



Lodgement of Documents under Sections 37 and 38AA of the AAT Act

This Direction is given under section 18B of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

1. About this Direction

- 1.1 This Direction sets out the procedures of the Administrative Appeals Tribunal (AAT) in relation to the documents that a decision-maker must lodge with the AAT under sections 37 and 38AA of the AAT Act. They are referred to in this Direction as the 'Section 37 documents' and 'Section 38AA documents' respectively.

Application

- 1.2 This Direction applies from 1 July 2015 to any application for a review of a decision to which section 37 of the AAT Act applies. It does not apply to:
- (a) an application in the Migration and Refugee Division; and
 - (b) an application for review of a security assessment under section 54 of the *Australian Security Intelligence Organisation Act 1979*.

Interpretation

- 1.3 All references to section numbers are to the AAT Act, unless otherwise specified.
- 1.4 In this Direction:

decision-maker means:

- (a) the person who made the decision that is the subject of the application for a review of a decision; or
- (b) where the AAT Act has been modified by another enactment, the person who has the obligations of a decision-maker under section 37 or section 38AA;
- (c) for an application for second review of a decision made by the Social Services and Child Support Division – the person specified in subsection 37(1AAB).

first review means a review that an enactment designates as an ***AAT first review***.

second review means a review that an enactment designates as an ***AAT second review***.

video surveillance material includes footage recorded in any format, any report relating to the footage and any log sheets produced in connection with the footage.

we or **us** means the AAT.

- 1.5 In accordance with the definition in section 2B of the *Acts Interpretation Act 1901*, a document means any record of information and includes anything from which sounds, images or writings can be reproduced with or without the aid of anything else.

2. When to lodge documents under section 37

- 2.1 The decision-maker must lodge the Section 37 documents with us within 28 days after receiving notice of the application or within such further time as we allow: subsection 37(1).
- 2.2 If an application for a review of a decision was not lodged within the applicable time limit, the period in which to lodge the Section 37 documents is 28 days after the later of:
- (a) the day on which the decision-maker receives notice of the application; or
 - (b) the day on which the AAT makes a decision to extend the time for making the application: subsection 37(1B).

Extension of the time to lodge Section 37 documents

- 2.3 A decision-maker may apply to have the 28-day time period extended. An application must be made to us if the decision-maker will not be able to lodge all or some of the documents within the 28-day period. An application to extend the time period must be made before the 28-day period expires.
- 2.4 An application to extend the time period must:
- (a) set out the reasons for requesting further time;
 - (b) advise whether or not the applicant opposes the request; and
 - (c) be lodged with us and given to the other party.
- 2.5 We will usually decide the application on the papers. If we consider a hearing should be held or, if a party advises that it wishes to make submissions, we may decide to hold a hearing in person or by telephone.

Shortening the time to lodge documents

- 2.6 On the request of a party, we may make an order under subsection 37(1A) directing that the Section 37 documents be lodged within a shorter period, if it appears to us that the party would or might suffer hardship if the period is not shortened.
- 2.7 A request for an order shortening the time to lodge the Section 37 documents must be made:
- (a) in writing in accordance with the approved form (Request for order to shorten time for lodging copy of document) which is available on the AAT website; or
 - (b) in another way we allow or direct.

- 2.8 We may also request a decision-maker to lodge the Section 37 documents before the end of the applicable period in relation to an application for first review of a social services or child support decision.

What documents must be lodged under section 37

- 2.9 Subject to any legislative provision or direction that modifies the operation of subsection 37(1), the decision-maker must lodge with the AAT one copy of:
- (a) a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision: paragraph 37(1)(a); and
 - (b) every other document or part of a document that is in the decision-maker's possession or under the decision-maker's control and is relevant to the review of the decision: paragraph 37(1)(b).
- 2.10 For subsection 37(1AAB), the requirements in subsection 37(1) also apply to an application for second review of a decision of the Social Services and Child Support Division.
- 2.11 A decision-maker may, instead of the statement required under paragraph 37(1)(a), lodge a copy of the document setting out the decision under review and the reasons for the decision if that document contains the matters required by paragraph 37(1)(a).
- 2.12 Section 37 has effect notwithstanding any rule of law relating to privilege or the public interest in relation to the production of documents: subsection 37(3).

Video surveillance material

- 2.13 If video surveillance material is in the possession of, or under the control of, a decision-maker and is relevant to the review of the decision, the decision-maker must lodge a copy of that material with us.

Applications under the Archives Act 1983 and the Freedom of Information Act 1982

- 2.14 If an application is for a review of a decision made under the *Archives Act 1983* or the *Freedom of Information Act 1982*, the decision-maker is not required to lodge with us under section 37 any document that is claimed to be an exempt record or exempt document: section 53 of the *Archives Act 1983* and section 64 of the *Freedom of Information Act 1982*.
- 2.15 If an application relates to a request for access to documents under the *Freedom of Information Act 1982* and a decision-maker has transferred any part of the request to another agency, the statement required under paragraph 37(1)(a) must identify the name of the agency that accepted the transfer, the aspects of the request that have been transferred and the date on which any transfer was made.

3. Confidential documents

- 3.1 In accordance with subsection 37(1AF), a decision-maker may apply for a direction under section 35 of the AAT Act that all or part of the contents of one or more of the Section 37 documents not be disclosed to the applicant or another party.

Applying for a direction that documents not be disclosed to another party

- 3.2 An application for a direction under section 35 must be made in writing and lodged with us together with a copy of each document in respect of which the direction is sought. The application must be made within the time period for complying with subsection 37(1) (including any extension of time that we grant).
- 3.3 The decision-maker must give a copy of the application, but not any document in respect of which the direction is sought, to any other party to the application.
- 3.4 The decision-maker is not required to include with the Section 37 documents any document in respect of which a direction is sought unless and until we:
- (a) decide the application for a direction under section 35; and
 - (b) direct the decision-maker to do so.
- 3.5 We will usually decide an application for a direction under section 35 on the papers. If we consider a hearing should be held or, if a party advises us that it wishes to make submissions, we may hold a hearing in person or by telephone.
- 3.6 We note that certain information may be protected from disclosure where an Attorney-General gives a certificate under section 36 or s 36B that disclosure of matter contained in a document would be contrary to the public interest.

4. Presentation of documents under section 37

Applications other than applications for first review or second review of social services or child support decisions

- 4.1 Unless otherwise agreed with us, the Section 37 documents must be arranged in the following order:
- (a) the application for review;
 - (b) the statement under paragraph 37(1)(a) or the document setting out the decision and reasons for decision;
 - (c) all other documents in chronological order from the earliest to the latest date.
- 4.2 Each document must be identified with a number commencing with the application for review as 'T1'. Subsequent documents will bear 'T' numbers in sequence. Each page must be numbered sequentially.
- 4.3 The Section 37 documents must be accompanied by an index, which sets out the date and a brief description of each document. The pagination must be set out in the index.

Applications for first review of social services and child support decisions

- 4.4 The Section 37 documents for applications for first review of social services and child support decisions must be arranged in the manner and lodged in the format agreed between us and the Department of Human Services. Each page must be numbered sequentially.

Applications for second review of social services and child support decisions

- 4.5 The Section 37 documents for applications for second review of social services and child support decisions must be arranged in the manner agreed between us and the Department of Human Services.
- 4.6 Each document must be identified with a number commencing with the application for review as 'T1'. Subsequent documents will bear 'T' numbers in sequence. Each page must be numbered sequentially.
- 4.7 The Section 37 documents must be accompanied by an index, which sets out the date and a brief description of each document. The pagination must be set out in the index.

5. Giving documents to other parties

- 5.1 Unless we direct otherwise, the decision-maker must give a copy of the Section 37 documents to any other party within the period for lodging the documents with us: subsection 37(1AE).
- 5.2 Where a decision-maker has made, and given to any other party, an application for a direction under section 35 in relation to a document, the decision-maker is not required to give a copy of the document to another party unless or until we:
 - (a) decide the application for a direction under section 35; and
 - (b) direct the decision-maker to do so.

6. Supplementary Section 37 documents

- 6.1 If the decision-maker becomes aware that:
 - (a) documents relevant to the decision under review were in its possession or control at the time the Section 37 documents were prepared; and
 - (a) those documents were not included in the Section 37 documents;
 the decision-maker must lodge the documents with us and give a copy to each other party as soon as is reasonably practicable, or in accordance with a direction of the AAT. These documents are referred to as 'Supplementary Section 37 documents'.

Applications other than applications for first review of social services or child support decisions

- 6.2 Supplementary Section 37 documents must be arranged in chronological order and identified with a number commencing with the first document marked as "ST1" and subsequent documents marked with "ST" numbers in sequence. Each page must be numbered. The page numbering is to be continued from the Section 37 documents.
- 6.3 Supplementary Section 37 documents must include an index, which sets out the date and page number of each document and a brief description of each document.

Applications for first review of social services and child support decisions

- 6.4 Supplementary Section 37 documents for applications for first review of social services and child support decisions must be arranged in the manner and lodged in the format agreed between us and the Department of Human Services.

7. Provision of Further Copies of Section 37 Documents

- 7.1 We may direct a decision-maker to lodge additional copies of the Section 37 documents at any time: subsection 37(1AA).

8. Further and better particulars and additional documents

- 8.1 We may direct a decision-maker who has lodged a statement under paragraph 37(1)(a) to lodge with us a further statement within a specified time: section 38.
- 8.2 The further statement must set out further and better particulars in relation to any one or more of the following in accordance with the direction:
- (a) particulars of findings on material questions of fact;
 - (b) reference to the evidence or other material on which those findings were based;
or
 - (c) particulars of the reasons for the decision.
- 8.3 If we form the opinion that particular other documents or documents of a particular class may be relevant to the review, we may request in writing that the decision-maker lodge a specified number of copies of those documents within a specified time: subsection 37(2).
- 8.4 Unless we direct otherwise, documents lodged under a notice issued pursuant to subsection 37(2) must be presented in the same manner as Supplementary Section 37 Documents.

9. Ongoing requirement to lodge relevant documents under section 38AA

- 9.1 After the time for complying with section 37 has ended and before the review is determined, a decision-maker must lodge with us a copy of any document that comes into the decision-maker's possession and is relevant to the review, other than any document:
- (a) previously lodged with us under section 37;
 - (b) already given to us by another party; or
 - (c) we have given to the decision-maker.
- 9.2 A Section 38AA document must be lodged as soon as practicable after the decision-maker obtains possession or control of the document.
- 9.3 The decision-maker must also give a copy of any Section 38AA document to any other party at the same time, unless the decision-maker applies for a direction under section 35 of the AAT Act in relation to the document in accordance with the procedures specified in Section 3 of this Direction.

Video surveillance material

- 9.4 Subject to any other direction or order we may make, if a decision-maker intends to rely on video surveillance material at the hearing of an application and that material has not already been lodged with us and given to any other party, the decision-maker must give a copy of the material to us and to any other party at least 28 days before the day on which the hearing is listed to commence.
- 9.5 If video surveillance material has not been given to us and any other party prior to the hearing in accordance with this Direction, or such other direction or order that we may make, the decision-maker may not rely on the material as evidence in the application without the leave of the AAT.
- 9.6 We will not make a direction under section 35 in respect of video surveillance material unless there is a persuasive reason, in the particular circumstances of an individual case, which requires us to make such a direction. The fact that the credibility of another party may be in issue will not, of itself, be a sufficient reason to make such a direction.

Justice Duncan Kerr
President

30 June 2015