litigation to a minimum;
- not take advantage of a claimant who lacks the resources to
- not rely on technical defences;
- not undertake and pursue appeals unless with reasonable prospects for success; and
- apologise where the agency is aware that it has acted wrongfully or improperly.

Our experience is that, as far as small business people are concerned, the ATO routinely breaches its model litigant obligations. Effectively the tactic the ATO uses is to drag out cases so that the ATO exhausts the resources of the small businessperson. But more, even where clear error and unfairness is identifiable, the ATO presses its resource and legal tactical advantage. As an example of the problem the ATO was severely criticised in the Federal Court as follows:

> the "…denial of procedural fairness to [small business person] Mr Shord … is patent."
>
> The ATO's "…Departures from model litigant behaviour can, in particular circumstances, constitute professional misconduct, a contempt of court or an attempt, contrary to s 43 of the *Crimes Act 1914* (Cth), to pervert the course of justice."
>
> (Justice Logan Full Federal Court judgment of 26 October 2017 (*Shord v Commissioner of Taxation [2016] FCA 761. File number WAD 332 of 2016*).)

<u>Solution</u>

The ultimate solution rests in the ethics and integrity of the ATO which, as discussed above, are arguably 'corrupted' by having all power resting with a single authority. The breaking up of the ATO into two authorities as proposed and sought for above will go a considerable distance to ensuring compliance with model litigant obligations. But further transparency can be created to encourage compliance.

A checking system should be instituted on the ATO's adherence to its model litigant obligations as they relate to small business. To this end, the ATO should be required to produce six-monthly public reports within privacy requirements which, at a minimum, list every case against every small business taxpayer in which the Commissioner has suffered an adverse judgment but despite which the case is continuing. Such reports should specify:

- The number of adverse judgments in the case.
- The number of days the matter has been outstanding since the first adverse judgment.
- Whether the case is being continued for strategic reasons and what those reasons are. If not, to state the reasons for continuing with the case

Reform Five: Reasonableness in ATO powers

Objective (a)

Disputed debts to be placed on hold until a debt is proven and finalised except where collection is authorised by a separate agency.

Problem

As things stand, the ATO has the power to collect disputed debts. This is because an amended assessment or default assessment becomes due and payable once issued, regardless of an objection. Sections such as s. 14ZZM *Taxation Administration Act 1953 (Cth) ("TAA")* make this clear.

The enormous power imbalance between the ATO and small business people puts small business people at a massive disadvantage.. Not only does the small businessperson have to be able to afford a defence, but the ATO is able to strip the person of the cash and assets that they need to conduct their defence. In many, if not most cases, this may well force the small businessperson to 'pay up'—whether the debt is provable. This creates enormous circumstances for miscarriages of justice on a scale that cannot be accurately assessed. But to give a rough indication of the size of the issue we understand that the ATO garnishees some 15,000 persons/businesses a year and bankrupts some 37 people a week. (previously mentioned)

There is a principle at stake. One miscarriage of justice is one too many. There must be protections for the innocent. All persons must have reasonable access to justice. Reform is required to break this cycle.

Solution

An effective reform at this point would be to amend legislation so that the ATO could not issue a garnishee notice in respect of any debt that had been disputed by an objection, unless there were serious reasons to do so, supported by a "serious non-compliance notice". This would issued by a separate agency, the *Serious Non-Compliance Tax Inspectorate* (See further explanation below.)

The power to garnishee and undertake other debt-collecting activities would be transferred from the ATO to the proposed and sought-after *Commonwealth Director of Tax Disputation (CDTD)* as discussed above.

Reform Five: Reasonableness in ATO powers

Objective (b)

Penalties capped at 25 per cent unless with independent approval

Problem

The ATO routinely amends assessments then imposes an administrative penalty of

- 50% for 'recklessness' or
- 75% for 'intentional disregard' (s. 284-90 Schedule 1 TAA) and may apply

- an uplift penalty of a further 20% (s. 284-220 Schedule 1 TAA)

taking the total penalty to 90%.

As an example, if the ATO issues an amended assessment alleging a primary tax debt owed of $100,000, the administrative penalty can be up to $90,000. Then, if that was for a tax period backdated 3 years, 9.88% interest can be applied on both amounts, on an accruing basis.

- $100,000 (disputed) tax amount can easily be
- $190,000 when administrative penalties are imposed, then when interest is added the debt becomes
- $252,063. ($190,000 x 1.0988^3)

There are broad discretions in the law for the ATO to remit both the administrative penalty and the interest: (see for example, s. 298-20 Schedule 1 TAA and s. 8AAG TAA).

That is, the small businessperson is commercially pressured by the ATO into paying the $100,000 whether the debt is real or not. In short, the ATO has the taxpayer 'over a barrel'.

The application of penalties is determined by the ATO auditors. The outcome is that potentially unjustified penalties increase the amount that appears to be owed (for example, what would otherwise be a $100,000 adjustment can become $190,000 if the most aggressive penalties are imposed).

Solution

An ultra-elite agency needs to be created by legislation which must 'sign off' on all administrative penalties the ATO wishes to impose that exceed 25 per cent . The ATO must apply to the agency to impose penalties above 25 per cent. The agency could be called the *Serious Non-Compliance Tax Inspectorate ("SNCTI")*

It could be staffed by some of the senior ATO officers who currently make these decisions. It should report to the Parliament annually. Its reports should disclose how much of the penalties are ultimately confirmed and collected.

The same mechanism should be required for interest, so that in all cases, the lower rate of SIC interest applies (bank bill plus 3%) unless a certificate is issued allowing for the imposition of GIC (which is bank bill plus 7%).

This reform will change the internal culture of the ATO from despot (with its draconian penalties) and shift the focus to what it should be— assessing the correct amount of tax.

Reform Five: Reasonableness in ATO powers

Objective (c)

ATO cannot act on an opinion of 'fraud and evasion' without independent approval and judicial oversight.

Problem

As things stand, s. 170 of the *ITAA36* means that once an assessment is obtained after the filing of a tax return, the ATO is limited to either two years (in the case of small businesses, generally) or four years to amend the assessment. This creates a very important statute of limitations for what is an administrative determination.

However, for cases where the Commissioner is 'of the opinion' that there has been fraud or evasion, the period is unlimited. An accusation or 'opinion' of fraud or evasion by the ATO is a highly serious matter. It effectively states that the taxpayer has engaged in criminal activity. It is a power that requires great attention to justice in its application.

But this power has been abused by the ATO. For example, in the case of *Douglass* (NSD1700/2016), Mr Douglass was accused of evasion because he applied 50 per cent of partnership income each to himself and his spouse. However, Douglass declared all partnership income in the tax returns. As soon as court proceedings commenced, the ATO withdrew the opinion of evasion. There are other cases of abuse of this power by the ATO in its dealings with ordinary small business people. The ATO can no longer be trusted with this power. Oversight is required.

Solution

A new agency needs to be given this responsibility—most likely the *Serious Non-Compliance Tax Inspectorate ("SNCTI")* as discussed above. Moreover, the use of the power must be subject to judicial oversight.

Section 170 (of the *ITAA36*) must be amended so that the fraud and evasion power in can only be used where the new agency head has issued an opinion as to fraud or evasion. In addition, the power to issue opinions of fraud and evasion must be made subject to judicial supervision. (This would require further amendment to s.170(7) The Federal Court or state Supreme Court must be required, on an ex-parte basis, to approve the issuing of a fraud or evasion opinion to ensure that the 'opinions' are not infected with jurisdictional error.

Reform Six: Strengthen the AAT and the Courts

Objective (a)

- The Administrative Appeals Tribunal needs state-based Vice-Presidents to manage tax appeals.

Problem

The AAT and the Federal Court are not necessarily the places where tax disputes should be conducted. Before 1986, the AAT's tax dispute work was handled by state-based Boards of Taxation which conducted administrative reviews and often sat with three members. They were highly respected both by the ATO and the public.

The AAT is a robust organisation but, with respect, it has failed for tax disputes. The failure of the AAT in *Shord* (previously mentioned) in Western Australia is apt. That failure comes after the failure of the AAT in Western Australia in *LVR* in 2010-2012. Both cases were followed with the Tribunal members resigning or retiring.

Solution

Bring back the best of the pre-1986 Board of Review while keeping within the AAT regime. The AAT Act needs to be amended to create a state-based Vice-President of Tax, appointed for each state, for 10 years, and to be appointed only with the consent of the respective State Attorney-General.

That state-based Vice-President of Tax would have

- overall AAT legislative authority for the constitution of members for AAT appeals as to tax in his or her own jurisdiction and
- the legislative authority to convene tribunals of 2 or more members.

The legislation would require that the state-based Vice-President of Tax holds a judicial commission from the respective state—for instance, in the District or County Court.

Once this reform is made, the buck will stop with the State-based Vice-President of Tax. The position holder's power will rival that of the Commissioner, and the State-based Vice-Presidents of Tax will become robust contributors to revenue law in Australia.

Reform Six: Strengthen the AAT and the Courts

Objective (b)

- State Supreme Courts to be acceptable as first 'port of judicial call' for tax disputes.

Problem

Presently, and technically, all tax appeals to Courts must be commenced in the Federal Court by the taxpayer as the applicant.

Before 1986, tax appeals were brought in the State Supreme Courts. The State Courts were well respected arbiters of tax matters. Some great judicial minds, particularly in the law of equity, wrote seminal judgements in tax.

The current situation has three key problems.

- First, the Federal Court is a superior court and some tax disputes are too small for it.
- Second, the Federal Court rules, when compared with State Supreme Court rules and State District Court rules, are 'anti-applicant'. That is that subpoenas cannot be issued without leave and discovery cannot be obtained without leave. Further there is presently an obsession with all evidence led by the Applicant being produced beforehand by way of written affidavit.
- Third, the lack of competition for this business makes the Federal Court uncompetitive.

In addition, the Federal Court being primarily a court for the judicial review of migration matters simply does not have judges who are as experienced in fact finding,

which is primarily what tax disputes are about. For their brethren in the State Supreme Courts and District Courts, fact-finding is their judicial 'bread and butter'.

Solution

The principle that must apply is that the Courts must be opened to competition in tax matters. We must also go back to pre-1986 where tax appeals were filed in the State Supreme Courts. But instead, with a modern pro-competition approach, where the legislation is changed to make it possible for a taxpayer to choose between the Federal Court, the State Supreme Court or the State District Court.

Ultimately, all appeals lead to the High Court, and the pro-competition approach will reduce the cost of tax litigation for taxpayers and make the judicial determination of the correct amount of tax a staple of all intermediate and superior Courts.

The High Court, by hearing appeals from both State Courts and Federal Courts will be able to develop the tax law, choosing between the best developments from both State and Federal Courts.

We simply, as a nation, must move from the situation where, when a taxpayer is unhappy with a tax decision they believe the only recourse is to complain to the ATO. The development of the law must occur in the Courts, and decisions must be tested in the Courts. Only then will sunlight shine on audit decisions that should have never been made, and the ATO will become a modern, law-abiding organisation which is capable of withstanding judicial review.

Appendix A

https://www.legislation.gov.au/Details/F2017L00369/Html/Text#_Toc477862927

Legal Services Directions 2017

Dated 29 March 2017

Appendix B—The Commonwealth's obligation to act as a model litigant

The obligation

1 Consistently with the Attorney-General's responsibility for the maintenance of proper standards in litigation, the Commonwealth and Commonwealth agencies are to behave as model litigants in the conduct of litigation.

Nature of the obligation

2 The obligation to act as a model litigant requires that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or a Commonwealth agency by:

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

(aa) making an early assessment of:

(i) the Commonwealth's prospects of success in legal proceedings that may be brought against the Commonwealth; and

(ii) the Commonwealth's potential liability in claims against the Commonwealth

(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, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate

(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 Commonwealth or the agency knows to be true

(ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum

(iii) monitoring the progress of the litigation and using methods that it considers appropriate to resolve the litigation, including settlement offers, payments into court or alternative dispute resolution, and

(iv) ensuring that arrangements are made so that a person participating in any settlement negotiations on behalf of the Commonwealth or a Commonwealth agency can enter into a settlement of the claim or legal proceedings in the course of the negotiations

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

(g) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement

(h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and

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