



## **The Duty to Act in Good Faith in ADR Processes at the AAT**

### ***Guidelines for applicants, respondents and representatives***

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1. Parties participating in alternative dispute resolution (ADR) processes in the Administrative Appeals Tribunal (AAT) must act 'in good faith' in relation to their conduct: s 34A(5) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act).
2. ADR processes, as defined in s 3(1) of the AAT Act, include conferencing, conciliation, mediation, neutral evaluation and case appraisal.
3. Parties' willingness to act in good faith is integral to the ADR process. Such willingness ensures that the fairness of the process is maintained and that parties can have confidence in any agreement reached through that process. An important aspect of the success of ADR processes is the ability of parties to rely on each other to act honestly and fairly when seeking to resolve or narrow the terms of their dispute.
4. This document provides a guide to the type of conduct that is expected of parties attending an ADR process at the AAT. It is by no means definitive or exhaustive.

#### **Good faith**

5. The term 'good faith' is not defined in the AAT Act, but could be defined to include a 'genuine effort' to uphold the basic principles of ADR.<sup>1</sup> These include:
  - people have a responsibility to take steps to resolve or clarify disputes
  - disputes should be resolved in the simplest and most cost-effective way
  - people who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.

#### **Conduct in good faith**

6. The Tribunal regards the following conduct as consistent with the duty to act in good faith:
  - ensuring that the person attending an ADR process (other than conferencing) on behalf of a party has the necessary authority to settle the matter
  - adopting an honest and genuine approach to resolving a dispute by discussion
  - maintaining the confidentiality of the ADR process: see the fact sheet [Privacy and confidentiality at the AAT](#) for more information

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<sup>1</sup> See National Alternative Dispute Resolution Advisory Council, *Maintaining and Enhancing the Integrity of ADR Processes*, Report (2011), p 35. 'Genuine effort' is the standard required for family dispute resolution processes under the *Family Law Act 1975* (Cth), but is not defined in the Act.

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- treating other parties to the ADR process and the AAT member or Conference Registrar respectfully
- acting reasonably and fairly having regard to the interests of all the parties disclosing information relevant to the dispute in a timely fashion
- being prepared to make concessions for the purposes of the ADR process, though not necessarily for the purposes of any subsequent AAT hearing
- endeavouring to limit the scope of proceedings by making partial concessions where appropriate
- having an open mind and a willingness to consider the interests of the other side, understand their position and consider options generated by the other side, or the AAT member or Conference Registrar
- having a willingness to propose options for the resolution of the dispute and discuss your position in detail
- explaining the rationale behind an offer of settlement or the refusal of the other party's offer of settlement
- being faithful to any agreement reached in the ADR process that is, 'holding up your end of the bargain'.

### **Withdrawing**

7. The duty to act in good faith does not:
- prevent a party from withdrawing from the ADR process if appropriate
  - require that agreement is reached or any particular outcome is achieved.

### **Inconsistent with good faith**

8. Failing to attend an ADR process without sufficient notice or reason is not consistent with a party's duty to act in good faith.

### **Duties of Australian Government agencies**

9. The AAT Act (s 33(1AA)) obliges decision-makers to use their best endeavours to assist the AAT in making decisions in relation to the proceedings.
10. Australian Government agencies and their representatives are also bound by the [Legal Services Directions 2005 \(Cth\)](#) that requires these agencies to act as 'model litigants'. The model litigant rules require Agencies to consider other methods of dispute resolution before commencing litigation, to participate 'fully and effectively' when participating in ADR and have authority to settle.<sup>2</sup> The obligations apply to proceedings in merits review tribunals and in all alternative dispute resolution processes. The standards expected of a model litigant go beyond the requirement that lawyers act in accordance with the ordinary ethical obligations of the legal profession.<sup>3</sup>

### **Disclosure obligations**

11. The duty to act in good faith does not oblige a party to act against his or her own interests or to act in the interests of the opposing party. However it does exclude unethical conduct.

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<sup>2</sup> *Legal Services Directions 2005 (Cth)*, Appendix B, cl 5.1 and 5.2.

<sup>3</sup> See Appendix B, cl 2, notes 1 and 3.

12. Representatives who are legal practitioners must fulfil their obligations under:
- Australian Solicitors' Conduct Rules
  - Barristers' Rules applicable in the practitioner's jurisdiction of practice.

### Seeking advice

13. Most ADR processes are simple but complex circumstances can arise. Although acting in good faith does not require an applicant or Agency to act in the interests of the other party it does prohibit misleading conduct. Misleading conduct can take many forms. Remaining silent when a lawyer knows the other party is relying on a false assumption they or their client has induced can be a breach of a lawyer's professional obligations, It is the duty of lawyers and other representatives to ensure their conduct is professional and ethical. If a representative is in any doubt about their ethical or professional obligations they should seek advice from their relevant professional body.<sup>4</sup>

### Confidentiality

14. The AAT Act (s 34E) prevents evidence of anything said or done during ADR processes at the AAT from being used in any court or tribunal proceeding, subject to limited exceptions.<sup>5</sup> This protection, the disclosure requirements of s 37 and the duty of good faith combine to set high standards and expectations for parties to ensure full and frank disclosure during AAT ADR processes.

These guidelines have effect from 11 December 2013.

**Justice Duncan Kerr**  
**President**  
**11 December 2013**

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<sup>4</sup> For a detailed discussion of the obligations of legal advisors during ADR processes see the paper, [The Ethical Limits of Advocacy in Mediation](#), prepared for the NSW Bar Association by Robert Angyal SC.

<sup>5</sup> Subsection 34E(2) provides that particular evidence arising out of an ADR process is admissible at hearing if the parties agree to the evidence being admissible. Subsection 34E(3) allows the admission of a case appraisal report or a neutral evaluation report in the absence of an objection by a party.