

Tax Disputes Masterclass

ATO Settlements – Statistics and Insights

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1. Overview

In 2023-24, approximately 1.25% of objections received by the Australian Taxation Office (**ATO**) progressed to filing in the Administrative Review Tribunal or the Federal Court of Australia, for reviews against objection decisions.¹ This figure is gradually declining.² Both taxpayers and the Commissioner of Taxation (**Commissioner**) are increasingly hesitant to pursue litigation, primarily due to the substantial costs and time commitment involved (in addition to the disruption to the business in the context of corporate disputes), coupled with the unpredictability of the litigation outcome. Additionally, taxpayers are wary of the reputational risks associated with legal proceedings, particularly in the context of the growing politicisation and public scrutiny surrounding the debate over tax and morality.

Considering the above, it is unsurprising that over 97% of formally disputed tax cases³ are resolved before the commencement of litigation proceedings.⁴ Whilst there can be a number of ways that a tax dispute is resolved, for example, if either party concedes, or the objection is allowed in full (in support of the taxpayer's position), or disallowed in full (in support of the Commissioner's position), in many instances, tax disputes are resolved as a result of the parties reaching a settlement.

An ATO settlement will occur where the Commissioner and a taxpayer, who are both parties to a tax dispute, negotiate with one another (often with the assistance of advisors), to come to an agreement to resolve the dispute. The Commissioner, or the taxpayer, or both, may make necessary concessions in order to facilitate the settlement. If it is not possible to reach a settlement through direct negotiations, the parties may consider whether an alternative dispute resolution (**ADR**) process may assist in reaching a settlement. ADR processes commonly involve the support of an independent third party, to assist the parties in reaching a resolution.

This paper draws from the statistics published by the ATO in their findings reports, including the *Public and multinational business disputes and settlements 2023-24* findings report, *Top 100 income tax and GST assurance programs* findings report, and *Next 5,000 tax performance program* findings report, and the data published in the ATO's Annual Reports, to discuss settlements in an ATO context. Specifically, this paper comments on recent trends in ATO settlements including discounts obtained by taxpayers, at what point in the 'tax dispute lifecycle'⁵ reaching a settlement may be optimal, settlement outcomes between different groups of taxpayers, how to successfully engage in the settlement process and our prediction as to the future of ATO settlements.

Key highlights include:

- The ATO settled 301 cases in 2023-24 which resulted in an average of a 31.2% discount for taxpayers (that is, the taxpayer paid 68.8% of the disputed amount of the tax). The majority of these settlements were in the privately owned and wealthy groups⁶ and public and multinational businesses markets.⁷

¹ See Figure 2. Part IVC of the *Taxation Administration Act 1953* (Cth) establishes a specific framework for taxation objections, reviews and appeals. It provides for the Administrative Review Tribunal to review objection decisions, as well as appeals to the Federal Court of Australia (**Federal Court**) against an objection decision.

² For every 1,000 objections received by the ATO, 20.9 in 2021-22 and 14.9 in 2022-23 progressed to filing in the Administrative Review Tribunal or Federal Court (see Figure 2).

³ Formally disputed tax cases are those assessments and decisions that are subject to an objection.

⁴ See Figure 2.

⁵ See Figure 1.

⁶ Representing 51% of settlements in 2023-24, see Commissioner of Taxation Annual Report 2023-24, [262].

⁷ Representing 22% of settlements in 2034-24, see Commissioner of Taxation Annual Report 2023-24, [262].

- Despite public and multinational businesses accounting for 22% of settlements in 2023-24, they contributed to approximately 92% (\$1.8 billion) of the tax revenue secured.⁸
- A majority of settlements occurred in the pre-audit stage in 2023-24⁹, a consistent trend over the years.¹⁰ However, settlements reached during the objection phase (which can be up to 2 to 3 years following the pre-audit stage), resulted in the largest discount for taxpayers.¹¹ In saying this, the materiality of the additional discount achieved needs to be weighed up against the additional time and costs expended in reach the objection stage of a tax dispute.¹²
- Income tax was the predominant revenue type settled with public and multinational businesses, accounting for around 96% of settlements in this sector in the 2023-24 year, with GST and other miscellaneous issues representing the balance of settlements.¹³ Of the cases settled with public and multinational businesses in 2023-24, approximately 65% of settlements involved 'global profit shifting risks' including transfer mispricing, withholding tax avoidance and minimisation, mischaracterisation, thin capitalisation, treaty shopping and tax avoidance,¹⁴ reflecting the ATO's continued focus on this area, with approximately 65% to 70% of current income tax audits in this sector involving global profit shifting issues.

⁸ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024); Commissioner of Taxation Annual Report 2023-24, [262].

⁹ Representing 51% of settlements – See Figure 6.⁹

¹⁰ See Figure 4, Figure 5 and Figure 6.

¹¹ With average discounts of 50% in the 2022-23 year and 39.6% in the 2023-24 year.

¹² For instance, the average discount achieved in the pre-audit phase in the 2023-24 year was 38.5% which compared to the average discount achieved in the objection phase in the 2023-24 year of 39.6%, is arguably immaterial,

¹³ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

¹⁴ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

2. Tax Disputes Landscape

To effectively engage in the ATO settlement process and optimise settlement outcomes, it is essential to understand the tax disputes landscape. This includes understanding how the ATO identifies tax risks, what its key priorities and focus areas are, and what the end-to-end dispute process entails – often referred to as the ‘tax dispute lifecycle.’

2.1 The ATO’s approach to identifying risks

In an ideal world, under Australia’s self-assessment tax system, the position that a taxpayer takes in their annual tax return is accepted by the Commissioner without adjustment, and a notice of assessment is issued accordingly.

However, given the increasingly complex commercial and legislative environment that taxpayers operate in, it is not surprising that the Commissioner has progressively disagreed with positions taken by taxpayers in their returns and has introduced additional measures outside of a taxpayer’s annual return to identify key tax risks.

Where the Commissioner does not accept the position taken in a taxpayer’s return and a compliance risk is identified, the ATO may commence a review (which may progress to an audit) against the taxpayer. This process is outlined in further detail below, in section 2.2.

As noted above, compliance risks may also be identified through ATO mechanisms outside of a taxpayer’s annual return. These measures have been increasingly relied upon by the Commissioner to expand the range of compliance risks being identified in real time, providing confidence to both the Government and the public that the business community (in particular) is fulfilling its tax obligations.

Some of these additional risk identification measures include:

- **Existing ATO assurance programs:** ATO assurance programs, including (but not limited to) the Top 1,000 combined assurance program, Top 100 GST and income tax assurance programs, Top 500 private groups tax performance program and the Next 5,000 private groups tax performance program, exist to provide assurance to the community that Australia’s largest taxpayers are meeting their taxation requirements. These ATO assurance programs generally facilitate periodic reviews of these taxpayer populations to address risk and compliance matters that are specific to the markets in which these taxpayers operate.
- **ATO data-matching processes and protocols:** The ATO uses sophisticated data and analytics techniques to compare data collected from employers, financial institutions, insurance and superannuation funds and property registers, with the information that a taxpayer provides in their annual tax return. Examples of this include the medium and emerging private groups tax performance program and the medium public and multinational business engagement program. Through the medium and emerging private groups tax performance program, data-matching and analytic models are used to identify wealthy individuals and link them to associated entities, to enable the ATO to consider those associated entities as a group.¹⁵ Through the multinational business engagement program, the ATO has identified high risk areas to focus on, common to multinationals.
- **Large transactions or changes to a taxpayer’s circumstances:** Large transactions or commercial activity that may lead to a significant change in a taxpayer’s circumstances will

¹⁵ ‘Medium and emerging private groups tax performance program’ (ATO Website, 21 October 2024) <[Medium and emerging private groups tax performance program | Australian Taxation Office](#)>.

often attract media attention, lead to conversations between professional bodies within the domestic and international market, and attract attention from other Australian regulators (such as ASIC or the ACCC), particularly when large (foreign) multinational entities are involved in the acquisition or disposal of Australian companies. The Commissioner is increasingly responding to current affairs in the global transactions market, often initiating reviews or compliance activity before the relevant taxpayers lodge their annual returns or other disclosure material with the ATO. In addition, it is becoming increasingly common for the Commissioner to exercise his power to request that the taxpayer pay, and the ATO hold in escrow, certain amounts of any potential tax debt, before a return is lodged. This is particularly prevalent in the private equity space.

- **Voluntary disclosures:** Voluntary disclosures can be made by a taxpayer to the Commissioner to inform the Commissioner of a mistake in a lodgement or false or misleading information, giving the taxpayer the opportunity to correct their tax affairs.

Assurance reviews, data-matching, large transactions or voluntary disclosures of the nature outlined above (or a mixture of them) may lead to the discovery of certain compliance risks, that the Commissioner may ultimately deem necessary to investigate in a more formal manner i.e. through the ATO audit process, or by other means, such as assurance or other reviews.

2.2 ATO tax dispute lifecycle

A typical Australian taxation dispute can generally be broken down into the following six stages:

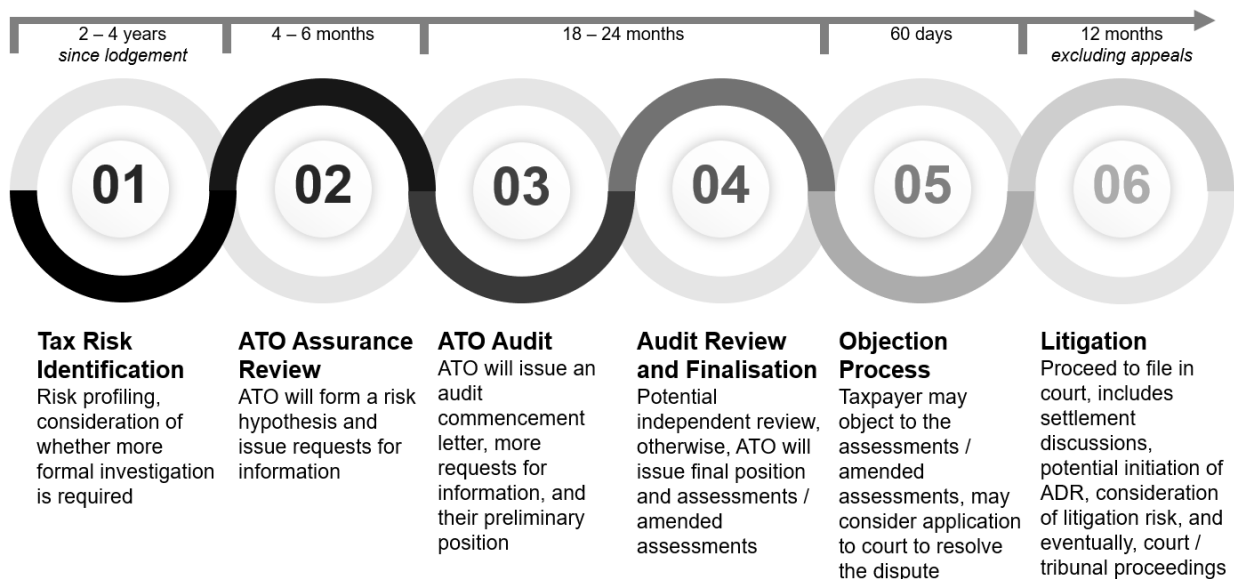


Figure 1: the ATO Tax Dispute Lifecycle

Some noteworthy points in relation to the ‘tax dispute lifecycle’ include:

- Settlement can be initiated at any stage of the process however, it seems that most settlements occur during the pre-audit and audit stages.¹⁶ While reaching a settlement at an earlier stage may save time and provide greater certainty, settlements reached towards the later phases of the dispute lifecycle tend to result in a higher discount for taxpayers. However, the materiality of the additional discount achieved at these later stages needs to be weighed

¹⁶ Commissioner of Taxation Annual Report 2023-24, [262]; *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

up against the additional time and cost required to proceed to these later stages. This is explored in further detail in section 3.2.2 of this paper.

- The timeframes indicated in Figure 1 for each stage are indicative only (per ATO guidance).¹⁷ In practice, the timeframes are considerably longer. For example, in 2023-24, the average cycle time for objections was 100 days¹⁸ (as opposed to the indicative 60 days).¹⁹
- Due to the stringent internal KPIs and reporting requirements that are imposed on ATO officers during an ‘audit’ to ensure their timely progress (with the general expectation that the audit is completed within 2 years), there is an increasing appetite by ATO case teams to front end the information gathering processes (ordinarily undertaken during the audit stage) by issuing extensive and multiple requests for information, often through the use of the Commissioner’s formal information gathering powers²⁰ during the ‘review’ stage of a dispute. Accordingly, the conduct of a review has considerably shifted in terms of the level of engagement and investment required by the taxpayer. This is another important factor for taxpayers to consider when deciding whether to continue defending the position adopted in their return or whether to initiate settlement discussions with the ATO. This must, however, be weighed up against the prospects of success of settlement at such an early stage, when both parties may not have undertaken the work necessary to narrow the issues in dispute and demonstrate ‘litigation risk’ (being the risk that the other party may be successful in Court).

2.3 Trends in ATO compliance action

The following table summarises the quantity and types of ATO disputes between 2021 and 2024:

Cases	2021–22	2022–23	2023–24
Returns lodged	40,744,416	41,908,253	43,530,439
Adjustments arising from audits	537,278	690,916	699,891
Disputed cases resolved			
▪ objections	18,684	23,480	30,465
▪ settlements	453	251	301
▪ litigation outcomes	455	276	444
▪ large market independent reviews	7	1	3
▪ small business independent reviews ^(b)	44	27	48
Average cycle time for objections	102 days	79 days	100 days
Part IVC cases lodged to courts/tribunals	440	388	469
Part IVC cases resolved prior to court hearing	297	169	250
Part IVC cases proceeded to decision	158	107	194
New Part IVC matters in proportion to objections	20.9 per thousand	14.9 per thousand	12.5 per thousand
Number of test case litigations finalised	3	5	3

Notes

(a) Objections include self-objections, which accounts for 52% of all objections resolved in 2023–24.

(b) The small business independent review service, which was in pilot phase from 1 July 2018, moved to business-as-usual effective 1 April 2021.

Figure 2: Commissioner of Taxation Annual Report 2023-24, ATO disputes, 2021-22 to 2023-24

¹⁷ ‘Period of Review’ (ATO Website, 4 September 2024) <[Period of review | Australian Taxation Office](#)>; ‘Next 5,000 Streamlined assurance reviews’ (ATO Website, 13 December 2024) <[Next 5,000 Streamlined assurance reviews | Australian Taxation Office](#)>; ‘Risk review and audit process’ (ATO Website, 24 October 2018) <[Risk review and audit processes | Australian Taxation Office](#)>; *Taxation Administration Act 1953* (Cth) s 14ZYA.

¹⁸ See Figure 2.

¹⁹ This timeframe is likely due to the operation of s14ZYA of the *Taxation Administration Act 1953* (Cth).

²⁰ *Taxation Administration Act 1953* (Cth) ss 353-10, 353-25.

As is evident in the extract at Figure 2, taxpayer compliance is increasing, with returns lodged increasing by over 1 million each year, amounting to approximately a 7% increase in returns lodged from 2021-22 to 2023-24. However, there is comparatively a disproportionate increase in adjustments arising from audits, with adjustments increasing by approximately 30% from 2021-22 to 2023-24. This is reflective of the comments made in section 2.1, in relation to the increasing pressure faced by the ATO to provide assurance to the Government and the public that taxpayers (particularly large corporates), are paying their fair share of tax. This, coupled with the Australian Government's budget deficit that has spanned 15 years, has resulted in the ATO's contribution and efforts to the collection of taxes needing to be met with a level of sophistication and rigour.

As noted in section 3.2 below, the number of cases proceeding to litigation (Part IVC cases lodged to courts / tribunals) is immaterial, with the significant majority of 'formal disputes'²¹ being resolved during the objection phase. In 2023-24 the number of disputes resolved during the objection process (30,465) is almost double the number in 2021-22 (18,684).²² This is likely as a result of the following factors:

- objections are handled by the Review and Dispute Resolution division, which is a separate and independent team to the review and audit team, who undertake a merits review (that is, the objections officer considers the matter afresh considering all the relevant facts, evidentiary materials and the technical positions);
- by the objection stage, both parties to the dispute have extensively progressed their cases, arguments and justifications for their positions, with relevant evidence having been considered and presented; and
- the taxpayer (and to a certain extent, the Commissioner) is faced with a 'go' / 'no-go' decision in respect of instituting court or tribunal proceedings (given that it is the next step in the tax dispute lifecycle) and as a result, litigation risk is extensively considered with both parties incentivised to come to a resolution taking into account their respective litigation risk.

²¹ For the purposes of the extract at Figure 2, ATO risk or assurance reviews are not considered to be 'formal' dispute cases. These processes are discussed in further detail in section 2.2 of this paper.

²² See Figure 2.

3. ATO Settlements

The ATO only settle disputes where it is appropriate to do so. In the context of settlements, the ATO is guided by the ATO's Code of Settlement and other obligations²³, including the obligation to act as a 'model litigant.' The ATO Code of Settlement sets out the ATO policy on the settlement of taxation and superannuation disputes, including disputes involving debt.

The ATO defines a settlement as follows: *"A settlement involves an agreement between parties to resolve matters in dispute where one or more parties make concessions on what they consider is the legally correct position."*²⁴

The ATO has an obligation to administer the taxation and superannuation laws through assessing, collecting taxes and determining entitlements. The ATO also has an obligation to administer the taxation system in an efficient and effective way, balancing competing considerations and applying discretion and good sense.²⁵

Settlement is an important element of the administration of the tax system particularly given the increasing cost of litigation.

3.1 Settlements in the context of a tax dispute

ATO guidance²⁶ notes that *"Where settlement is sensible and appropriate in relation to a matter, it is unnecessary to go through a formal process of assessment, amendment and objection. A settlement can occur for one issue, multiple issues or the entire dispute. It may be that settlement is discussed several times throughout a dispute before a final agreement is reached."*

3.1.1 When will the ATO consider settlement?

Under the Code of Settlement, when deciding whether or not to settle, the ATO must consider *all* of the following factors:

- The relative strength of the parties' position following careful consideration of the evidence, the application of the law to the facts, the quantum of the tax in dispute and the possible litigation outcome (commonly referred to as 'litigation risk');
- The cost versus the benefits of continuing the dispute need to be evaluated. Considerations include the internal and external ATO legal costs, the cost and risk in collecting the liability (including the taxpayer's ability to pay) and the effective and efficient use of resources. If the costs of continuing the dispute exceed the benefits, settlement is likely to be a preferable option; and
- The impact on future compliance for the taxpayer and broader community. This requires the ATO to apply the 'good management rule' where it weighs up the cost benefit of agreeing to concessions on the taxpayer's past liabilities to achieve compliance by the taxpayer (or a group of taxpayers) for current and future years.

²³ Including the *Legal Services Directions 2017* (Cth).

²⁴ ATO Code of Settlement (24 June 2024).

²⁵ ATO Code of Settlement (24 June 2024).

²⁶ 'Practical guide to the ATO Code of settlement' (ATO Website, 14 October 2024) <[Practical guide to the ATO Code of settlement | Australian Taxation Office](#)>.

Settlement will generally not be considered where the following factors are at play:

- Where there is a contentious point of law which requires clarification and would benefit from judicial guidance and precedence, the ATO will prefer the matter is litigated in these instances;
- If it is in the public interest to litigate, for example if the issues in dispute will have wider implications and impact the tax obligations of the broader community, then there will be a preference for a Court to oversee the matter in a structured and methodical way that ensure public confidence in the outcome; or
- Where the ATO consider the behaviour involved is so serious or egregious that they believe pursuing a settlement would undermine the integrity of the tax system or fail to send a clear and strong message to the community, for example in cases of fraud or evasion or other forms of deliberate wrongdoing.

In terms of timing of when a settlement may be reached, the statistics regarding when taxation disputes are settled are discussed in detail at section 3.2 of this paper. Typically, the majority of settlements occur during the pre-audit phase.²⁷

3.1.2 What underpins the ATO's settlement decision?

An ATO settlement decision is underpinned by a combination of factors designed to ensure fairness, consistency and the integrity of the tax system. The settlement decision should be seen to be an appropriate application of the Code of Settlement principles to the facts and circumstances of the matters in dispute.

Often, the settlement parameters are influenced by the following factors:

- **The strength of the ATO's case:** That is, the associated litigation risk if the matter was to proceed to litigation. The ATO will assess whether it has a strong legal position and sufficient evidence to support its position. Often, the assessment of litigation risk will be made by external Counsel that have been engaged by the ATO, with the assistance of the Tax Counsel Network (which provides technical input on tax issues, cases and rulings). Litigation risk will have a direct impact on the discount afforded to the taxpayer with respect to the total tax in dispute.²⁸
- **The taxpayer's history of compliance:** Whether the taxpayer has acted in good faith and if they have cooperated with the ATO during the investigation as well as engaged fairly throughout the settlement negotiation process will have an impact on the ATO's settlement framework. In particular, this will have a bearing on the amount of the penalty that is agreed in the context of settlement and in particular, whether the penalty is remitted partially or in full.
- **Certainty around future tax compliance:** The ATO may be willing to compromise on the tax payable in respect of the prior years in dispute, to achieve certainty over the taxpayer's go-forward position. This will minimise the risk of future disputes and provide assurances to the ATO about the tax to be collected in future years.²⁹

²⁷ See Figure 4, Figure 5 and Figure 6..

²⁸ ATO Code of Settlement (24 June 2024).

²⁹ ATO Code of Settlement (24 June 2024).

Despite the ATO guidance discussed above, it is important for taxpayers to be aware that in practice, it is often the taxpayer that initiates settlement discussions, and it is not uncommon for the ATO to ‘reject’ these attempts by the taxpayer. This may be for a variety of reasons including:

- the ATO has not fully developed their thinking around the risk hypothesis;
- there is a need to undertake further information gathering for the ATO to fully ventilate the facts and evidence;
- the case is part of a cluster of similar cases and the ATO are wanting to progress the cases to a similar stage before determining which ones to settle and which ones to pursue; and
- all ATO stakeholders are not aligned on the merits of settlement.

In these circumstances, the taxpayer is left with no choice but to either continue to progress the dispute or ‘walk away,’ by paying the full amount of tax in dispute. What is also observed in practice is that the longer the dispute continues, the more challenging it is to engage in settlement discussions, as both parties become increasingly entrenched in their respective positions. This is evident in the tables at Figures 4 to 6 below, which demonstrate that most cases settle earlier in the dispute lifecycle.

3.1.3 What is the process that the ATO follows to secure and finalise a settlement?

The Code of Settlement provides the following guidance in respect of the finalisation of ATO settlements:

- The settlement decision should be seen to be an appropriate application of the Code of Settlement principles on the facts and circumstances of the matters in dispute. The decision should be documented and evidenced so that it would satisfy an objective review.³⁰
- Settlements can only be approved by an ATO officer who has the delegation or authorisation to conclude settlements. All Senior Executive Service officers have the delegation to settle taxation and super disputes. In some areas other ATO officers are authorised to make settlement decisions.³¹
- In some ATO business areas, settlement panels provide advice to ATO officers on reasonable parameters for settlement negotiations and decisions.³²
- For cases where external counsel has been engaged, it is expected that the advice of counsel would be obtained on the merits of the Commissioner’s position and the reasonableness of the proposed settlement.³³

3.1.4 How is a settlement formalised?

Settlements must be finalised by the parties signing a written agreement which sets out the terms of their agreement (that is, by way of a settlement deed).³⁴ The written agreement must represent the final agreed position between the parties (including all payment obligations or future compliance obligations). A settlement will not be legally enforceable until it is finalised in this way.

³⁰ ATO Code of Settlement (24 June 2024).

³¹ ATO Code of Settlement (24 June 2024).

³² ATO Code of Settlement (24 June 2024).

³³ ATO Code of Settlement (24 June 2024).

³⁴ ATO Code of Settlement (24 June 2024).

Model deeds

The form of the written agreement that will be appropriate to evidence a particular settlement may vary. The ATO have model deeds available for use in preparing a settlement agreement.³⁵ The agreements vary between a long form agreement, short form agreement, GST agreement and deeds in relation to disputes in the Administrative Review Tribunal. In the usual course of concluding a settlement (once an agreement has been reached), there is generally a further negotiation process between the taxpayer and the ATO, to agree any changes to the general terms contained within the settlement deed. The usual course of drafting a deed is that the relevant ATO officer will provide the initial draft to the taxpayer, which the taxpayer then has the opportunity to vary as appropriate. This 'back and forth' process will continue between the parties until both parties are comfortable that the deed reflects the settlement terms that were agreed. In respect of this process, it should be noted that while diverging significantly from the model deeds is possible, it is likely to require the approval of senior ATO legal officers, which is likely to further delay the conclusion of the dispute.

Varying a settlement agreement

Like any legal agreement, ATO settlement agreements can be varied post-execution. However, this can occur in very limited circumstances because, as a general rule, the ATO does not consider that settlements should be amended without good reason.³⁶ In certain instances, where the ATO agrees, in the interests of fair and reasonable administration, some settlements can and should be varied.

Taxpayers may seek to reopen a settled case where the ATO subsequently changes its view of the law on which the settlement was based, in a way that would have achieved a better outcome for the taxpayer, subject to the following conditions:³⁷

- a settlement resolves only one matter in dispute (and not multiple issues such as 'global' settlements);
- the taxpayer requests that the settlement be varied;
- the timeframe for the relevant amendment period has not ended; and
- the settlement was concluded after 1 December 2009 (the public release of the Inspector General of Taxation Review into aspects of the ATO's settlement of active compliance activities).

3.2 ATO settlement statistics and trends

The following sections consider the ATO-reported statistics in respect of settlements, including the number of settlements, timing of settlements within the ATO's dispute lifecycle, the settlement variance (being the amount that the Commissioner conceded in reaching a settlement) and the settlement outcomes for different taxpayer groups.

³⁵ 'Model settlement deeds' (ATO Website, 14 October 2024) <[Model settlement deeds | Australian Taxation Office](#)>.

³⁶ ATO Code of Settlement (24 June 2024).

³⁷ 'Practical guide to the ATO Code of settlement' (ATO Website, 14 October 2024) <[Practical guide to the ATO Code of settlement | Australian Taxation Office](#)>.

3.2.1 Number of settlements

The following graph depicts the five-year trend in the number of dispute cases settled with the ATO. It is apparent that there is, on average, a downward trend in the number of cases being settled by the ATO. This may be the result of a number of factors, including (but not limited to):

- Parties may have become more confident that they can achieve a favourable outcome through litigation, especially given that there have been recent judicial ruling and trends that appear to favour the taxpayer.³⁸
- While litigation is often expensive, settlements can also involve costly negotiation, legal fees and ongoing settlement administration which may be almost equivalent to the cost of litigating the matter.
- The ATO's approach of 'locking in' the tax treatment for future years (not currently in dispute) may be unappealing to many taxpayers who might prefer to accept the uncertainty of litigation rather than commit to a position that could be commercially disadvantageous in the future.

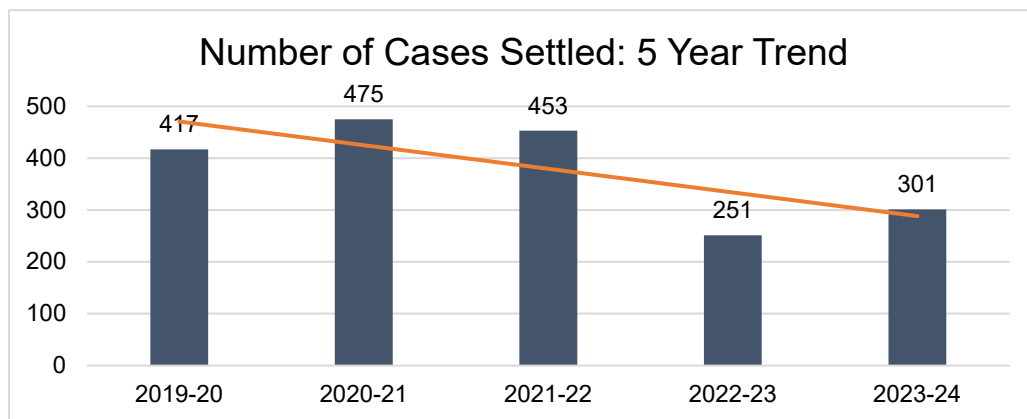


Figure 3: Commissioner of Taxation Annual Reports 2019-20 to 2023-24, Settlement cases

3.2.2 Timing of settlements

It is evident, based on the data extracted below, that the majority of settlements occur in the early stages of a dispute, that is, generally during the pre-audit (assurance review) and audit phases, with between 75% and 80% of disputes settling at this stage in 2022, 2023 and 2024. Settlements then become less common as the matter progresses toward litigation, with only 1% of disputes progressing to the Federal Court. It is also evident that as the dispute lifecycle progresses, both the taxpayer and the Commissioner become more entrenched in their own positions and are less likely to settle the dispute, given the time and effort already invested. Settlements are becoming harder to negotiate and obtain, with disputes more generally taking longer to resolve.

³⁸ In 2023-24, the Federal Court handed down tax cases in *Singtel v Federal Commissioner for Taxation* [2024] FCAFC 29, *PepsiCo, Inc. v Commissioner of Taxation* [2024] FCAFC 86, and *Mylan Australia Holding Pty Ltd v Commissioner of Taxation (Commissioner)* (No 2) [2024] FCA 253, with both the *PepsiCo* and *Mylan* decisions resulting in favourable outcomes for the taxpayers. In 2022-23, the Federal Court handed down tax cases in *Bechtel Australia Pty Ltd v Commissioner of Taxation* [2023] FCA 676, *Commissioner of Taxation v Landcom* [2022] FCAFC 204, *B&F Investments Pty Ltd as trustee for the Iluka Park Trust v Commissioner of Taxation* [2023] FCAFC 89, *Guardian AIT Pty Ltd as trustee for The Australian Investment Trust v Commissioner of Taxation*; *Springer v Commissioner of Taxation* [2023] FCAFC 3, *Minerva Financial Group Pty Ltd v Commissioner of Taxation* [2022] FCA 1092, *Commissioner of Taxation v Wood* [2023] FCA 574, with the *Landcom*, *Minerva* and *Wood* decisions resulting in favourable outcomes for the taxpayers.

The preference to settle a matter in the early stages of a dispute may be due to a range of factors:

- **Cost and time efficiency:** From a taxpayer's perspective resolving a matter early can avoid the high costs associated with defending an ATO audit, including the time and expense of gathering documentation, engaging professional advisors and the disruption to the business. Equally, reaching an early settlement allows the ATO to allocate resources elsewhere, avoiding prolonged investigations.
- **Certainty and closure:** Settling early gives the taxpayer certainty and finality of the outcome, reducing the risk of further scrutiny over their tax affairs and the potential for contagion risk and additional issues being identified. The ATO gets the benefit of collecting tax earlier than it otherwise would even if the amount recovered is at a discount to the total tax in dispute.
- **Mitigation of Penalties and Interest:** If a taxpayer agrees to settle early, they may be able to reduce the penalties or interest that might otherwise accumulate during a prolonged dispute.
- **Better outcome for both parties:** In some instances, the taxpayer may get a better financial outcome (such as a greater discount on the liability in dispute) by settling before the dispute fully progresses. This is because it is less likely for the ATO to become entrenched in their technical position in the early stages with less time and resources allocated to progressing the investigation and finessing its position. The correlation between the discount achieved against the stage at which the settlement is reached is considered in further detail below.

Stage	Settlement cases	% of total settlements	ATO position \$m	Settled position \$m	Variance \$m	Variance %
Pre-audit	142	31	615.9	412.5	203.4	33
Audit	195	43	1,304.3	636.7	667.6	51
Objection	75	17	1,355.6	844.6	511	38
AAT	39	9	151.7	26.7	125	82
Federal Court	2	0	88.4	44.3	44.1	50
High Court	0	0	0	0	0	0
Total	453	100	3,516.0	1,964.8	1,551.2	44

Figure 4: Commissioner of Taxation Annual Report 2021-22, Stage at which settlement occurred 2021-22

Stage	Settlement cases	% of total settlements	ATO position \$m	Settled position \$m	Variance \$m	Variance %
Pre-audit	97	39	259	139.2	119.8	46
Audit	100	40	4,851.5	2,762.2	2,089.3	43
Objection	21	8	474.7	235.7	239	50
AAT	30	12	50.6	26.3	24.3	48
Federal Court	3	1	5.2	2.7	2.4	47
Total	251	100	5,640.9	3,166.1	2,474.9	44

Notes

(a) Variance calculations are based on exact figures.

(b) Totals may differ from the sum of components due to rounding.

Figure 5: Commissioner of Taxation Annual Report 2022-23, Stage at which settlement occurred 2022-23

Stage	Settlement cases	% of total settlements	ATO position \$m	Settled position \$m	Variance \$m	Variance %
Pre-audit	153	50.8	249.4	153.3	96.1	38.5
Audit	81	26.9	1,118.7	755.4	363.3	32.5
Objection	43	14.3	687.1	414.9	272.2	39.6
ART	21	7.0	351.8	285.8	65.9	18.7
Federal Court	3	1.0	415.2	332.1	83.0	20.0
Total	301	100	2,822.2	1,941.5	880.5	31.2

Notes

- (a) Variance calculations are based on exact figures.
(b) Totals may differ from the sum of components due to rounding.

Figure 6: Commissioner of Taxation Annual Report 2023-24, Stage at which settlement occurred 2023-24

3.2.3 Settlement Variance

Settlement variance is the amount that the Commissioner conceded in reaching a settlement, as compared to the starting position, not taking into consideration any penalties or interest imposed. The trend over the last five years (as depicted in Figure 7) is that the ATO is offering significantly lower settlement discounts (31%) in 2023-24, compared to 44% and 45% in 2022-23 and 2021-22 respectively, with an average settlement discount of 39% over the five years.

This may be indicative of the ATO's increasingly stringent approach to settlements based on careful consideration of litigation risk (as required under the ATO's Code of Settlement) and their continued focus on narrowing the tax gap and vigorous approach to tax collection, particular under new leadership. It is noteworthy that the variance has decreased despite the more recent 'losses' in the Courts for the Commissioner as discussed above in section 3.2.1.

The following graph summarises the five-year trend around settlement discount (variance):

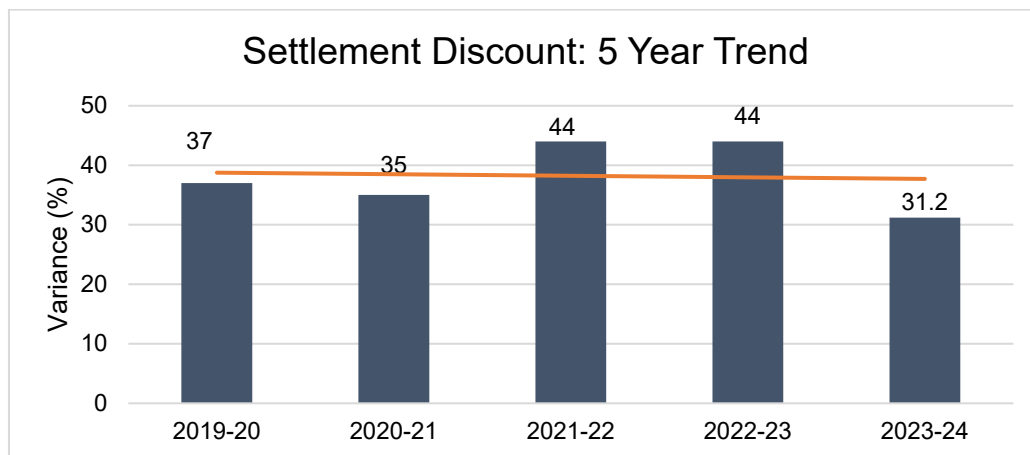


Figure 7: Commissioner of Taxation Annual Reports 2019-20 to 2023-24, Settlement variance averages

When you consider the tables at Figure 4, Figure 5 and Figure 6, it is evident that in prior years (2022-23 and 2023-24), the greatest discounts were achieved in settlements that took place during the objection phase. However, the materiality of the additional discount achieved may not necessarily outweigh the additional time and costs expended in reach the objection stage. For example, the average discount achieved in the pre-audit phase in the 2023-24 year was 38.5% which is not significantly less that the average discount achieved in the objection phase in the 2023-24 year of

39.6%. Depending on the amount of tax at stake, securing an additional 1.1% discount may be considered immaterial and not worth the extra effort, cost and resources.

3.3 Settlements in the context of different taxpayer populations

In 2022-23, the ATO settled a total of 251 cases, with the majority of these in the privately owned and wealthy groups and public and multinational businesses markets. A breakdown of all ATO settlements by group for 2022-23 is extracted below:³⁹

Client group	Settlement cases	% of total settlements	ATO position \$m	Settled position \$m	Variance \$m	Variance %
Individuals ^(a)	6	2.3	1.7	1.0	0.7	43
Small business	20	8.0	11.5	8.1	3.4	30
Privately owned and wealthy groups	75	29.9	123.3	73.9	49.4	40
Public and multinational businesses	74	29.5	5,497.6	3,078.7	2,418.9	44
Not-for-profit organisations ^(d)	1	0.4	1	0.5	0.5	52
Self-managed superannuation funds	75	29.9	5.9	4	2	33
Total	251	100	5,640.9	3,166.1	2,474.9	44

Notes

- (a) Variance calculations are based on exact figures.
(b) Totals may differ from the sum of components due to rounding.
(c) The client group Individuals does not include those who are in business – for example, sole traders.
(d) The client group Not-for-profit organisations includes government entities.

Figure 8: Commissioner of Taxation Annual Report 2022-23, Settlements by group 2022-23

In 2023-24, the ATO settled a total of 301 cases, with the majority of these in the privately owned and wealthy groups and public and multinational businesses markets. A breakdown of all ATO settlements by group for 2023-24 is extracted below:⁴⁰

Group	Settlement cases	% of total settlements	ATO position \$m	Settled position \$m	Variance \$m	Variance %
Individuals ^(a)	2	0.7	0	0	0	0
Small business	15	5.0	3.2	2.2	0.9	30.0
Privately owned and wealthy groups	154	51.2	199.5	135.0	64.5	32.3
Public and multinational businesses	67	22.3	2,604.5	1,795.8	808.7	31.0
APRA-regulated superannuation funds	1	0.3	9.0	4.3	4.7	52.3
Self-managed superannuation funds	62	20.6	5.9	4.2	1.7	29.5
Total	301	100	2,822.2	1,941.5	880.5	31.2

Notes

- (a) Variance calculations are based on exact figures.
(b) Totals may differ from the sum of components due to rounding.
(c) The Individuals group does not include those who are in business – for example, sole traders.

Figure 9: Commissioner of Taxation Annual Report 2023-24, Settlements by group 2023-24

³⁹ Commissioner of Taxation Annual Report 2022-23, [224].

⁴⁰ Commissioner of Taxation Annual Report 2023-24, [262].

3.3.1 Public Groups and International

In 2023-24, the Commissioner settled 67 cases with public and multinational businesses, securing around \$1.8 billion in tax revenue.⁴¹ Despite public and multinational businesses only accounting for 20% of the settlement population, the \$1.8 billion contributed amounted to 92% of the tax revenue collected in that year.⁴²

It is noteworthy that more than 75% of all public and multinational business settlements (approximately 22 settlements) in 2023-24 included future-year obligations.⁴³ This is often an important driver from the ATO's perspective when agreeing to settle a dispute, as it means that in addition to resolving past years, future behavioural change and increased tax collections through the settlement process can also be achieved, creating greater certainty for the tax system and government revenues.⁴⁴

ATO guidance notes, in the context of public and multinational business disputes, that “*Settlements contribute to a well-functioning tax system, providing overall fairness and the best use of our resources. Settlements secure revenue that may otherwise be at risk or difficult to pursue due to time and cost.*”⁴⁵

Key issues settled

In 2023-24, income tax was the predominant revenue type settled, accounting for around 96% of settlements with public and multinational businesses (approximately 28 settlements).⁴⁶ This represents a 20% increase from 2022-23, where income tax accounted for around 80% of settlements with public and multinational businesses (approximately 24 settlements), with the balance comprising fuel excise and GST issues.⁴⁷

Of the cases settled with public and multinational businesses in 2023-24, approximately 65% of settlements involved ‘global profit shifting risks’ including transfer mispricing, withholding tax avoidance and minimisation, mischaracterisation, thin capitalisation, treaty shopping and tax avoidance⁴⁸ reflecting the ATO's continued focus on this area, with approximately 65%-70% of current income tax audits in this sector involving global profit shifting issues.

In 2023-24, the ATO's settlement variance for public and multinational businesses was 31%, meaning that the Commissioner secured 69% of the disputed amount considered payable under their starting position.⁴⁹ The ATO's five-year average variance for public and multinational businesses is 39%, indicating that the Commissioner was more inclined to settle disputes for 61% of the disputed debt amount in 2023-24. Prior to 2023-24, the last time that the settlement variance was below the 39% average was in 2020-21, where the Commissioner presumably softened their debt collection approach during the course of the COVID-19 pandemic.⁵⁰

From a revenue collection perspective, the Commissioner having secured approximately \$1.8 billion in tax revenue in 2023-24 from settlements with public and multinational businesses, is consistent with

⁴¹ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

This includes settlements across all parts of the ATO, not just Public Groups. Disputes with public and multinational businesses commonly involve several legal entities, resulting in multiple counterparties signing settlement deeds.

⁴² *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

⁴³ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

⁴⁴ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

⁴⁵ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

⁴⁶ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

⁴⁷ *Public and multinational business settlements 2022–23* (ATO Findings Report NAT75627, January 2023), [5].

⁴⁸ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

⁴⁹ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

⁵⁰ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

the five-year average but is significantly lower than the \$3 billion in tax revenue secured by way of settlement with public and multinational businesses in 2022-23.⁵¹

3.3.2 Private Groups

It is important to note that the ATO do not report on disputes and settlements for private groups (including the Top 500 and Next 5,000 populations) as extensively as they report on disputes and settlements for public and multinational businesses.

Although the ATO has previously released statistics concerning settlements for individuals (including high wealth), micro enterprises, small-to-medium enterprises, large businesses and not for profit and government markets, this data is largely outdated (from 2016).

As at March 2022, approximately 29% of private wealth / groups cases are settled during pre-audit stage, 48% during the audit stage, 15% at the objection stage, with a very limited number of cases settling once they reach the Administration Appeals Tribunal or the courts.⁵²

3.4 Transparency and governance of ATO settlements

Alongside the regular release and reporting on settlement statistics by the ATO, transparency around ATO settlements is also achieved through objective, third-party transparency and governance initiatives, including the Independent Assurance of Settlements (**IAS**) program and the Australian National Audit Office's (**ANAO**) audit of the ATO's use of settlements.

3.4.1 The Independent Assurance of Settlements Program

The IAS program was introduced in 2016 and involves 5 former Federal Court judges, who provide a view on whether some of the ATO's largest and most significant settlements are fair and reasonable.

The criteria for a settlement to be automatically selected for review are where the:

- pre-settlement position is greater than \$50 million;
- settlement amount is greater than \$20 million; and
- variance is greater than \$20 million.

Any other case considered significant (for example, potential reputational significance or media interest) will be approved for review by a Deputy Commissioner.

In the 2017 audit conducted by the ANAO (discussed below), the IAS program was found to be contributing to the ATO's improvement of its approach to settlements, with the ATO having the highest level of reporting around settlements compared to other national revenue authorities internationally.⁵³

⁵¹ *Public and multinational business disputes and settlements 2023–24* (ATO Findings Report QC73422, 8 November 2024).

⁵² 'Private Groups Stewardship Group key messages' (ATO Website, 9 March 2022) < [Private Groups Stewardship Group key messages 9 March 2022 | Australian Taxation Office](#)>.

⁵³ 'Independent Assurance of Settlements Program' (ATO Website, 24 June 2024) < [Independent Assurance of Settlements Program | Australian Taxation Office](#)>.

In 2023-24, 16 ATO settlement cases were reviewed under the IAS program:

Settlement cases	ATO position \$m	Settled position \$m	Variance \$m	Variance %
16 ^(b)	5,678.9	3,129.8	2,549.0	45

Notes

(a) Totals may differ from the sum of components due to rounding.

(b) All independently assured settlements were found fair, reasonable and in the interests of Australia.

Figure 10: Commissioner of Taxation Annual Report 2023-24, Settlement cases reviewed by IAS program

This is a decrease from 2022-23, where 24 settlement cases were reviewed under the IAS program:

Settlement cases	ATO position \$m	Settled position \$m	Variance \$m	Variance %
24 ^(b)	2,787.8	1,861.9	925.9	33

Notes

(a) Totals may differ from the sum of components due to rounding.

(b) All independently assured settlements were found fair, reasonable and in the interests of Australia.

Figure 11: Commissioner of Taxation Annual Report 2022-23, Settlement cases reviewed by IAS program

The IAS program is noteworthy for taxpayers planning on engaging in settlement negotiations with the ATO. The process, which only occurs after a settlement is complete, can be a contributing factor to whether a settlement is reached with the ATO. In essence, it is important for a taxpayer to understand that there must be a good 'tax logic' behind a settlement offer which, in turn, will allow the ATO officers and their stakeholders to be assured that the settlement will be in the best interest of the administration of the tax system and will be approved by an independent assurer.

3.4.2 Australian National Audit Office audit of ATO settlements

In 2017, the ANAO undertook an audit with the objective to examine the effectiveness of the ATO's use of settlements to resolve taxpayer disputes. The high-level audit criteria was as follows:

- Does the ATO enter into, negotiate and follow up on settlements in accordance with its policies and procedures, including the Code of Settlement?
- Does the ATO have adequate internal guidance and public reporting for settlements?⁵⁴

The audit ultimately concluded that the ATO effectively uses settlements to resolve disputes with taxpayers; the ATO's settlement practices are effective, in that settlements were entered into, negotiated and followed up largely in line with its settlement policies and procedures, including the principles outlined in the Code of Settlement; and the ATO has comprehensive policies and procedures to provide guidance to officers with settlement responsibilities.⁵⁵

Further, the ANAO provided three audit recommendations⁵⁶ to the ATO, which the ATO agreed with. These recommendations were:

1. ATO to review key pre-settlement assurance mechanisms (such as panel usage, authority to settle, dual signoff, and the use of settlement submission template) across business lines and

⁵⁴ ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21 2017-18, 13 December 2017) [5].

⁵⁵ ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21 2017-18, 13 December 2017) [6] – [8].

⁵⁶ ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21 2017-18, 13 December 2017) [16].

implement changes to ensure all business lines have appropriately tailored pre-settlement mechanisms.

2. ATO to implement processes that provide assurance that settlement terms involving future compliance obligations are being met.
3. ATO to enforce the retention of adequate settlement case records and evidence in Siebel.

Whilst this ANAO audit was undertaken before the impacts of the COVID-19 pandemic were realised by the ATO and the Australian and international economy more generally, the audit report provides several valuable insights into the ATO's use of settlements which are still presently applicable, including:

- In 2017, the ANAO found that the ATO had a “*renewed focus on early dispute resolution through ongoing engagement with taxpayers, with an intention to more actively identify settlement opportunities.*”⁵⁷ Between 2013 and 2017, an average of 860 ATO settlements were reached each year.⁵⁸ However, more recently between 2019 and 2024, the ATO are averaging approximately 379 settlements per year.⁵⁹
- The Commissioner generally considers it inappropriate to settle where there is a contentious point of law that requires clarification. In this circumstance, the ATO may fund litigation for the taxpayer under its test case litigation program.⁶⁰ Settlement would also not be considered if it is in the public interest to litigate or there is a need to send a strong message to the community about the taxpayer's persistent non-compliant behaviour.⁶¹
- The ATO advised that there is no specific process within the client engagement business lines for monitoring taxpayer adherence to future compliance obligations following settlement and that different business lines have different approaches to follow up future compliance terms of settlement. The ATO advised the ANAO that it is the responsibility of the case officer to ensure that any future compliance obligations under the terms of settlement are satisfied.⁶² This led to the ANAO's recommendation 2.
- The ATO utilise a settlement outcome template to record the details of each settlement which are then used for various corporate reports including annual reports. After a deed has been executed, the case officer must load a settlement outcome template in Siebel within 14 days of the execution date. Of the cases sampled, 37 cases (62 per cent) had loaded the settlement outcome template within 14 days of the execution date. Of the cases that had templates loaded outside of the 14 days, six cases had over 100 days between the deed execution date and outcome template load date, with the highest being 491 days.⁶³ This may again be linked to the lack of public reporting on settlements by the ATO and ANAO's recommendation 3.
- The Public Groups and International (PGI) business line generated a monthly pipeline report with details of settlements in progress and finalised settlements, including cases for which negotiations have ceased however, no other business line generated a similar report.⁶⁴ Further, PGI had the highest level of conformance with the key procedures in the settlement negotiation phase of all business lines. These facts may provide insight as to why business lines outside of the Public Groups and International business line do not publicly report on settlements in as much detail (or at all).

⁵⁷ ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21 2017-18, 13 December 2017) [1.19].

⁵⁸ ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21 2017-18, 13 December 2017) [Figure 1.1].

⁵⁹ Commissioner of Taxation Annual Reports for 2019-20, 2020-21, 2021-22, 2022-23 and 2023-24.

⁶⁰ The test case litigation program funds cases that have tax implications beyond the particular taxpayer dispute. The program provides financial assistance to taxpayers to help them meet some or all of their reasonable litigation costs. See 'Test Case Litigation Program' (ATO Website, 24 June 2024) <[Test Case Litigation Program | Australian Taxation Office](#)>.

⁶¹ ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21 2017-18, 13 December 2017) [2.4].

⁶² ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21 2017-18, 13 December 2017) [2.51].

⁶³ ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21 2017-18, 13 December 2017) [3.20].

⁶⁴ ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21 2017-18, 13 December 2017) [2.11].

- Pre-settlement assurance mechanisms vary among the business lines. The following table, extracted from the ANAO report, provides a summary of this:

Mechanism/ business line	Private Groups and High Wealth Individuals	Public Groups and International	Small Business and Individuals	Indirect Tax	Superannuation	Review and Dispute Resolution
Panel referral	✓	None	✓ (Ad hoc basis for complex cases)	✓	✓ (Ad hoc basis for complex cases)	None
Settlement submission template ^a	New version	New version	Traditional version	Traditional version	Traditional version	New version
Settlement authorisation ^b	SES: Unlimited EL2: <\$10m EL1: <\$1m	SES	SES: Unlimited EL2: <\$10m EL1: <\$1m	SES or EL2	SES or EL2	SES: Unlimited EL2: <\$10m EL1: <\$1m
Counter- signoff	None	✓	None	None	None	None

Note a: Following feedback from the Independent Assurance of Settlements pilot (see paragraph 2.19), the ATO redesigned the traditional settlement submission template to improve the recording of settlement negotiations in real time. The new template is required to be completed for new settlement cases in Private Groups and High Wealth Individuals, Public Groups and International, and Review and Dispute Resolution post 1 July 2016, which can potentially be selected for the external Independent Assurance of Settlements review. Other business lines are encouraged to use the new template but they have the option of continuing with the traditional template.

Note b: The authorisation amount refers to the maximum amount of tax (including interest and penalties) that can be reduced. Business lines have different instruments of authorisation that set out the authorisation levels for concluding settlements in the business line.

Figure 12: The Australian Taxation Office's Use of Settlements ANAO Audit Report, Pre-settlement assurance mechanisms by business line

- Despite the above, it was concluded that: *"The ATO provides sufficient transparency around settlements in its public reporting, having regard to restrictions on disclosing information on particular settlements. The settlement information reported publicly by the ATO includes data on: the stage at which settlements occurred; and market segment and client group breakdowns of the number of settlement cases finalised, pre-settlement and settled ATO positions, and settlement variance. The ATO also provides a statement in its annual reports about the Independent Assurance of Settlements process and the level of confidence indicated by the review findings. When compared to other national revenue authorities, the ATO provided the highest level of public reporting around settlement activities."*⁶⁵

3.5 Strategies for achieving a successful ATO settlement

There are a number of practical considerations to factor into any settlement process with the ATO. In particular, understanding the ATO's organisational structure, the key ATO stakeholders relevant to the settlement process and the pressure points throughout the process are critical to achieving a successful settlement outcome.

⁶⁵ ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21 2017-18, 13 December 2017) [3.49].

3.5.1 Understanding the ATO's organisational structure

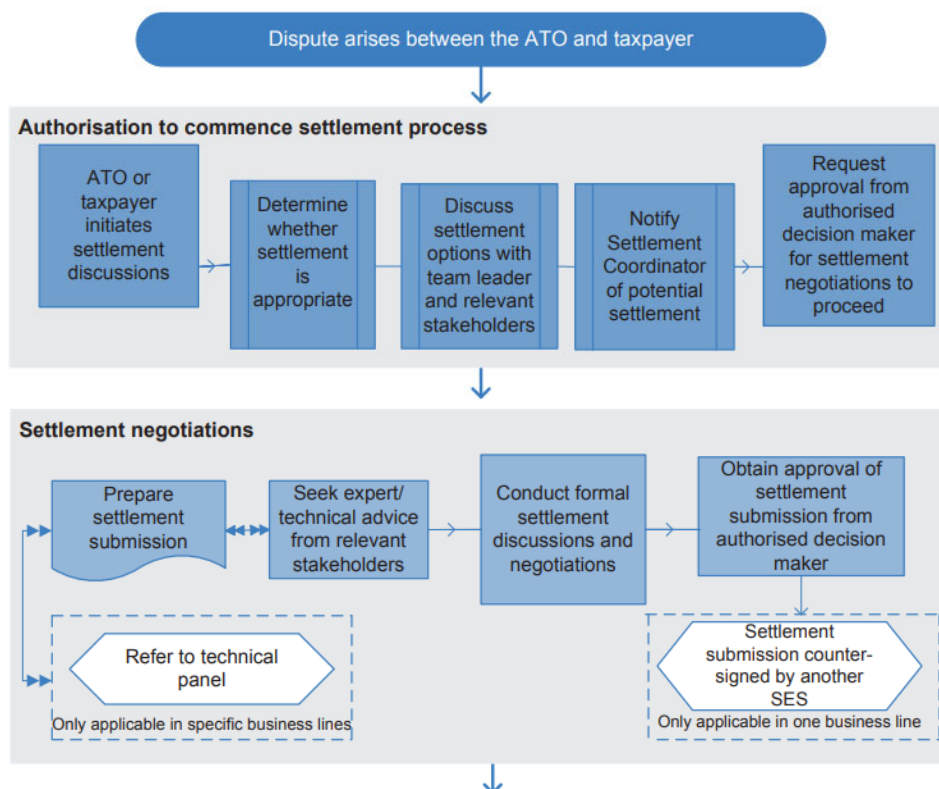
The ATO's organisational structure includes business lines that are responsible for managing certain tax matters and compliance activities for different market segments. The ATO's business lines that undertake settlements are: Private Groups and High Wealth Individuals; Public Groups and International; Small Business; Individuals; Indirect Tax; and Superannuation.⁶⁶ In addition to the ATO's overarching Code of Settlement, each business line has individualised settlement policies and procedures. It is imperative to understand the process to be followed and the stakeholders relevant to that process for the respective business line.

For example, within the Private Groups and High Wealth Individuals business line the Settlement Panel must approve all settlements. Effectively, this means the ultimate decision maker is not part of the negotiation process and therefore can be a potential blocker after the settlement outcomes have been discussed and agreed between the parties. There have been instances where the settlement panel has rejected an in-principal settlement, which can be frustrating for both parties when significant time, energy and resources have been committed to trying to bring the dispute to its final resolution.

3.5.2 Key internal stakeholders within the process

There are various steps and procedures within the process by which settlements are reached to resolve disputed tax cases, with some variations among business lines.⁶⁷

The following diagram, extracted from the ANAO's report, *The Australian Taxation Office's Use of Settlements*⁶⁸, provides an overview of the ATO's settlement process:



⁶⁶ ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21, 2017-18), [18].

⁶⁷ Variations between business lines' settlement policies and procedures include approval authorisations and assurance mechanisms. ANAO, *The Australian Taxation Office's Use of Settlements* (ANAO Report No. 21, 2017-18), [18].

⁶⁸ At [20].

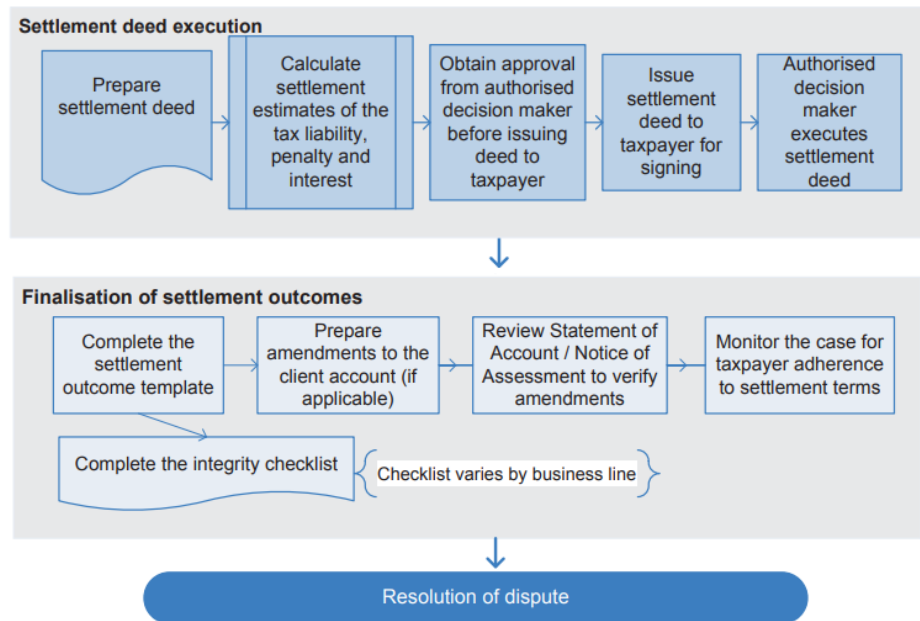


Figure 13: The Australian Taxation Office's Use of Settlements ANAO Audit Report, Overview of the ATO's settlement process

What is evident from these diagrams is that whilst the key point of contact during an ATO review or audit may be the team leader, the team leader has internal stakeholders that must be consulted throughout the process and may be required to approve the settlement outcomes. It is important to identify who these stakeholders are and ensure that they are well informed and engaged throughout the process.

Ultimately settlements can only be approved by an ATO officer who has the delegation or authorisation to conclude settlements. All Senior Executive Service (**SES**) officers have the delegation to settle taxation and super disputes.⁶⁹ Ensuring that the relevant SES officer is in the room when the settlement outcomes are being negotiated and agreed is therefore essential.

In some business areas, the ATO's Tax Counsel Network (**TCN**) is involved in the matter. TCN provides technical leadership in relation to significant tax issues, cases and rulings. Where TCN is involved, the ATO will need to seek their expert opinion in relation to the settlement (in particular, in relation to the merits of the Commissioner's case). For cases where external counsel has been engaged, it is expected that the advice of counsel would be obtained on the merits of the Commissioner's position and the reasonableness of the proposed settlement.⁷⁰ Given the input required from either TCN or external counsel (or both) to finalise a settlement, taxpayers should request their involvement from the outset of the settlement process to avoid any adverse reactions and potential delays down the line.

Settlement panels provide advice to ATO officers on reasonable parameters for settlement negotiations and decisions.⁷¹ As noted above, in some instances settlement panels can reject a settlement after it has been agreed in-principal by the parties. As settlement panels cannot be involved during the negotiation process, this is sometimes an unavoidable risk. The risk can however be mitigated by ensuring the ATO team leading the negotiations is consulting regularly with their key

⁶⁹ ATO Code of Settlement (24 June 2024).

⁷⁰ ATO Code of Settlement (24 June 2024).

⁷¹ ATO Code of Settlement (24 June 2024).

stakeholders who may be overseeing several settlements within the business line and can therefore provide input as to views of the settlement panel

3.5.3 How to practically reach a settlement outcome

While not the direct subject of this paper, there is much literature on negotiation techniques and negotiating styles (much of which is focused on the United States of America). For example, in the book *Getting to Yes* by Roger Fisher and William Ury⁷², in order to have a successful negotiation, one needs to separate the people from the problem, focus on interest not positions, canvass all possible outcomes before deciding what to do, and set an objective criterion as to what the result must achieve.⁷³

In our experience, often the path to success rests in both parties:

1. narrowing and articulating the issues in dispute;
2. identifying the bounds of each party's settlement parameters (for example, in relation to the substantive issue in dispute, interest and any applicable penalties); and
3. applying litigation risk and “tax logic” to arrive at a principled outcome.

In a practical sense, when preparing a settlement proposal, setting out the issues and the settlement parameters in a clear and concise manner together with the principles underpinning the offer (often known as the “tax logic”) equips the ATO team leading the negotiation with the ability to engage in productive conversations with their stakeholders and secure the necessary approvals to finalise the settlement.

⁷² R Fisher and W Ury, *Getting to Yes*, (Penguin Books, 3rd edition, 2011).

⁷³ R Fisher and W Ury, *Getting to Yes*, (Penguin Books, 3rd edition, 2011).

4. Alternative Dispute Resolution

ADR may be utilised by the Commissioner and the taxpayer as a pathway to reaching a settlement. The ATO's Code of Settlement notes that “*ADR approaches, including mediation, may be used during settlement negotiations*”.⁷⁴

ATO guidance defines ADR as an umbrella term for processes, other than judicial or tribunal determination, in which an impartial person assists those in a dispute to resolve or narrow the issues between them, including ADR processes run or initiated by courts or tribunals.⁷⁵

4.1 Types of ADR

The various types of ADR commonly used by the ATO are outlined in the below table.

Whilst the Commissioner does not report on the frequency of the use of each of the types of ADR, commentary around the Commissioner's perspective toward each type of ADR is also included below.

Type of ADR	Explanation
Negotiation	<p>Negotiation can take many forms and can be classified in many ways. In the broadest terms, a negotiation is “<i>generally, [a] mutual discussion and arrangement of terms of a transaction or agreement</i>.”⁷⁶</p> <p>In the context of a tax dispute, the ATO and the taxpayer (potentially with their legal representatives) will attempt to resolve the dispute through without prejudice⁷⁷ discussions, supported by principled settlement offers and counter offers that one party may put forward for consideration by the other. The settlement process is discussed in further detail in section 3.</p> <p>The ATO has noted that direct negotiation is their preferred method when it comes to resolving disputes.⁷⁸</p>
Facilitated Negotiation / Conferencing	<p>A neutral third party, the facilitator, assists the parties to discuss and resolve the dispute. The facilitator may assist the parties to resolve particularly difficult points, acknowledge each other's perspectives and identify interests.</p> <p>The ATO offers an ‘in-house facilitation’ program where the ATO appoint an accredited and impartial ATO facilitator to guide the discussion between the taxpayer and their case officer. The facilitator is professionally trained in mediation and will not have had previous involvement in the dispute.⁷⁹</p>

⁷⁴ ATO Code of Settlement (24 June 2024).

⁷⁵ PS LA 2013/3: *Alternative Dispute Resolution (ADR) in ATO disputes*, [4], referencing www.ag.gov.au and the ATO Plain English Guide to Alternative Dispute Resolution.

⁷⁶ *Concise Australian Legal Dictionary* (3rd ed, 2004) ‘Negotiation’.

⁷⁷ ‘Without Prejudice’ allows both parties to be transparent in their negotiations, without their positions and the information revealed throughout the negotiation process being able to be used against them as evidence in the event that the dispute proceeds to court.

⁷⁸ ‘Resolving Disputes’ (ATO Website, 14 October 2024) <[Resolving disputes | Australian Taxation Office](#)>.

⁷⁹ ‘In-house facilitation’ (ATO Website, 14 October 2024) <[In-house facilitation | Australian Taxation Office](#)>.

Mediation	A neutral third party, the mediator, manages a structured communication process in which the ATO and the taxpayer identify their interests, consider perspectives, review options and positions and seek solutions. In its strictest form, the mediator does not have a determinative or advisory role, as mediation is a facilitative process. However, the context of tax mediation, the mediator taking on a more advisory role can sometimes occur.
Conciliation (Neutral Evaluation / Case Appraisal)	A similar process to mediation except that the neutral third party (often an expert in the issue in dispute) can provide an opinion or suggestion in respect of the merit or potential outcomes of a particular party's position. This opinion is purely advisory (and not binding). As noted above, in a tax disputes context, a mediation may evolve into a process that is more similar to a conciliation, should the mediator take on a more advisory role.
Arbitration	<p>A neutral third party, the arbitrator, runs a hearing according to a set of rules agreed between the ATO and the taxpayer (or those imposed by relevant legislation) and delivers a binding determination. This is a determinative process.</p> <p>Arbitration is generally not appropriate for tax disputes because it can incur similar costs and delays as litigation, potentially conflicts with the statutory responsibilities of the Commissioner as decision-maker and can lack the openness and transparency of court or tribunal decisions.⁸⁰</p>

Figure 14, below, places each ADR alternative on a spectrum, having regard to cost, control of the outcome and whether the process is facilitative, advisory or determinative. The ADR spectrum is an important strategic consideration for any party considering ADR, when having regard to the risks associated with each type of ADR.

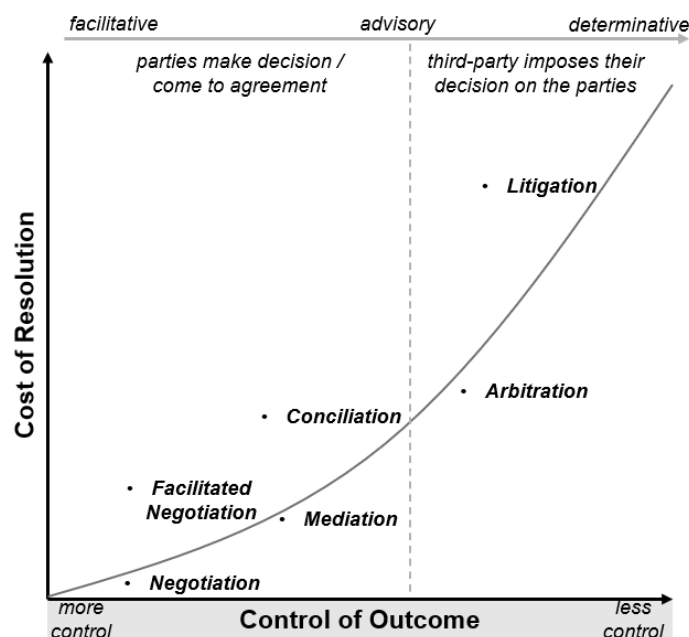


Figure 14: ADR alternative spectrum

⁸⁰ PS LA 2013/3, [24].

Whilst the type of ADR selected is ultimately up to the parties to the dispute to agree with each other, having consideration to the strategic considerations summarised in the above graph, the ATO notes that their preferred method of ADR is direct negotiation and, in our experience, are likely to favour this method over others.

4.2 ATO guidance and approach to ADR

The ATO has released several Practice Note Law Administration (**PS LA**) documents that provide further commentary and guidance around the Commissioner's approach to ADR including *PS LA 2013/3: Alternative Dispute Resolution in ATO disputes* and *PS LA 2009/9: Conduct of ATO litigation and engagement of ATO Dispute Resolution*.

As outlined in the above table and further in PS LA 2013/3⁸¹, ADR processes are generally classified as facilitative, advisory or determinative. The following definitions are provided in respect of each classification:

- In a facilitative process, an ADR practitioner assists the parties to identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement in respect of part, or all of the dispute. Mediation is an example of a facilitative process.
- In an advisory process, an ADR practitioner considers and appraises the dispute and provides advice on possible or desirable outcomes. Neutral evaluation and case appraisal are examples of advisory processes. Advisory processes, by their nature, cannot be made to be binding on any party.
- In a determinative process, an ADR practitioner evaluates the dispute and makes a decision. Arbitration (and expert determination) are examples of determinative processes.
- Some processes may overlap and become 'blended processes,' where the ADR practitioner plays multiple roles. For example, in conciliation and conferencing, the ADR practitioner may facilitate discussions as well as provide advice on the merits of the dispute.

PS LA 2009/9 notes that the ATO strives to have all disputes brought to finality in a fair, timely and equitable manner consistent with the law, and supports the appropriate use of all dispute resolution techniques to minimise litigation and related costs.⁸²

PS LA 2013/3⁸³ notes that by way of general observation, ADR may be appropriate when:

- there are issues that are able to be negotiated;
- the ATO has something to give;
- the taxpayer has something to give;
- the dispute is capable of being settled within existing settlement policies and practices; and / or
- early resolution is preferable to judicial determination.

Further, in practice, ADR may be appropriate where it will, for example:

- achieve a quicker or cheaper resolution particularly when the cost of litigating is out of proportion to the possible benefits;
- narrow or clarify the facts and issues in dispute;
- minimise risks associated with evidentiary difficulties;
- facilitate a certain / earlier payment of tax; and / or

⁸¹ At [23].

⁸² At [4].

⁸³ At [7].

- maintain or improve the relationship between the parties in dispute.⁸⁴

4.3 ADR approaches – pros and cons

Every dispute will have unique facts and circumstances that will lend themselves to the availability and preference of different types of ADR. In tax disputes, it is common for settlements to occur through direct negotiations because it is the most cost-efficient way to arrive at a principled outcome, where both parties have complete oversight and control over the process. However, this should not preclude the parties to the dispute from considering other avenues of resolving the dispute through different ADR methods. The appropriateness of each method should be determined based on their ‘pros’ and ‘cons’ in the context of the dispute and the preference of the parties.

The below table outlines some of key benefits and drawbacks associated with each type of ADR:

Type of ADR	Pros	Cons
Negotiation	<ul style="list-style-type: none"> • Participant autonomy and control over the process and the final outcome • Without the need for third party facilitation or formal procedures, direct negotiations can be quicker and more flexible • Cost effective as there is no need for intermediaries (such as Counsel or mediators) • Confidentiality is generally maintained (noting that there is a shift in ATO behaviour in this regard) • There is flexibility in the process as parties can tailor solutions creatively without being bound by rigid rules or external constraints • Direct communications can also lead to a more constructive approach, preserving the relationship between the parties 	<ul style="list-style-type: none"> • Power imbalances (due to resources and experience) can lead to unfair outcomes • Direct negotiation can be hindered by emotional conflicts • Without a facilitator or mediator shepherding the process, direct negotiations can lack structure which can cause confusion at certain junctures • Potential for stalemate if both sides are unwilling to compromise and there is no intermediary to defuse the situation
Facilitated Negotiation / Conferencing	<ul style="list-style-type: none"> • Facilitator ensures neutrality helping balance power dynamics and preventing bias • Facilitated negotiations can be faster than other approaches due to its structured yet flexible approach 	<ul style="list-style-type: none"> • Even if an agreement is reached, it is not enforceable without further legal backing (usually in the form of a binding settlement deed which must be negotiated and agreed separately)

⁸⁴ PS LA 2013/3, [8].

	<ul style="list-style-type: none"> Facilitators encourage open and constructive dialogue enabling parties to narrow the issues in dispute and have a better appreciation of each parties' position 	<ul style="list-style-type: none"> The success of the process depends heavily on the facilitator's skill, experience and effectiveness Facilitated negotiation may not be effective for very complex or deeply rooted conflicts that require more formal intervention
Mediation	<ul style="list-style-type: none"> As the mediator is an independent third party, they are often successful in assisting the parties narrow the issues in dispute and facilitate a compromise The mediator effectively removes any power imbalance as the parties use the mediator as an intermediary such that the parties do not have to engage directly The mediator can encourage flexible solutions whilst permitting the parties to have transparency and control over the process and outcome 	<ul style="list-style-type: none"> The agreement reached in mediation is not legally binding unless both parties choose to formalise it by way of a settlement deed (which must be separately negotiated) While the mediation itself may be relatively quick, the preparation required (often with written papers being shared with the mediator) and ensuring the availability of all stakeholders and intermediaries involved can prolong resolutions Can be relatively costly given the numerous representatives (including legal representatives and Counsel) and the mediators' involvement The success of the process is highly dependent on the mediator's ability to grasp the technical and appreciate the nuances in the fact pattern, which, in the context of tax disputes is often complex Inexperience or lacking commerciality may lead to suboptimal outcomes

<p>Conciliation (Neutral Evaluation / Case Appraisal)</p>	<ul style="list-style-type: none"> • The involvement of experts on the specific issues can lead to a clear and objective assessment of the merits of the case, helping both parties understand the strength and weaknesses of their positions • Due to the involvement of the expert, this method can lead to quicker resolution times • Each party has the opportunity to put their case forward to the expert thereby allowing the issues in dispute to be clearly and concisely communicated • Similar to the other ADR processes, the process is non-binding unless a formal settlement deed is negotiated by the parties reflecting the outcome of the process • Given that the success of the process is highly dependent on the expertise of the expert, in tax disputes where there may be multiples legal and technical positions in dispute, it may be challenging to find an expert with the diversity of experience and skill • While the conciliation itself may be time efficient, the preparation required and ensuring the availability of the relevant stakeholders (including the expert) may make it challenging to expedite the process
<p>Arbitration</p>	<ul style="list-style-type: none"> • The decision made by the arbitrator is final and binding providing certainty in the outcome • Arbitration is quicker than litigation as the process is generally more streamlined and less formal (but still results in a binding outcome) • The process is well structured providing clarity to both parties • Both parties have an opportunity to put their position across in a similar way to how they would present to a Court (without the associated time and costs) • While arbitration can be less expensive than litigation, it is still often costly when considering the arbitrators fees, legal representation and administrative costs are taken into account • There are limited options to appeal an arbitrator's decision, which means that if a party is dissatisfied with the outcome, there is little recourse to challenge the decision • Given the formal structure heavily dominated by the arbitrator, there is less participant autonomy and control over the process • Due to the significant cost and time commitment this can perpetuate power imbalances between parties • Less opportunity for the parties to explore flexible outcomes that are mutually beneficial given the arbitrators decision is final

5. The Future of ATO Settlements and Key Takeaways

5.1 Emerging trends

Throughout our ATO dealings in the recent years, we have observed several emerging trends, discussed below.

5.1.1 Public statements relating to ATO settlements and litigation

Whilst reaching a settlement has historically been favourable for many taxpayers due to its relative confidentiality (when compared with a process that is in the public interest, such as litigation), this is becoming a thing of the past.

It has recently been observed, particularly in the PGI space, that the ATO is often unwilling to settle a dispute unless the settlement deed imposes a requirement on the taxpayer to release a public statement in respect of the ATO settlement.

Further, settlement deeds now include (or are specifically devoid of) clauses that allow the ATO to share the outcome of a settlement with those countries that Australia have an Exchange of Information agreement with. This means that other jurisdictions have the ability to see the settlements reached in Australia and may look to implement similar outcomes in their jurisdiction as a result (especially where transfer pricing is concerned).

5.1.2 Increasing cost and uncertainty of litigation

The ATO's legal services expenditure has increased significantly over the years, driven by increasing legal costs market-wide as well as the ATO's increased focus on compliance following the COVID-19 pandemic. In 2023-24, the ATO spent \$113,949,774.00 on legal services.⁸⁵ This figure increased by \$8.9 million (8.5%) when compared to the previous year.⁸⁶ This, coupled with the growing uncertainty of whether a Court will decide the matter in the Commissioner's favour (with the litigation decisions under Part IVC of the *Taxation Administration Act 1953* increasingly supporting the taxpayer's position in whole or in part⁸⁷), means that there will be pressure on the ATO to successfully resolve disputes by way of settlement in a way that maximises the recovery of the disputed amount. Accordingly, while there appears to be a slight downward trend in the occurrence of settlements in the last few years (see Figure 3), it is likely that this trend may reverse in the years to come.

⁸⁵ Commissioner of Taxation Annual Report 2023-24, [263]. This figure includes both internal and external legal services expenditure. ATO internal legal officers manage tax litigation, debt litigation, general legal advice and freedom of information, resulting in a \$44,737,200.00 expense in 2023-24. External legal services costs amounted to \$69,212,574.00 in 2023-24 including professional fees, briefs to counsel and disbursements. The external costs exclude the ATO's 'Test Case Litigation' Program which provides financial assistance to taxpayers who are litigating matters that will clarify the tax and superannuation laws administered by the ATO, in the interests of developing legal precedent in order to ensure the community are being providing with clear principles on how to apply the law.

⁸⁶ Commissioner of Taxation Annual Report 2023-24, [263].

⁸⁷ Commissioner of Taxation Annual Report 2023-24, [265]; Commissioner of Taxation Annual Report 2022-23, [227]. In 2023-24, 29% of litigation decisions supported the taxpayer's position in whole or in part, an increase from 21% in 2022-23. These percentages include some Administrative Appeals Tribunal outcomes.

5.1.3 Impact of new ATO leadership

The ATO, under the new leadership of Rob Heferen, is likely to have a more cautious approach to settlements especially in the PGI space, where settlements can receive both media and political interests. This does not mean that the ATO will walk away from settling matters where it makes good sense from an administrative perspective however, it is likely that external scrutiny from the media, political pundits, and the IAS program will likely make it difficult for both the Commissioner and the taxpayer to come to a speedy resolution of a dispute, prior to litigation.

5.2 Long-term outlook

Settlements will always be a cornerstone of the tax disputes landscape. The overall complexity of the tax system, coupled with the sheer volume of activity occurring in the Australian economy will naturally mean that an administrator like the ATO will need to continue to find ways to administer the tax laws in an efficient and cost-effective manner – which settlements no doubt, do. However, the availability and the willingness of the ATO to enter into settlement arrangements tends to be cyclical and highly dependent upon the political environment, ATO leadership and the specific risks that are being identified and / or dealt with at that time. Given these factors, it will be interesting to observe the ATO's use of settlements under the new Commissioner of Taxation and a potentially new Federal Government during this election year.

5.3 Key takeaways and conclusion

ADR offers a practical and cost-effective way for taxpayers to resolve disputes with the ATO. The available data discussed above illustrates the optimal timing for initiating settlement discussions, highlighting the dispute stages at which the ATO is more likely to engage in successful negotiations and where the taxpayer may benefit from a reduced liability. The statistics offer valuable insights into the success rates and preferred strategies for settlement negotiations, particularly in public and multinational markets. Additionally, navigating the settlement framework, including the process and the stakeholders involved are critical to optimising settlement outcomes.