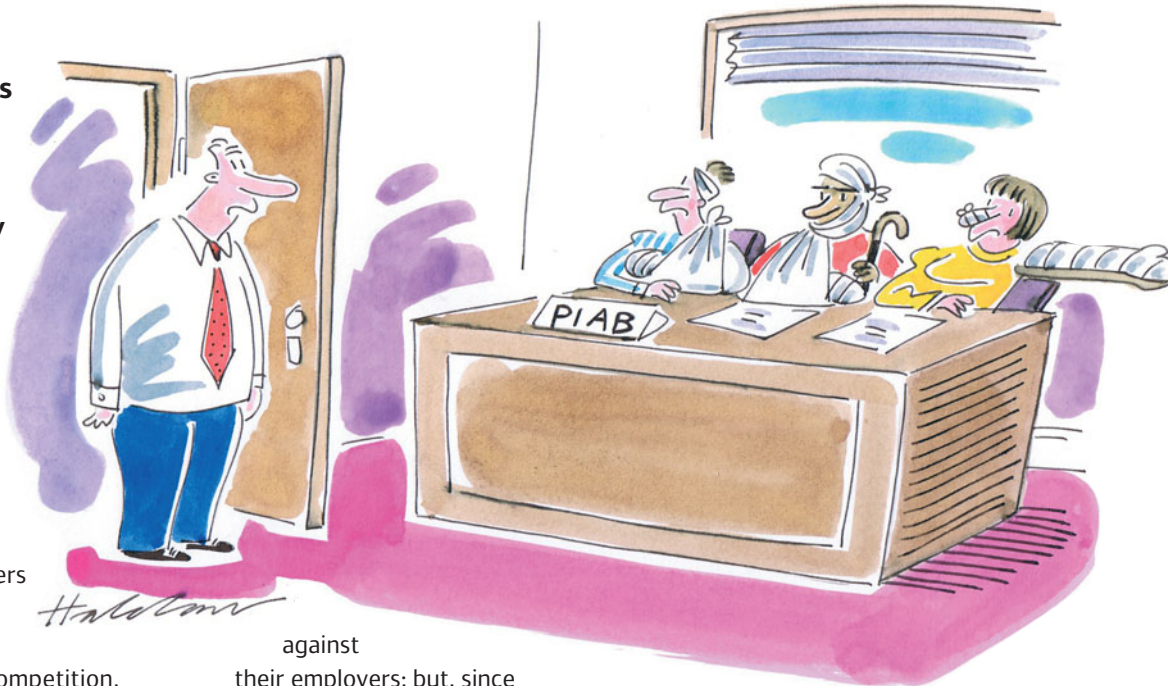


# The Key

## Assessing personal injuries in the Republic of Ireland.

In recent years, personal injury claims in the Republic of Ireland have been dealt with according to a regime set up by the Personal Injuries Assessment Board Act 2003.

The Act established the Personal Injuries Assessment Board (PIAB), an independent statutory body representing consumers, unions, employers and others. PIAB, whose executive members are appointed through public competition, assesses quantum – not liability. At first, PIAB acted only where employees were claiming



against their employers; but, since September 2005, it has been empowered to deal with all non-medical personal injury cases.

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## Civil Liability and Courts Act

Close to the time when the PIAB was set up, the Civil Liability and Courts Act 2004 (CLCA) came into force. Among other things, the CLCA introduced a two-year limitation period for personal injury actions (ie “from the date of accrual of the cause of action or the date of knowledge of the cause of action which ever occurs later”). The Act also brought in a Book of Quantum – to be published by PIAB – and actuarial tables, which can be amended from time to time by the Minister for Justice, Equality and Law Reform. Under the CLCA, it is an offence to give false instructions to a solicitor or expert in the context of a personal injury case.

## Current procedure

In personal injury cases, the current procedure is:

- The plaintiff submits an application, with a medical report, to PIAB. (Although the system was intended to avoid the need for plaintiffs to use solicitors, it is believed that nine out of ten plaintiffs still do so because they have to engage medical experts and identify potentially liable defendants.)
- PIAB then asks the defendant whether liability is to be disputed.
- If the defendant declares an intention to defend liability, PIAB issues a formal authorisation number; this allows the plaintiff to issue court proceedings. (Without PIAB’s authorisation, there can be no contest through the courts.)
- If the defendant accepts liability, PIAB considers the merits of the case so as to assess quantum. This is done on the basis of documents provided by the parties and involves medical and other experts. PIAB

goes on to announce its assessment, which will be based on the Book of Quantum and actuarial tables mentioned above.

- Insurers have 90 days to confirm whether they will accept the assessment. The penalty for missing the deadline is €900 (payable to the PIAB) and so insurers tend to make efforts to settle in time.
- If the parties accept the assessment of quantum, the case ends and the plaintiff will pay medical experts’ and legal costs out of the award.
- If one or other party decides not to accept the assessment within the time limit, PIAB gives a letter of authorisation so that the plaintiff can issue court proceedings. It is understood that almost 40% of assessments have been rejected by claimants. This tactic currently has the effect of exerting pressure on defendants and their insurers, who often prefer to settle for a figure above the PIAB’s assessment rather than prolong the case and increase exposure to costs. At present, plaintiffs who go to court but then fail to win an award exceeding the PIAB assessment are not at risk for the extra legal costs incurred. However, insurers normally make an offer at about the same level as the PIAB assessment and the plaintiff is at risk of paying costs if the court’s award does not exceed that sum. PIAB has championed legislation – currently in draft – which may tidy up this area: it is proposed that the court will be told of the PIAB assessment and, if the plaintiff fails to beat it, they will be at risk for costs.

## Comparisons with old regime

The new system has been in existence since

1 June 2004 and comparisons with the previous system have emerged.

The process is faster: the courts used to take up to three years to deal with claims, whereas PIAB makes its assessment within nine months. But it is not clear whether the headline statistics compare like with like – for example, should time taken to process PIAB assessments be contrasted with ‘quantum-only’ court cases, rather than with all personal injury cases previously going through the courts?

The cost of pursuing claims in 2003 is estimated at €450m, with approximately €1bn recovered in damages. PIAB is credited with 88% savings on Circuit Court costs and 97% on High Court costs. This translates into average savings per case of €6,373 in the circuit courts and €27,703 in the High Court.

And the number of claims being pursued through the courts has fallen significantly: in 2004, 15,000 High Court writs and 20,000 circuit court writs were issued, whereas, in 2005, the equivalent figures were 750 and 3,000 respectively.

Certain costs are now hidden. While awards have (arguably) not declined since the introduction of PIAB, the successful plaintiff pays legal and medical costs out of the award. It may be that the courts’ awards will be increased slightly to reflect medical expenses.

Insurance premiums have reduced as a result of the introduction of the PIAB scheme; readers should not be surprised if there is an impetus to bring in something similar in their own jurisdictions.

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# Small can be dangerous

Manufacturers and insurers need to be alert to the legal risks when developing nanotechnologies.

**The first episode of the American hit sitcom *Mork and Mindy* was broadcast on 14 September 1978. Soon after, “Nanoo Nanoo” (Orkan for “Goodbye”) became a household alien catchphrase. Twenty-nine years on, it seems that a new catchphrase is emerging: ‘Nano Nano’ – humanoid for a whole new range of exciting technologies. But with these new technologies comes risk as well as opportunity.**

## What is nanotechnology?

Nanotechnology is a field of science generally associated with the manipulation of matter on an atom-by-atom or molecule-by-molecule basis to construct a certain atomic or molecular configuration so as to create computer chips and other devices that are thousands of times smaller than current technologies permit. These miniaturised configurations are able to undertake highly complex work by performing operations in parallel.

The result is the widespread development and production of nanotechnology-related products and applications in many sectors, such as aerospace, car manufacturing, chemicals, biotechnology, medicine and food. Helmut Kaiser Consultancy Group estimates that the global nano-food market was worth

US\$5.3bn in 2005 and will rise to US\$20.4bn by 2010. It further predicts that nanotechnology will be used in 40% of the food industries by 2015. An iconic example of nano-based ‘future food’ was Kraft’s clear, tasteless nano-drink that contained hundreds of flavours in invisible nanocapsules. The idea was that a microwave transmitter could be used to trigger release of the flavour, colour, texture and concentration of the individual’s choice. This ‘smart’ drink received international attention and remains the most widely cited example of potential nano-food.

## Major advantages

As the world population continues to explode, it is hoped that nanotechnology will help solve the dilemma of limited planetary resources through more efficient generation, storage and distribution of energy. It is also envisaged that nanotechnology will enhance the quality of life for human beings through

medical diagnostics, drug delivery and customised therapy. It could also benefit the



environment through, for example, the development of stronger, lighter-weight materials in transportation that reduce fuel use. Furthermore, it is hoped that nanotechnology applications in electronics will increase access to technology through reduced cost and higher performance of memory, networks, processors and components.

## Inherent risks

Reducing bulk material to the size of nanoparticles may cause it to behave differently and to display completely new and

unexpected properties. Some studies indicate that certain nanoparticles may cause adverse effects due to their small size and specifically manufactured properties. Initially, it is easy to identify the risk posed to those involved in the electronics industry and particularly to employees dealing with the production instruments using nanotechnology. But there is also fear of the unknown consequences of digesting minute particles which are designed to behave in a specific way in the body, and which could arise in any number of diverse circumstances.

Consequently, in order to determine effectively both the long-term properties and the general reliability of nanoproducts – as well as their effects on human health and the environment – it has been suggested that all involved parties (including scientists, businesses, regulatory authorities, consumers and the insurance industry) start an open ‘risk dialogue’.

## EU action plan

On the 7 June 2005, the European Commission adopted the action plan “Nanosciences and nanotechnologies: An action plan for Europe 2005-2009”, the text of which was adopted by the European parliament on 28 September 2006. This action plan defines a series of actions for the immediate implementation of a safe,

integrated and responsible strategy for nanosciences and nanotechnologies. Elements of the nanotechnology action plan include research, development and innovation, public health and safety, together with environmental and consumer protection.

### UK law and regulation

One example of the gaps in the UK regulation of nanotechnology is the use of nano versions of already approved ingredients in food products. Currently, each additive used in food products must comply with specific purity criteria laid down in related European Commission directives. So any new nanomaterials would need to undergo safety assessments by the European Food Safety Authority before they were included on the relevant positive list and so be permitted in foods. These risks are taken very seriously by the EU. As a result, the Food Safety Agency (FSA) has called for research proposals to assess the potential applications of nanotechnology for food additives and other novel ingredients, and to consider consumer safety and the regulatory implications of their possible use.

The FSA has also suggested an amendment to the legislation to require that all nanocomponents be subject to their own risk assessment. Alternatively, it might be possible to base future law dealing with nanotechnology on established rules concerning analogous products or processes, such as biotechnology. It may well be that a co-ordinated regulatory approach of both nanotechnology and biotechnology will develop. Either way, it is arguable that laws will have to be made to ensure limits on research of particularly dangerous

nanodevices, so as to ensure adequate safety monitoring of nanotech products in use and to make certain that sufficient procedures are in place to compensate those who may be adversely affected by them.

### Risk of liability

There are risks and challenges facing manufacturers and insurers in relation to the development of these new technologies. For example, manufacturing companies will have to be responsible for ensuring that nanotech products do not pose a danger to their users or others passively. Furthermore, as the nanotech market expands, and law and regulation evolve, manufacturers will have to conduct safety trials to show product safety and quality. This is cutting-edge technology and problems are bound to arise.

UK manufacturing companies must seek ways to develop a regulatory system, as well as prepare for potential product liability claims arising out of exposure to these new technologies both during manufacture and after the goods have entered the public domain. Although the products may be nano, the claims against those manufacturing them could be mega, and insurers of relevant manufacturers involved in this field should be aware of the potential risk.

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# A changing climate

## D&O cover may be withdrawn from insureds lacking an adequate policy for dealing with climate change.

**While many still argue about the existence of climate change and its link with increasingly extreme weather conditions, the issue is a topic of considerable interest in the insurance world. While most insurers tend to agree that climate change may have a direct bearing on lines of risk such as property, casualty and business interruption, there is a growing view that other lines of risk may also be affected.**

Recent developments suggest that a storm may be brewing for directors regarding the range of risks their companies could face in future. The question of whether traditional directors and officers (D&O) policies provide adequate cover is likely to present problems – and opportunities – for underwriters and insureds. In many respects, 2007 is a watershed year in this context: several recent developments (examined in more detail below) suggest that directors are now firmly on notice about the weather-related risks facing corporations.

Of course, the climate change debate has been going on for some time. Governments continue to have differing views about the link (or otherwise) between the emission of greenhouse gases and a perceived change in weather patterns. Some remain sceptical about

the link; others believe that there is enough evidence for the issue to be addressed in a substantial way. Insurers are less sceptical than most about the link and an increasing number have led the field in reviewing the causes of climate change. This is perhaps because, more than any other industry, insurers have already seen the scale of the problem.

For example, recent reports suggest that the 2005 hurricane season in North America was an extreme experience, resulting in over \$57bn worth of losses. Lloyd's has also recently released a report urging insurers to "adapt or bust" to the issue of climate change, warning that, if the insurance industry wishes to survive, it must change its ways and adapt to the emerging risks.

### Recent key developments

During 2007, there have been several significant reports concerning climate change, adding to the growing body of knowledge in this field. In particular, there has been the staged release of the 2007 Fourth Assessment Report by the Intergovernmental Panel on Climate Change (the IPCC Report) and the publication of the Carbon Disclosure Project Report 2006 (the CDP Report). In addition, there has been the key US Supreme Court decision of *State of Massachusetts v Environmental Protection Agency*. These developments are a clear

wake-up call for directors about the challenges they (and their companies) face now and in the immediate future. They also put directors on notice of the risks that companies could face in relation to changing weather patterns.

The IPCC Report continues the recent work that the IPCC has done regarding the scientific assessment of climate change. Critically, the report notes that there has been a significant increase in greenhouse gas emissions, finding that, in carbon dioxide output alone, there has been an 80% rise in emissions between 1970 and 2004. The IPCC believes that most of this increase has come from the energy sector and that emissions will continue to rise even if steps are taken immediately to address the problem. The IPCC now seems to accept that there is a direct connection between an increase in emissions and a change in the world's climate. Its important Fourth Assessment Report looks at the issue of mitigating climate change. By implication, business will have a vital role to play in this process.

The CDP Report analyses how various businesses around the world are dealing with shifting weather patterns. Significantly, the report states that "climate change and shareholder value are inextricably linked". It finds that recent research supports the view that there is a link between global warming and emissions, and that directors can no longer "claim to be unaware of what is at stake". The report goes on to say that a

failure by directors to take account of climate risks "may well be tantamount to an abdication of fiduciary responsibility and an indication of poor management". It suggests that corporations need to consider urgently the possibility that climate change can manifest itself not only in physical and regulatory risks for business, but also in threats to reputation and competition.

Besides these two major reports, there has been the April 2007 Supreme



Court case of *Massachusetts v the EPA*. While specific to its facts, the decision could have important repercussions for directors. The Supreme Court ruled that greenhouse gases are 'pollutants'. This finding will have significant consequences for a wide range of industries – and could open a flood of claims by individuals against 'knowing polluters'. The decision sets a benchmark against which a company's required environmental understanding may be measured, with the

US media describing it "as a turning point" in corporate knowledge.

### Consequences for directors

So where does this leave directors and their insurers? In any discussion of climate change and insurance risks, property damage and related lines will form a prominent part of the discussion as any increase in weather extremes obviously has a direct bearing on risk in this respect. But an increase in global warming has consequences for other areas of the market too. For example, if

warming trends continue and seasonal variations become more dramatic, this will clearly have an impact on health and crop cover.

Directors could also now be exposed to claims connected with climate change. These claims could come first from aggrieved third parties – those who have suffered because of the activities or inaction of companies heavily involved in industries (such as the energy sector, for

instance) intimately connected with greenhouse gas emissions. The US Supreme Court has now ruled that such gases are pollutants and the IPCC has called for all concerned to act to mitigate the problem.

The second type of legal action is perhaps of even greater concern. These claims have their basis in shareholder criticism that directors are liable for irresponsible or negligent management of climate change issues. In the post Sarbanes-Oxley world, directors should assure themselves that any corporate risks linked with climate matters do not go undisclosed to shareholders.

Importantly, people cannot claim to be ignorant of these issues. The Fourth Assessment Report, the CDP 2006 Report and the EPA case are all examples of the knowledge now available to directors. Indeed, several insurers have recently declared that D&O cover may be withdrawn from insureds that do not have an adequate policy in place for dealing with climate change. The challenge for insurers and insureds in relation to D&O cover is to ensure that this type of cover adequately adapts to the new weather-related issues that are facing directors. To think that climate change is an issue only as regards property cover, for example, is likely to prove short-sighted.

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# Traders across borders, beware!

The Sultan of Brunei's victory in a Sydney court is a warning to those doing business across borders.

## A recent decision of the Supreme Court of New South Wales warns those trading between jurisdictions of the importance of choice-of law issues.

Following the lowering of trade barriers, international trade has grown substantially in recent years. This has led to the increased importance of the development of private international law and a renewed focus on questions of choice-of-law – particularly where the law of the country found to have the closest connection to the transaction concerned may significantly and unfairly disadvantage one of the parties.

### A golden Koran

The New South Wales case involved Garsec, an Australian based investment company. Garsec claimed that the Sultan of Brunei had reneged on an agreement to purchase – for US\$8m – a 400-year-old gold-lined manuscript copy of the Koran.

The case attracted significant media attention in Australia, as Garsec had planned to donate part of the sale proceeds to a group of Islamic charities, including an Islamic school in Sydney.

Garsec claimed that the agreement for sale was made in 2005, between its directors and representatives of the Sultan, by telephone between Brunei and Sydney.

The company sought an order for specific performance of the alleged contract or damages for its breach. The Sultan filed an application for leave to withdraw his appearance in the proceedings and an order that the proceedings be permanently stayed on the basis of jurisdiction.

### Clearly inappropriate forum

In considering the question of forum non conveniens, the court applied the 'clearly inappropriate forum test' set out in *Voth v Manildra Flour Mills Pty Ltd* (1989) 15 NSWLR 513. This required the court to consider the competing connections of the respective forums with the subject-matter of the proceedings, taking due account of any legitimate personal or juridical advantage accruing to either party by choice.

Garsec claimed that New South Wales was the appropriate jurisdiction because the key telephone call was made to Sydney and the relic was stored in Sydney throughout the relevant events.

Garsec frankly admitted forum shopping because of the sovereign immunity enjoyed by the Sultan in Brunei as head of state and of Islam. This immunity extended to others involved in the deal, including the Sultan's personal secretary and godson.

### No sympathy from judge

Justice McDougall applied the reasoning in

*CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, saying that it was oppressive to bring proceedings to prevent an opposing party from pursuing remedies available in the courts of another country but not available in Australia – particularly when the issues here were more closely connected to Brunei than to New South Wales or Australia.

It was likely, said the judge, that the contract was formed in Brunei when the acceptance of the offer was communicated to the Sultan by his representative in Brunei. Although some of Garsec's loss (expenses associated with the deal) occurred in Australia, other factors pointed to the conclusion that the place of the wrong was Brunei, which was where the acts alleged to constitute the wrong had occurred.

Upon determining that the applicable law was the law of Brunei, the judge expressed reluctance to interpret the constitution of a foreign country – particularly when article 86 of the Brunei constitution allows questions on its application to be referred to an 'interpretation tribunal'.

Justice McDougall also considered the very substantial inconvenience and expenses likely to be suffered should the Sultan have to travel to New South Wales – far greater than that of Garsec's directors travelling to Brunei. Reference was also made to the disruption to Brunei's administration and its people in the event that the country's ruler should be away overseas.

The judge rejected Garsec's submission that the significant and legitimate juridical advantage available in maintaining the proceedings in New South Wales was that there was no other forum by reason of the Sultan's immunity. He also dismissed submissions about possible criminal prosecution in Brunei, finding that the court should not shelter Garsec from the consequences of its actions there.

"Garsec chose to contract with the Sultan of Brunei," the judge said at paragraph 108 of his judgment. "It must take him as it finds him: including, at least prima facie, with the benefit of sovereign immunity".

Garsec is considering an appeal.

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# Improving regulation in Australia

Better regulation is the key to realising ASIC's new strategic plan.

**The Australian Securities and Investments Commission (ASIC) – Australia's corporate regulator – has recently drafted a new strategic plan and set of values for the next five years. Central to the success of this scheme is improved regulation, the Commission believes.**

ASIC's recent initiatives are designed to provide a simpler and more practical approach to regulation. They are in response to complex regulatory changes, recently experienced in Australia and worldwide, and to the current debate about the cost and impact of regulation generally. As a result of the initiatives, which came into effect on 5 July 2007, ASIC decisions, policies and approaches should be more accessible and easier to understand.

## Strategic plan

The ASIC strategic plan for 2005-10 (the Strategic Plan) sets out five key strategies to help ASIC respond to future challenges. The plan aims to:

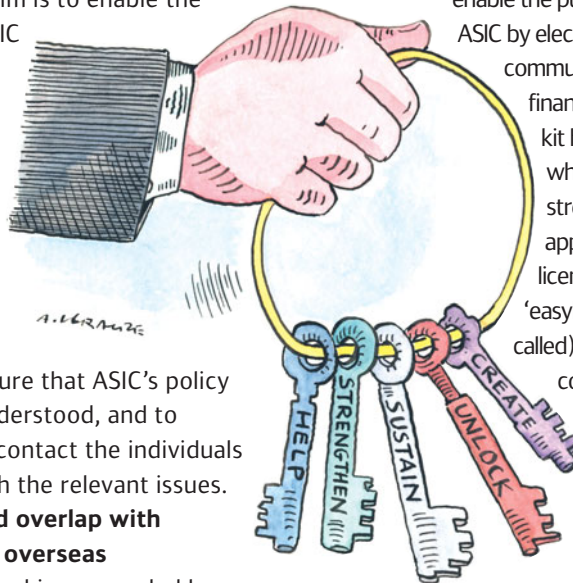
- help consumers make better financial decisions;
- strengthen the integrity of Australian corporations;
- sustain confidence in Australian financial markets;
- unlock new value from public information; and
- create a more flexible organisation.

The strategy is based around the core values of ASIC, which the Strategic Plan summarises in a single sentence: "We value an organisation that is strong, fair and progressive."

## ASIC priorities

In order to achieve better regulation, ASIC has identified its priorities as follows:

- **Transparency.** The aim is to enable the public to see how ASIC is organised, who makes the decisions, how these decisions are made and the role that the Australian parliament requires ASIC to play.
- **Accessibility.** The objectives are to ensure that ASIC's policy and approach are understood, and to enable the public to contact the individuals at ASIC who deal with the relevant issues.
- **Less duplication and overlap with other domestic and overseas regulators.** A joint working group led by senior staff from ASIC and the Australian Prudential Regulatory Authority (APRA) has been formed to identify and work towards resolving any regulatory duplication or overlap. There are also related initiatives in place involving the Insolvency and Trustee Service Australia and the US Public Company Accounting Oversight Board. The aim is to achieve



complementary approaches to issues which involve other jurisdictions or cross-border issues.

- **Understanding the impact of regulation on business and individuals.** The aim is to use more reliable and relevant information in making decisions.
- **Streamlining and less paperwork.** This will enable the public to deal with ASIC by electronic communication. A new financial services licensing kit has been launched which allows a streamlined online approval process for licence applications. The 'easy lodge service' (as it is called) also allows company details to be checked and changed online.
- **Consultation with stakeholders to include a consumer advisory panel on consumer issues.** A Chairs Committee of the chief executives of the Big Four accounting firms and representatives from the accounting professional bodies has been formed.

of all the types of regulatory documents currently published. The aim is to reduce the different types of documents being produced, and to introduce a new design with a simpler template. The public will then have fewer types of documents to deal with and find it easier to see what each type of document is and how it is intended to be used.

ASIC will no longer produce guides or policy statements. These have been replaced by the new regulatory guide categories. Documents will now fall into four distinct categories: consultation papers, regulatory guides, reports and information sheets.

In addition, ASIC has also developed and published a web-based "road map". This is a subject matter index that enables quick access to regulatory documents, class orders and reports.

Details of the initiatives are published in a document entitled 'Better Regulation; ASIC Initiatives' and is available on ASIC's website at [www.asic.gov.au](http://www.asic.gov.au).

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## Documents and publications

One of the main features of these initiatives is a rationalisation and redesign of ASIC documents. A stocktake has been carried out

# Getting tough about tax

A new uncompromising strategy has been unveiled by the Revenue.

**HM Revenue & Customs (HMRC) has announced a new approach to tackling tax disputes (see [www.hmrc.gov.uk/practitioners/lss-intro.htm](http://www.hmrc.gov.uk/practitioners/lss-intro.htm)). The Litigation and Settlement Strategy (LSS) makes it clear that HMRC will take a hardline approach when it comes to settling or litigating disputes, particularly in cases involving arrears in connection with tax evasion or avoidance.**

## A strict line

When considering settling avoidance and evasion cases, the LSS stresses (at para 15) that any negligence or tax evasion on the part of the taxpayer should not be rewarded by financial gain. Accordingly, tax, interest or penalties will not be undercharged for the sake of a quick settlement and, where HMRC's legal advice is strong, the LSS states (at para 16) that settlement for less than 100% of the tax and interest due should not be accepted.

In deciding whether or not to take legal action, "aggressive avoidance schemes" and instances where "taxpayers have set out to undermine the purpose of tax legislation" will top HMRC's list of cases that should be litigated (see LSS para 22).

While much of the attention has focused on tax evasion and avoidance schemes, the hardline approach seems to have been adopted across the board, with the LSS advising HMRC (see para 14) not to enter into 'package deals' when agreeing to any settlement and not to 'split the difference' or offer any discount for an agreement not to litigate in 'all or nothing cases'.

When it comes to making a decision to litigate, the likelihood of success will be the dominant fact for HMRC. However, the LSS says (see para 21) that cases could be litigated where the chance of succeeding is less than 50%. However, this would have to be justified on the grounds that, for instance, a very large amount of tax or a fundamental point of principle is at stake.

## Avoiding disputes

But despite its overall get-tough approach, the LSS does also stress (see para 5) that "where possible, issues should be resolved in non-confrontational and collaborative ways without entering into a dispute". It encourages dialogue between the taxpayer and HMRC "on a pre-return and perhaps pre-transaction basis". It also anticipates (again at para 5) that "where returns appear to be incorrect, many taxpayers will make a correction upon challenge".

## Implications of the LSS

The LSS has significant implications for tax advisers and their professional indemnity insurers. For example:

- (1) If more tax avoidance arrangements are rejected by the LSS, and if in future HMRC takes a far stricter line in negotiations, then there is a greater risk that disgruntled taxpayers will complain – and seek compensation from – their advisers.



- (2) It is therefore very important that tax advisers incorporate the LSS into advice they give to clients, particularly when advising on tax mitigation strategies that go beyond basic statutory tax reliefs.
- (3) A taxpayer will have weaker grounds for complaint if they are made fully aware of HMRC's general approach in advance.

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