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Australian Taxation Office

The Executive Director
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Issue date: 20 January 2011

Dear Executive Director,

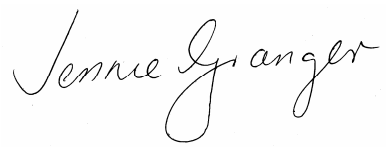
Re: Australian Law Reform Commission - Discovery in Federal Courts
Submission - The Commissioner of Taxation of the Commonwealth of Australia

I refer to the Australian Law Reform Commission's Consultation Paper, 'Discovery in Federal Courts', and the Commission's invitation for submissions to the inquiry.

Please find enclosed a submission on behalf of the Commissioner of Taxation of the Commonwealth of Australia.

Please do not hesitate to contact me if you have any enquiries.

Yours faithfully,



Second Commissioner Granger

Submission – Discovery in Federal Courts

A. SCOPE OF SUBMISSION

1. The Commissioner of Taxation (***"the Commissioner"***) is engaged in litigation across a range of tax products, and in a number of jurisdictions. The scope of this submission is primarily directed at the Commissioner's involvement in litigation before the Federal Court that arises pursuant to Part IVC of the *Taxation Administration Act* 1953 (***"Part IVC"***), although some comments are made in respect of discovery beyond the scope of such litigation.

2. Litigation conducted pursuant to Part IVC is brought subsequent to an internal objection process, available to taxpayers in respect of specified decisions made by the Commissioner.[1] A common example is an appeal lodged in respect of a decision made by the Commissioner to disallow an objection lodged by a taxpayer against an amount included in a taxation assessment.

3. Litigation arising under Part IVC before the Federal Court of Australia is governed by Order 52B of the *Federal Court Rules*. These are supplemented by Practice Note TAX 1, previously known as the Tax List Directions, dated 25 September 2009 (***"PN TAX 1"***). The comments made in this submission draw upon the Commissioner's litigation experience in this context, are also relevant to non-taxation litigation.

4. Apart from taxation litigation conducted pursuant to Part IVC, the Commissioner is also involved in the following types of litigation:

   a. declaratory proceedings;

   b. administrative law (general law) and *Administrative Decisions (Judicial Review) Act* 1977 proceedings;

   c. section 39B(1A) of the *Judiciary Act* 1903 and s 75(v) of the *Constitution of the Commonwealth of Australia* proceedings; and,

   d. debt recovery related litigation.

5. We have specifically declined to make submissions on or comment in respect of the matters identified in 'Chapter 4 - Ensuring Professional Integrity: Ethical Obligations and Discovery'. The Commissioner, including his officers and legal services providers, is subject to and conducts litigation pursuant to the Model Litigant Obligations, contained in Appendix B of the *Legal Services Directions 2005* made pursuant to section 55ZF the *Judiciary Act* 1903, which, in some respects, requires the Commissioner to conduct litigation differently to the broader legal profession.

6. The submission will focus on discovery processes before the Federal Court at first instance in tax appeal proceedings where the Commissioner is the respondent.

B. BACKGROUND TO ORDER 52B / PART IVC TAXATION LITIGATION

[1] A reference to the Commissioner includes, as appropriate, the Commissioner, his delegates and persons authorised by those delegates.

7. As a preliminary matter, it is useful to note the path to Part IVC litigation, which can be summarised as follows:

   i. there must be a decision such as an assessment, determination, notice or decision, or a failure to make a private ruling and, concurrently, "a provision of an Act or of regulations …[that] provides that a person who is dissatisfied with [such a decision] may object against it";[2]

   ii. the taxpayer lodges a taxation objection setting out, inter alia, "fully and in detail, the grounds that the person relies on";[3]

   iii. the Commissioner must make an objection decision on the taxation objection;[4]

   iv. where the person is dissatisfied with the Commissioner's objection decision the person may appeal to the Federal Court.[5]

C. FEDERAL COURT OF AUSTRALIA – PN TAX 1

8. PN TAX 1 provides a framework for the efficient case management and conduct of taxation appeals. Importantly, the case management protocol envisaged and applied by PN TAX 1 is one of early identification and narrowing of the issues in dispute (both legal and factual), with the parties and the court seeking to achieve that end in the early stages of the proceeding.

9. In our experience, litigation managed in accordance with PN TAX 1 achieves the aim of the practice note. Engagement with active case management processes are conducive to the early identification and narrowing of issues and determination of relevant discovery requirements.

10. Whilst PN TAX 1 was drafted to suit the needs of parties dealing with tax litigation,[6] we consider it would be of benefit to the court and parties to litigation

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[2] As required by s 14ZL of the *Taxation Administration Act* 1953.

[3] *Taxation Administration Act* 1953, section 14ZN and section 14ZU.

[4] *Ibid*, section 14ZY.

[5] *Ibid*, section 14ZZ.

[6] Relevantly, the circumstances of tax litigation include:

- Pre-litigation processes undertaken during audit and objection stages, which involve interaction between the Commissioner and the taxpayer and are often conducive to fact and evidence gathering, as well as the narrowing of issues, thereby circumscribing the dispute prior to reaching litigation. In many instances, documents will have been provided to the Commissioner by the taxpayer or a third party;
- A limitation of grounds pursuant to section 14ZZO of the *Taxation Administration Act* 1953, which provides that "[i]n proceedings on an appeal under section 14ZZ to the Federal Court against an objection decision: (a) the appellant is, unless the Court orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates …";
- A requirement pursuant to Part IVC and Order 52B that the litigation must relate to an 'objection decision' of the Commissioner
- The requirement pursuant to Order 52B rule 5 for the filing of an appeal statement (or an appeal affidavit in some circumstances), rather than pleadings. Arguably, these statements provide an increased measure of clarity as to the case each party must meet compared to pleadings. In accordance with clause 4 of PN TAX 1, appeal statements must state in summary form:

  (a) the basic elements of the party's case or defence;

to adopt the protocols detailed in that practice note more generally across all practice areas.

11. The initial obligations on the parties arising under PN TAX 1 include:

    a. the filing of an appeal statement by the respondent Commissioner and the applicant within 28 days and 40 days respectively of the application commencing with the proceeding being served on the Commissioner. The appeal statement sets out the facts, issues in dispute and contentions on the issues as perceived by each party;

    b. the filing of a pro-forma questionnaire (by both parties) within 40 days of the application being served on the Commissioner. The pro-forma questionnaire sets out the background, as well as details of and other proceedings related to the dispute; and,

    c. the attendance by both parties at a scheduling conference.

12. Of particular significance, both to the case management ethos generally, but also to discovery, is the scheduling conference. Justice Gordon, writing extra-judicially, has described the process thus:

> "The scheduling conference approximately six weeks after an application is filed. I cannot overstate its importance. The conference narrows the disputed facts and issues. Each party brings to the scheduling conference an initial witness list with the name of each witness the party intends to call at trial. ***Discovery, if permitted at all, is limited by the disputed issues identified at the conference.*** With the assistance of the lawyers, the Tax List judge establishes a pre-trial schedule for all interlocutory steps needed to bring the proceeding to trial. A date for the trial itself will be usually set. If you turn up unprepared to the scheduling conference, you will fundamentally put at risk your client's case. I don't mean to scare you."[7] [emphasis added]

(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.

[7] Gordon M, 'Avoid error and irrelevance – embrace change', (2009) 44(4) *Taxation in Australia* 207 – 210 at 208.

13. As is evident from that passage, and PN TAX 1, there is an emphasis on an early narrowing of the dispute (both legal and factual) and establishing the steps to take place leading up to the hearing of the matter; including discovery. In respect of discovery, PN TAX 1 provides, inter alia, that except where ordered otherwise it is to be limited:

> 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.

General observations

14. In addition, we make the following general observations.

Case management and discovery

15. The Commissioner's observations in respect of discovery in tax appeal proceedings are linked with the case management protocols applied by PN TAX 1. In this regard, it is important to bear in mind that discovery is not isolated from case management generally and the approach undertaken pursuant to PN TAX 1, which we recommend to the ALRC, provides a broader context of quick and efficient resolution of the dispute.

16. It is both important to the cultural change necessary for a change to discovery, but also to litigation generally, that discovery reform be an element of overall efficient case management, rather than a discrete aspect of litigation.

The emphasis is on both practitioners and the court

17. The subsequent discussion contains references or assumptions as to preparation being undertaken by practitioners prior to the scheduling conference. In our view, any proposed reforms should require similar preliminary and early preparation so that both parties are required to focus on the essential elements of the conduct of the matter at the first return date. As is required under PN Tax 1, at the first return date the parties should be able to state with specificity the legal issues, the evidence and the witnesses to be called and the time that is required to prepare the case for hearing. The parties should also be in a position to agree to a trial date, which is to be at the earliest practicable date, in any case no later than 12 months from the first return date.

18. To achieve effective case management and control of discovery it is necessary that the court take an active role in that process, as is the case with the scheduling conference. The following may assist in achieving that end:

    a. training of the judiciary and judicial officers in respect of new court processes to encourage acceptance, endorsement and application of those processes to matters nationally;

    b. a commitment by parties and the court to active case management principles, guided by a Practice Note;

    c. routine referral of matters to case management conferences to monitor the conduct of the case;

    d. where parties seek discovery, referral to a case management conference (pre-discovery conference) before a judge or other judicial officer (associate judge or registrar with training in discovery issues), to review the request for discovery, explore options for discovery, and ultimately decide on the extent of discovery and manage the discovery process; and,

    e. encouraging consistency in practice by appropriate means.

D. COMMENTS ON THE PROPOSALS AND QUESTIONS OF THE ALRC

19. The Commissioner makes the following comments in respect of the proposals made and questions posed by the Consultation Paper.

Question 2-2

> Does the requirement for leave of the court effectively regulate the use of discovery in civil proceedings in the Federal Court?

20. In the Commissioner's experience, the requirement for leave of the court does effectively regulate the use of discovery. The Court actively engages with the parties in determining what, if any, discovery orders are appropriate and carefully examines the categories of documents to be discovered.

21. The Court will often require submissions on the extent of discovery and question the parties on why particular documents or information will be useful and how they will be used in the proceedings; how discovery is to be undertaken; and whether there are any methods for obtaining documents or information that are more time and cost effective.

22. The requirement to gain the leave of the Court before undertaking any discovery activities ensures that the parties have considered how best to obtain documents and how the documents or information will be used in the proceedings. The requirement to specify categories of documents does limit the extent of discovery and therefore manages the cost and efficiency of the process.

23. As the Court has the benefit of the processes outlined in paragraph 11 and understands the issues in dispute, it is better able to determine what documents or categories of documents will assist in coming to a decision on

the issues. Having this background is essential to the Court making appropriate discovery orders.

24. Once leave is granted, the provision of the affidavit of discovery should be monitored carefully to ensure that the party giving discovery has responded in categories in accordance with the order. The court should make certain that the list of documents is cross referenced to categories and that it is clear that all material is relevant to the categories of discovery.

Question 2-6

> Should O 15 r 2 of the *Federal Court Rules* (Cth) be amended to adopt the categories of documents discoverable in Fast Track proceedings, so that discovery in the Federal Court is limited to the following documents of which the party giving discovery is aware at the time orders for discovery are made or discovers after a good faith proportionate search:
>
> (a) documents on which the party intends to rely; and
>
> (b) documents that have significant probative value adverse to a party's case?

25. The categories of documents should remain as currently set out in O 15 r 2 of the *Federal Court Rules* (Cth). However, in conjunction with the *Federal Court Rules*, we consider that the current practice note on discovery (CM 5) could be expanded to address discovery in all litigation by adopting the protocols set out in PN Tax 1.[8]

26. With the intervention of the Court as identified in the comments in response to Question 2-2, the current categories of documents are suitable and allow the parties and the Court sufficient flexibility to ensure adequate discovery is provided in a particular instance.

27. We make this submission by reference to PN Tax 1, which provides four categories of documents, as opposed to the two provided by the *Fast Track* process (CM 8).

28. Accordingly, we are of the view that limiting the ambit of discovery is not best achieved by providing, as a starting point, a more limited set of categories, but by appropriate orders informed by the proper identification of the legal and factual issues in dispute; a process that involves both the parties and the Court determining what measure of limitation is appropriate. We are also of the view that the provision of discovery should also be the subject of monitoring for compliance by the court more actively than is the current practice.

Question 3-2

> In general, does the amount of money spent on the discovery process in proceedings before the Federal Court generate:
>
> (a) too much information;

[8] Reproduced in paragraph 13 above.

(b) too little information; or

(c) about the right amount of information to facilitate the just and efficient disposal of the litigation?

Where possible, please provide examples or illustrations of the costs of discovery relative to the information needs of the case.

29. The hands-on role of the Court in the initial stages of taxation litigation has generally resulted in requests for discovery being directed by reference to limited categories relevant to the issues in dispute. In some limited cases discovery has been refused or greatly restricted.

30. The Court considers the parties' requests in light of the documents filed in accordance with PN TAX 1 and the information obtained during the scheduling conference to arrive at a considered position as to which documents or categories of documents will be relevant to the proceedings. It is considered that this approach has limited the costs to the parties, although it is difficult to quantify the amount.

31. For instance, the Court has, rather than requiring the production of documents, ordered a party to provide a summary of evidence pursuant to section 50 of the *Evidence Act* 1995 (Cth). This reduces discovery costs by limiting the copying involved and the costs of the party seeking discovery, as that party is not required to analyse the documents.

32. There have been instances whereby the Court has made orders for discovery requiring the production of all documents in the possession of the Commissioner received from third parties. Such orders can be satisfactory, however, it should be made having regard to the history of the case and having taken into account the earlier disclosure of information and document exchange by the parties. For example in a recent tax appeal case an order was made requiring the Commissioner to discover documents obtained from third parties. In that matter, the Court made an order for discovery of third party information despite having been informed of a history of exchange of information which included 3 mediations processes, 3 tranches of Freedom of Information disclosure and ongoing dialogue between the parties involving a complex international transaction entered into 10 years earlier. The Court order for discovery caused much dislocation and expense to comply with the order for discovery and resulted in production of documents which had already been disclosed under prior obligations, such as provision of documents under the Freedom of Information Act. When making orders and monitoring the return of documents under those orders, the court, operating under a case management system and having an understanding of the history of the case and the issues involved, can ensure that there is little duplication in the documents produced and, accordingly, a reduction in the time and money expended in compliance with the orders.

Question 3-8

Should special masters be introduced to manage the discovery process in proceedings before the Federal Court? If so, what model should be adopted?

33. In our view, it is necessary to actively manage the discovery process, including the extent of any order and the provision of discovery. Regular case

management of all matters is desirable and the case management process, including discovery, may require additional resourcing in the Courts.

34. The introduction of special masters/registrars into the process, particularly to follow up any matters unresolved following a scheduling conference, may assist with the additional workload of a case management process.

35. In our experience, discovery in taxation disputes is generally handled well by the tax list coordinating judge due to the parties' adherence to the requirements in PN TAX 1. The requirements of the pro-forma questionnaire and the scheduling conference also suppose that the parties have discussed the issues and possible discovery, therefore the parties and the Court are well informed when the decision is made on discovery. Accordingly, care would need to be taken to coordinate the activities of any special master with the docket judge's specialist knowledge of a matter.

Question 3-9

> Should there be a presumption that a party requesting discovery of documents in proceedings before the Federal Court will pay the estimated cost in advance, unless the court orders otherwise?

36. No, it is not considered that this is necessary, as it may significantly disadvantage low wealth litigants. The objective sought could, perhaps, be met in appropriate cases by leaving the matter to the Court's discretion, perhaps with provision for the Court to order pre-payment of the estimated cost either to the discovering party or to the Court as security for costs.

37. If the discovery process is closely managed issues of abuse of discovery process should not arise, or at least arise infrequently.

Proposal 3-1

> Following an application for a discovery order, an initial case management conference (called a 'pre-discovery conference') should be set down, at a time and place specified by the court, to define the core issues in dispute in relation to which documents might be discovered. At the pre-discovery conference, the parties should be required to:
>
> (a) outline the facts and issues that appear to be in dispute;
>
> (b) identify which of these issues are the most critical to the proceedings; and
>
> (c) identify the particular documents, or outline the specific categories of documents, which a party seeks to discover and that are reasonably believed to exist in the possession, custody or power of another party.

38. We agree with this Proposal, and make the following observations in support. We also make some additional observations below at paragraphs 53 - 56.

39. Although there are differences, the process anticipated by this proposal resonates with the current process under PN TAX 1, which has largely been successful in taxation litigation.

40. As previously noted, the conduct of taxation matters directed by PN TAX 1, which involves the filing of appeal statements and pro-forma questionnaires and attendance at a scheduling conference, requires the parties to have understood and, in most instances, discussed the issues and facts in dispute. At the scheduling conference, the parties are expected to engage in discussion with the Court on the three matters outlined in proposal 3-1. In our experience, having had the benefit of the appeal statements and pro-forma questionnaires and after hearing from the parties, the Court is active in setting down what documents or categories of documents, if any, should be discovered.

41. Importantly, the width of a discovery order should be informed by the pro-forma questionnaires, which provide the history of the dispute, as well as the appeal statements. This ensures the Court is both properly informed of, and can take into account, the extent of the interaction between the parties prior to litigation, which necessarily includes what, if any, documentation has already been exchanged.

Proposal 3-2

> Prior to the pre-discovery conference proposed in Proposal 3–1, the party seeking discovery should be required to file and serve a written statement containing a narrative of the factual issues that appear to be in dispute.
>
> The party should also be required to include in this statement any legal issues that appear to be in dispute. The party should be required to state these issues in order of importance in the proceedings, according to the party's understanding of the case. With respect to any of the issues included in this statement and concerning which the party seeks discovery of documents, the party should be required to describe each particular document or specific category of document that is reasonably believed to exist in the possession, custody or power of another party.

42. We agree with this Proposal, and make the following observations in support. We also make some additional observations below at paragraphs 53 - 56.

43. This proposal describes a document similar to the appeal statement required under PN TAX 1. In taxation litigation, the appeal statement can be a very useful document to determine the position of each party and informs the Court where the dispute remains.

44. Further to the above, clause 6 of PN TAX 1, entitled 'Discovery', provides, by clause 6.5 the following:

> 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.

45. This process for discovery disputes complements the existing steps in respect of PN TAX 1, thereby consolidating the existing expectation that the parties will discuss and attempt to narrow the scope for dispute early in the proceedings. This "meet and confer" requirement is also present in the *Fast Track* practice note (CM 8) in respect of interlocutory disputes (including disputes about discovery).

46. The preceding observations indicate that the objectives of Proposal 3-1 and Proposal 3-2 have been largely achieved via the implementation of PN TAX 1.

47. Both the preparation of the parties for the scheduling conference as well as the conduct of the scheduling conference itself are inexorably important in encouraging a change in attitude and culture to discovery and case management generally.

Proposal 3-3

> Prior to the pre-discovery conference proposed in Proposal 3–1, the parties should be required to file and serve an initial witness list with the names of each witness the party intends to call at trial and a brief summary of the expected testimony of each witness. Unless it is otherwise obvious, each party's witness list should also state the relevance of the evidence of each witness.

48. We agree with this Proposal, and make the following observations in support. We also make some additional observations below at paragraphs 53 - 56.

49. The process envisaged by this Proposal is already effectively captured by the current case management protocols provided by PN TAX 1, specifically by clause 5.4(b) entitled 'Initial Directions Hearing / Scheduling Conference', and as referenced in paragraph 3.126 of the Consultation Paper.

50. However, in practice it has often been difficult to identify with any great specificity the person who will be called to give evidence by the time of the scheduling conference. The Court has often been prepared to accept the parties' initial views as to the general nature of the witnesses to be called (i.e. whether the taxpayer or, if a company, which office holders will be called and whether expert witnesses will be required). This has allowed the Court to determine whether the parties require time to obtain affidavits, including experts' reports.

51. It is suggested that should this proposal be adopted, the Court should, in practice, accept that parties may require additional time to determine the witnesses to be called.

General comment on Proposals 3-1, 3-2 and 3-3

52. As above, we agree with Proposals 3-1, 3-2 and 3-3. We also make the following comments in respect of those Proposals:

53. First, it would be of utility to the parties to taxation litigation if those Proposals were captured within the existing PN Tax 1 framework, or within a modified version of that framework. This would avoid any duplication of steps and will ensure that the strong case management focus that is prevalent in scheduling conferences is not diminished.

54. Secondly, discovery should not be viewed as an isolated or discrete element of litigation. It must not only be considered to form part of, but must also be addressed as, an element in the overall case management processes governing litigation. The implementation of the Proposals should, where possible, not be divorced from the overall case management process; this has made the application of PN Tax 1 largely successful, including in respect of discovery. It is our view that the Proposals should be incorporated within a broader case management regime, specifically one which seeks to identify, at an early stage, the factual and legal issues considered by the parties to be in dispute, and their significance.

55. A subsidiary point follows; namely, Proposal 3-2 requires only the party seeking discovery to prepare a statement containing a narrative of the factual issues in dispute (and the legal issues). In our view, the opposing party should be given

an opportunity to respond to the statement to the extent that the party disagrees. This will ensure that the judge is informed of the facts and issues in dispute between the parties.

Cost consequences

56. In our submission, costs consequences should be built into the *Federal Court of Australia Act* 1976 (Cth) or the practices of the Court to ensure that parties participate in the scheduling conference (first directions hearing or pre-discovery conference) to full effect. That is, that a party will face cost consequences should the other party and/or the Court discover that relevant documents, categories or documents of information were not disclosed to the Court at or before the scheduling conference. This will ensure that each party has all relevant information at an early stage to enable that party to properly form an opinion on the prospects of success and consider the options available to the party.

57. There should also be a requirement for the legal representative to certify at the scheduling conference that the material presented at that conference is complete. Specific provision should be made for cost consequences against the legal representative to follow in the event of deliberate omission.

Proposal 3-6

> The Federal Court should develop and maintain a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings, including the technologies used in the discovery of electronically-stored information.

58. Yes, the Court should include in its ongoing training and development programs, a course that specifically deals with the management of discovery by the judiciary, and any judicial officers such as special masters. Training should extend to case management principles generally.

59. Further to the response provided to question 3-8, specific training will allow judicial officers to understand what is technologically possible and relatively straightforward in respect of discovery. Judicial officers may also develop further expertise in distilling what types of information or categories of documents will be most useful in specific types of matters.

60. Training in both areas will assist in making practical and effective discovery orders.

Chapter 5

61. The comments on Chapter 5 – Alternatives to Discovery are limited to a response on the questions regarding the implementation of pre-action protocols.

62. In the context of entering into settlement discussions or other means of Alternative Dispute Resolution (***"ADR"***), we refer to Law Administration Practice Statement PS LA 2007/23, which provides:

> 1. [t]he ATO recognises and supports the use of Alternative Dispute Resolution (ADR) in appropriate cases as a cost effective, informal, consensual and speedy means of resolving disputes.
>
> …
>
> 3. Relatively few ATO disputes are currently resolved through a judicial determination. Most disputes are finalised at some stage prior to a hearing. The ATO aims to resolve disputes as early as practicable in the dispute process.
>
> …
>
> 5. Commonwealth agencies and their legal services providers have an obligation under Appendix B to the Attorney-General's *Legal Services Directions 2005* to act as model litigants in the conduct of litigation and in alternate dispute resolution processes. The model litigant obligation requires agencies to endeavour where possible to avoid, prevent and limit the scope of legal proceedings including by giving consideration in all cases to ADR before initiating legal proceedings and by participating in ADR where appropriate. The requirement to consider alternate methods of dispute resolution is a continuing obligation from the time litigation is contemplated and throughout the course of litigation. …
>
> [footnotes omitted]

63. Prior to the filing of appeal statements or the scheduling conference, the parties will often have discussed ADR and may have been successful in narrowing the issues in dispute. In light of this, we consider it is appropriate for the Court to ask the parties at the scheduling conference (or other first directions hearing) whether they have discussed or attempted ADR and what factors do or do not lend themselves to ADR processes.

64. Furthermore, in our view, the Consultation Paper correctly observes at paragraph 3.141 (in discussing Proposals 3-1, 3-2 and 3-3) that:

> "A general obligation to produce 'key' documents in the early stages of proceedings would be too vague and ambiguous to expect strict compliance and is likely to breed satellite litigation."

65. In a similar sense, we perceive that there may be some difficulties with respect to the production of such documents during the pre-action protocol phases.

66. The experiences under PN Tax 1 suggest that identification of the factual and legal issues in dispute, which when coupled with the Court's expectations at the scheduling conference, efficiently assists in limiting disputes. Drawing on those experiences and applying them to the context of pre-action protocols might suggest that a document more akin to an appeal statement would be an appropriate document to exchange, provided that should the matter proceed to litigation, the Court actively seeks to ensure that such documents were properly prepared, and that the parties did make attempts to narrow the issues, much in the same way as the scheduling conference process expects.