



Review of Taxation and Commercial Decisions

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

1. About this Direction

Application

- 1.1 This Direction sets out the procedures of the Administrative Appeals Tribunal (AAT) in relation to:
- (a) applications in the Taxation and Commercial Division;¹ and
 - (b) applications relating to decisions made under the:
 - (i) *Airports Act 1996* and legislative instruments made under that Act;
 - (ii) *Civil Aviation Act 1988* and legislative instruments made under that Act;
 - (iii) *National Health Act 1953* in relation to pharmacies; and
 - (iv) *Quality Agency Principles 2013*.
- 1.2 This Direction has effect from 1 July 2015.
- 1.3 The procedures set out in this Direction may be altered to suit individual cases but only by a specific direction of the AAT.
- 1.4 If another Direction is inconsistent with this Direction, this Direction applies.

Interpretation

- 1.5 In this Direction:
- decision-maker** means:
- (a) the agency or other entity that made the decision under review and any representative; or
 - (b) if another agency or entity is a party and is the contradictor in the review – that agency or other entity and any representative;

¹ The applications that are allocated to the Taxation and Commercial Division are set out in the Allocation of Business to Divisions of the AAT President's Direction.

we or **us** refers to the AAT;

you refers to the Applicant and any representative.

2. General principles

- 2.1 In general, an AAT member will be allocated to manage each case from lodgement to resolution (the **Managing Member**), assisted by the AAT's Conference Registrars who will usually conduct any alternative dispute resolution (ADR) processes.
- 2.2 In carrying out our functions, we must pursue the objective of providing a mechanism of review that:
- (a) is accessible;
 - (b) is fair, just, economical, informal and quick;
 - (c) is proportionate to the importance and complexity of the matter; and
 - (d) promotes public trust and confidence in the decision-making of the AAT.²
- 2.3 You and the decision-maker must use your best endeavours to assist us to fulfil this objective.³ The decision-maker must also use its best endeavours to assist us to make our decision in relation to the application.⁴
- 2.4 We expect you and the decision-maker to cooperate with us and with each other to:
- (a) identify the real issues in dispute early; and
 - (b) deal with those issues efficiently and effectively.

We expect you and the decision-maker to think about the best way to run the case and to engage in a dialogue with us to achieve our statutory objective. These expectations apply regardless of the nature or complexity of the matter.

- 2.5 We aim to reduce cost and delay by:
- (a) narrowing the issues in dispute;
 - (b) limiting factual investigation to what is required in relation to the issues;
 - (c) holding as few additional case events as possible.

We recognise that the particular steps to be taken in moving each application towards resolution will vary. We will adopt a case management approach that best meets the needs of each application. Flexibility is the key to our approach.

3. Initial procedures

- 3.1 Shortly after an application is lodged, we will allocate it to a Managing Member. In general, the Managing Member will manage the application and, if the application proceeds to hearing, preside at the hearing.
- 3.2 In most cases, the first case event will be a case management directions hearing conducted by the Managing Member. However, some applications may be referred to the conference process and managed initially by an AAT Conference Registrar.

² Section 2A of the AAT Act.

³ Subsection 33(1AB) of the AAT Act.

⁴ Subsection 33(1AA) of the AAT Act.

- 3.3 We will send you and the decision-maker a listing notice setting out the date, time and location of the first case event.
- 3.4 The decision-maker must, within 28 days after receiving notice of an application, lodge with the AAT and give to you and any other party the documents required under subsection 37(1) of the AAT Act. These documents are referred to as the 'Section 37 documents'. We have the power to shorten or extend the 28 day period if an application is made to us.⁵ For more information about the requirements relating to the Section 37 documents, see the Lodgement of Documents under Sections 37 and 38AA of the AAT Act Practice Direction.
- 3.5 If you believe your application needs to be dealt with urgently, you can request an expedited review in accordance with the procedure set out in our General Practice Direction. We will actively facilitate the expedited review of a decision if we are satisfied it requires an urgent determination.

4. Case management directions hearing

- 4.1 Generally, the Managing Member will hold a first directions hearing to discuss the management of the application before the Section 37 documents are lodged. The Managing Member may hold the directions hearing after the Section 37 documents have been lodged if you or the decision-maker request this.
- 4.2 The case management directions hearing may be held in person or by telephone.
- 4.3 At the case management directions hearing, the Managing Member will discuss with you and the decision-maker the case management strategy that will be most effective to achieve early resolution of the application by way of agreement between the parties or by the AAT making a decision. The strategy must be proportionate to the nature and complexity of the application.
- 4.4 Consideration will be given, in particular, to the following:
- (a) whether any orders ought to be made about the Section 37 documents;
 - (b) in the case of multiple applications or multiple applicants, whether particular procedural directions should be made;
 - (c) whether there is a related proceeding elsewhere, such as:
 - (i) a debt recovery proceeding in a court; or
 - (ii) a proceeding under Part IVC of the *Taxation Administration Act 1953* in the Federal Court of Australia; and
 if so, what impact this may have on the application;
 - (d) whether an early ADR process should be arranged or the parties be allowed a period for private negotiation;
 - (e) how evidence is to be presented at any hearing, including:
 - (i) whether the hearing should proceed on evidence in the form of witness statements or oral evidence with outlines of the evidence anticipated to be given by each witness;

⁵ See subsections 37(1) and (1A) of the AAT Act.

- (ii) if any experts are to give evidence, whether the evidence will be given other than by way of the concurrent evidence procedure.⁶
 - (f) making directions about lodging with us and giving to the other party evidence and Statements of Issues, Facts and Contentions; and
 - (g) the scheduling of hearing dates.
- 4.5 We expect you and the decision-maker to communicate with each other in a meaningful way about matters to be raised at the case management directions hearing before it takes place, with a view to agreeing about directions in advance of the hearing. If you are representing yourself, we expect the decision-maker to take the initiative in this communication. If agreement can be reached about appropriate directions, you and the decision-maker may ask that the Managing Member make the directions by agreement.
- 4.6 For the assistance of parties, a template for directions that may be made at the case management directions hearing is at Attachment A. A template of a Statement of Issues, Facts and Contentions is at Attachment B.

5. Alternative Dispute Resolution

- 5.1 We will work actively with you and the decision-maker at all times to encourage the exploration of an early resolution to the dispute through use of ADR.
- 5.2 In general, the ADR process that will be used in applications relating to taxation and commercial decisions will be:
- (a) conferencing;
 - (b) conciliation; or
 - (c) mediation.
- 5.3 You and the decision-maker are required to act in good faith in relation to the conduct of an ADR process.⁷
- 5.4 More information about ADR processes at the AAT, including about confidentiality in ADR processes, is available on our website.

Conferences

- 5.5 If your application is referred to a conference, we will usually hold the first conference within 6 to 10 weeks after your application has been lodged. The conference may be held in person or by telephone. A further conference may be held if necessary.
- 5.6 The purpose of the conference process is to:
- (a) identify and narrow the issues in dispute;
 - (b) identify further evidence that may be gathered;
 - (c) discuss this evidence when it has been received, as well as the merits of the case;
 - (d) explore whether an agreed outcome can be reached; and
 - (e) discuss the future conduct of the application.

⁶ See our Use of Concurrent Evidence in the AAT Guideline.

⁷ Subsection 34A(3) of the AAT Act.

- 5.7 Conferences are conducted by AAT Conference Registrars who may make directions during the conference process.

Conciliation or Mediation

- 5.8 A conciliation or mediation will usually be included in the directions made by a Managing Member.
- 5.9 A person with authority to make decisions on proposed settlement options must attend the conciliation or mediation, or be contactable by telephone.
- 5.10 At least 3 working days before a conciliation or mediation, you and the decision-maker must:
- (a) give the AAT and each other a list of the people who will attend the ADR process;
 - (b) give a Confidential Issues Statement to the AAT only.
- 5.11 The Confidential Issues Statements will be viewed only by the Conciliator or Mediator for the purpose of the conciliation or mediation and will not be provided to the other party. It should contain:
- (a) a summary of the issues in dispute;
 - (b) what the party hopes to achieve from the ADR process;
 - (c) a list of outcomes, from best to worst, if the application is not settled;
 - (d) an assessment of the legal, commercial, business and reputation risks of continuing litigation;
 - (e) what offers of settlement have been made, if any;
 - (f) costs incurred to date;
 - (g) for taxation applications, the amount in dispute, including the primary tax, penalties and general interest charge, as well as the amounts that have been paid and the amounts that are outstanding; and
 - (h) in the event the application proceeds to hearing, how long you estimate the hearing may take and a proposed list of witnesses.
- 5.12 The Confidential Issues Statement should be no more than 3 pages.
- 5.13 For the assistance of parties, a template of a Confidential Issues Statement is at Attachment C.
- 5.14 Conciliations and mediations are generally conducted by AAT Conference Registrars who may make case management directions at the conclusion of the ADR process if agreement has not been reached.

6. Other matters

Additional directions hearings

- 6.1 A directions hearing may be listed at any time if required, including if you or the decision-maker has not complied with this Direction or with a specific direction made by the AAT. Either you or the decision-maker may make a request for a directions hearing. The request must be:

- (a) in writing;
- (b) given to the other party; and
- (c) set out what orders or directions are sought and the basis on which they are sought.

6.2 The Managing Member will usually hold any directions hearing.

Conduct and communication

- 6.3 At all times, you and the decision-maker are expected to communicate courteously with each other and with us.
- 6.4 In general, if you send a document or other communication to the AAT, you or the decision-maker are expected to send a copy to each other and make it clear that the communication has been copied to the other party.
- 6.5 Any request made to us (for example, to vary a direction) must be in writing and be accompanied by reasons. You must seek the view of the other party in relation to the request before sending it to the AAT and include any views in your request.

Justice Duncan Kerr
President

30 June 2015

ATTACHMENT A

EXAMPLE DIRECTIONS

File Number(s) 20____/_____

[name of applicant]

Applicant

[name of respondent]

Respondent

Before: [name of Managing Member]

Date:

[Multiple applications]

... This application and application(s) with file number(s) [file numbers] be heard together and that evidence in one application be evidence in all applications.

... All documents that are lodged in the applications are to be lodged for inclusion on the file with file number 20____/_____.

[Section 37 documents]

... The Respondent must lodge with the Tribunal and give to the Applicant any further Section 37 documents by [date].

[Evidence and Statement of Issues, Facts and Contentions]

... The Applicant must lodge with the Tribunal and give to the Respondent:

(a) any witness statements⁸ and other evidence on which the Applicant intends to rely at the hearing; and

(b) a Statement of Issues, Facts and Contentions;

by [date].

⁸ A witness statement is a written statement setting out all of the evidence intended to be given by a witness on which you propose to rely. It will operate as the only evidence of that witness unless the Tribunal allows additional evidence to be given by that witness.

- ... The Applicant must lodge with the Tribunal and give to the Respondent:
- (a) any outlines of evidence⁹ and other evidence on which the Applicant intends to rely at the hearing; and
 - (b) a Statement of Issues, Facts and Contentions;
- by [date].
- ... The Respondent must lodge with the Tribunal and give to the Applicant:
- (a) any witness statements and other evidence on which the Respondent intends to rely at the hearing; and
 - (b) a Statement of Issues, Facts and Contentions;
- within [number of days] of receiving the Applicant's material.
- ... The Respondent must lodge with the Tribunal and give to the Applicant:
- (a) any outlines of evidence and other evidence on which the Respondent intends to rely at the hearing; and
 - (b) a Statement of Issues, Facts and Contentions;
- within [number of days] of receiving the Applicant's material.
- ... The Applicant must lodge with the Tribunal and give to the Respondent any evidence in reply or a letter indicating that the Applicant does not intend to do so within [number of days] of receiving the Respondent's material.

[ADR process and hearing]

- ... The matter be listed for a Conference/Conciliation/Mediation (... day) in the week commencing [date].
- ... No later than 10 working days prior to the start of the hearing, each party must lodge with the Tribunal and give to the other party a list of witnesses intended to be called at the hearing.
- ... The matter be listed for hearing (...days) on [date(s)].

Instructions for completing Directions

[Note: These instructions do not form part of the Directions and MUST BE DELETED before the Directions are provided to the AAT for consideration]

At the first case management directions hearing, the Managing Member will discuss with the parties the case management strategy that will be most effective to achieve early resolution of the application by way of agreement between the parties or by the AAT making a decision.

The AAT expects parties to communicate with each other in a meaningful way about matters to be raised at the case management directions hearing before it takes place, with a view to agreeing about directions in advance of the hearing.

⁹ An outline of evidence is a document that sets out the evidence that it is anticipated a witness will give orally at the hearing. The Tribunal expects that the evidence of the witness will not go beyond what is set out in the outline unless the Tribunal allows additional evidence to be given by that witness.

If the Applicant is self-represented, we expect the decision-maker to take the initiative in this communication. If agreement can be reached about appropriate directions, the parties may ask that the Managing Member make the directions by agreement.

The directions included in this template are intended to guide parties only, and are not complete or exhaustive. Parties should amend the template as required.

ATTACHMENT B

STATEMENT OF ISSUES, FACTS AND CONTENTIONS

File Number(s) 20____/_____

[name of applicant]

Applicant

[name of respondent]

Respondent

Issues

[Applicant/Respondent] considers that the issues for the Tribunal to determine are as follows:

1. *[Explain what the problem is with the decision: what questions do you want the Tribunal to answer? For example, is the deduction properly allowed under the Income Tax Assessment Act? Was the penalty correctly imposed?]*
- 2.

Facts

The following are the relevant facts as the [Applicant/Respondent] perceives them:

1. *[Briefly explain what happened. Do not include opinions. Do not include evidence, but footnote Section 37 documents, statements or other documents if relevant]*
- 2.

Contentions

[Applicant/Respondent] contends as follows:

1. *[Explain the conclusions you want the Tribunal to make and why these conclusions should be made].*
- 2.

Decision sought

3. [Applicant/Respondent] seeks an order [affirming] / [varying] / [setting aside] / [remitting] / [other] the decision.

Instructions for completing Statement of Issues, Facts and Contentions

These instructions do not form part of the Statement and MUST BE DELETED before the Statement is lodged with the AAT

The purpose of a Statement of Issues, Facts and Contentions is to inform the AAT and the parties of each other party's case so that, when read together, they should present a clear picture of the issues in dispute and the respective positions of the parties.

A Statement of Issues, Facts and Contentions must set out:

- the issues that the party considers fall for determination;
- the essential facts relied on, or understood, by that party (but not the evidence relied on to demonstrate those facts);
- the contentions that the party will advance at hearing; and
- the decision or decisions that the party will seek at hearing.

The facts must be stated succinctly and, where necessary, cross-reference the Section 37 documents.

A party may amend a Statement of Issues, Facts and Contentions provided adequate notice is given of any proposed change.

In a taxation application, the AAT generally expects that an Applicant who is represented will lodge with the Tribunal and give the Respondent a Statement of Issues, Facts and Contentions first, followed by the Commissioner of Taxation. However where an Applicant is self-represented, that process will generally be varied such that the Commissioner of Taxation lodges a Statement of Issues, Facts and Contentions first.

In an application for review of a decision by a regulatory body, the AAT expects that the regulatory body will usually lodge with the Tribunal and give the Applicant a Statement of Issues, Facts and Contentions first, followed by the Applicant.

It should be possible to identify the evidence required to be presented at the hearing from the factual issues remaining in dispute between the parties.

ATTACHMENT C

CONFIDENTIAL ISSUES STATEMENT

File Number(s) 20____/_____

[name of applicant]

Applicant

[name of respondent]

Respondent

PROVIDE THIS STATEMENT TO THE AAT ONLY

IT WILL BE READ BY THE CONCILIATOR/MEDIATOR ONLY

Are you the Applicant or Respondent?

- *[Insert which party you are]*

What are the issues in dispute?

- *[Explain what the problem is with the original decision: what questions do you want the Tribunal to answer? For example, is the deduction properly allowed under the Income Tax Assessment Act?]*

What do you want to achieve from the ADR process?

- *[Explain what you want to negotiate through this ADR process. For example, a payment plan; a conditional licence]*

What is the best to worst outcome if you don't settle?

- *[Explain what will happen if you win at a hearing. Explain what will happen if you lose]*

What are the risks of not settling?

- *[Explain what the legal, commercial, business and reputation risks are for you if you don't settle but continue on to a hearing]*

What offers of settlement have been made?

- *[Explain what offers and counter-offers have been made to settle this matter, if any]*

How much has this application cost?

- *[Explain how much money you have spent so far on this application. For example, the costs for lawyers or accountants and lost wages]*

[For taxation applications only] How much is in dispute?

- *[Explain the amount in dispute, including the primary tax, penalties and general interest charge, as well as the amounts that have been paid and the amounts that are outstanding]*

How long will the hearing be?

- *[Explain how many days you think the hearing will go for]*

What witnesses will you call?

- *[Insert the names of the people you want to give evidence to support your application and what their relationship is to you]*