



Confidentiality in Alternative Dispute Resolution Processes

Guidelines for applicants, respondents and representatives

1. The Administrative Appeals Tribunal (AAT) uses alternative dispute resolution (ADR) processes to try and resolve matters and agree to a final decision without the need for a hearing. Where an agreement cannot be reached, the ADR process is designed to narrow the issues in dispute that will be discussed at the hearing.
2. ADR processes, as defined in s 3(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act), include [conferencing](#), [conciliation](#), [mediation](#), [neutral evaluation](#) and [case appraisal](#). Most ADR processes at the AAT are conducted by a Conference Registrar.¹
3. Parties engaging in ADR processes at the AAT are required to act in “[good faith](#)”: s 34A(5) of the AAT Act. Maintaining the confidentiality of the ADR process is a very important aspect of acting in good faith. There are limitations, however, to the confidentiality of ADR processes at the AAT just as there are in any ADR setting, including private mediation.
4. This document provides information about confidentiality in ADR processes. It should be read in conjunction with the fact sheet, [Privacy and confidentiality at the AAT](#).

Why is confidentiality important?

5. Confidentiality is an essential feature of ADR processes. Confidentiality is generally maintaining private and secret: all discussions; the contents of documents disclosed that will not be used as evidence; and information provided during the ADR process. Maintaining confidentiality encourages meaningful participation and can promote good outcomes.² Respecting confidentiality encourages a full and frank discussion between the parties about the issues in dispute and this can assist in the resolution or narrowing of the issues.

Are ADR processes held in public or in private?

6. Unlike most hearings at the AAT, which are open to the public, ADR processes are held in private only the parties and their representatives usually attend with the Conference Registrar.

¹ At times a Member of the Tribunal may also conduct an ADR process.

² National Alternative Dispute Resolution Advisory Council *Maintaining and Enhancing the Integrity of ADR Processes: from principles to practice through people* (February 2011) p:41.

7. In the course of an ADR process (particularly conciliations and mediations) the Conference Registrar may discuss matters in a private session with the parties. What is said in the course of those private sessions is kept confidential. The Conference Registrar has an ethical obligation not to disclose information obtained in the course of a private session unless clearly instructed to do so by a party or where disclosure is otherwise required by law.

Is what is said or done, at an ADR process, confidential?

8. Matters discussed during an ADR process vary widely but can include proposals and options to reach a settlement of the application; discussion of circumstances that have given rise to the application; calculations of possible entitlements; and case management issues to help prepare the application for hearing, for example exchange of names of treating medical practitioners.
9. What is said or done in the course of an ADR process at the AAT cannot be admitted as evidence in any hearing before the AAT (unless the parties agree) or in any other court or tribunal: s 34E of the AAT Act. For example, the terms of any settlement offer or concession made by either party in an ADR process would not be reported or admitted as evidence in a subsequent hearing and to do so would be considered as contempt and a breach of trust.
10. Evidence lodged by a party with the AAT that is discussed in the course of an ADR process is treated differently. Evidence (such as witness statements, medical reports, video surveillance footage and reports) forms part of the AAT file and is not treated confidentially simply because it was discussed at an ADR process. The parties may rely on that evidence at a hearing without seeking the agreement of the other party or parties.
11. Any written report provided to the parties following a case appraisal or neutral evaluation may be admitted into evidence during a hearing unless a party objects.
12. Information about procedural matters discussed at an ADR process, including any directions that are made or undertakings to do things, will be recorded and communicated within the AAT as part of our case management processes.
13. Where an application is settled at or following an ADR process, the AAT may make a decision in accordance with terms of agreement lodged by the parties: see ss 34D and 42C of the AAT Act. The AAT's decision may be made available to a person who was not a party to the decision on request unless the decision is subject to a confidentiality order under s 35 of the AAT Act or another legislative requirement for confidentiality applies.

Disclosure to third parties

14. The AAT expects that parties will deal sensitively with confidential information disclosed to them in the course of an ADR process.
15. While the AAT Act does not specifically prohibit a party from disclosing to third parties anything said or done in the course of an ADR process, parties should be aware that there may be limitations on disclosing information obtained in AAT proceedings.

- Information cannot be disclosed if it is subject to a confidentiality order under s 35 of the AAT Act or another legislative requirement for confidentiality applies.
 - Duties of confidentiality may arise in the context of someone receiving information which they know, or should know, is confidential.³ Parties may be able to pursue remedies for breach of confidence in relation to information received in an ADR process, if the information was communicated in circumstances where there was an obligation of confidence.⁴
 - A party that obtains a document provided under compulsion in an AAT proceeding must not use the document for any purpose other than that for which it was given unless:
 - the document was received in evidence by the AAT in relation to the proceeding and the confidentiality of the document is not protected by an order under s 35 of the AAT Act or by another statutory provision; or
 - the AAT gives the party leave to use the document for another purpose.
16. This implied undertaking applies to documents lodged under s 37 of the AAT Act, documents lodged pursuant to a direction given by the AAT (for example, expert reports or witness statements) and documents produced in response to a summons issued by the AAT: see the AAT's [Practice Direction relating to Release from the Implied Undertaking](#).
17. These guidelines have effect from 17 April 2014.

Justice Duncan Kerr
President
17 April 2014

References

Ethical guidelines for mediators Law Council of Australia August 2011

National Mediator Accreditation System Practice Standards, September 2007

[Privacy and Confidentiality at the AAT: What is usually public and what is usually private when the AAT reviews a decision.](#)

National Alternative Dispute Resolution Advisory Council, *Maintaining and Enhancing the Integrity of ADR Processes: from principles to practice through people* (February 2011)

³ National Alternative Dispute Resolution Advisory Council *Maintaining and Enhancing the Integrity of ADR Processes: from principles to practice through people* (February 2011) p.47.

⁴ Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47.