



Administrative Appeals Tribunal

Law Council of Australia Tax Workshop 2012

Tax Dispute Resolution: The AAT Perspective

27 OCTOBER 2012

Aitken Hill Conference Centre, Yuroke, Victoria

Law Council of Australia Tax Workshop 2012

Tax Dispute Resolution: The AAT Perspective

Hon Justice Duncan Kerr - President of the Administrative Appeals Tribunal and
Judge of the Federal Court of Australia

In July 1986 the Administrative Appeals Tribunal (AAT) assumed the jurisdiction in taxation matters which previously had been exercised by Taxation Boards of Review. As noted by the former President of the Tribunal, the Hon Garry Downes AM, most members of the Boards became members of the Tribunal.¹

The AAT now has jurisdiction under the *Taxation Administration Act 1953* (TAA) to review many of the most important decisions made by the Commissioner of Taxation. The Tribunal also reviews decisions made by the Commissioner under a number of other Acts and Regulations.

The most common tax related decisions brought before the Tribunal are those in respect of:

- the assessment of income tax, including allowable deductions, tax avoidance schemes and capital gains tax liability;
- the assessment of GST, the superannuation guarantee charge, fringe benefits tax and, more recently, excess superannuation contributions tax;
- the imposition or remission of penalties for failure to comply with taxation law;
- private rulings made by the ATO;
- a refusal to extend the time for lodging a tax objection; and
- the release of taxpayers from taxation liabilities on hardship grounds.

In many of those cases a taxpayer has the alternative of proceeding in the Federal Court of Australia. However, approximately 80% are commenced in the AAT.

Possible reasons why the AAT has been preferred by applicants include:

- no or lesser fees;

The AAT application fee for taxation matters is \$816, except for those applications dealt with in the Small Taxation Claims Tribunal (STCT) which is \$81. The Federal Court of Australia filing fee is \$938 for an individual and \$2248 for a corporation, plus there are ongoing fees payable as proceedings progress.² Both the AAT and the Federal Court of Australia can reduce their application fee to \$100 for certain categories of people (e.g. holders of concession cards) or in the case of financial hardship.

Acknowledgements

I gratefully acknowledge the input of Deputy President Stephen Frost in the preparation of this paper. I am also greatly appreciative of the staff of the Tribunal who assisted with revising it and collating the data.

¹ See Twenty Five Years of Tax Cases in the AAT; Eleven years of the "practical business tax", delivered by the Hon. Justice Garry Downes AM, on 17 October 2011 at the Corporate Tax Association 2011 GST Corporate Intensive in Sydney. <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/CorporateTaxAssociationOctober2011.htm> and published in (2012) 50(1) Law Society Journal 70.

² These are the applicable fees for the Federal Court of Australia as at 16 October 2012. A new fee structure and fee schedule will apply from January 2013.

- lesser ‘front end loading’ of costs;

The obligation on the Commissioner to give the Tribunal and the taxpayer the documents held by the ATO relating to the case at an early stage contributes to early and full disclosure of the case against a taxpayer and the conferencing practices of the Tribunal seek to narrow the areas of dispute. These, combined with the relative informality of the Tribunal system (albeit often understandably more court like in large and complex tax disputes) can limit the financial cost of the early stages of dispute handling.

- the right to request confidentiality;

Section 14ZZE of the TAA allows the applicant to request that any hearing (other than those in the STCT) be in private. In the STCT, pursuant to s 35 of the AAT Act, the Tribunal can exercise similar power upon request but there is no automatic right for a private hearing in those cases. If a hearing is held in private, an associated provision, s 14ZZJ of the TAA, provides that the applicant is not to be identified in the Tribunal’s reasons for decision.

- the availability of a range of flexible, informal, inexpensive and effective ADR processes that include, but are not restricted to more formal mediation;
- the absence of requirements to comply with the rules of evidence;

In most tax matters, an applicant bears the burden of proof to establish that an assessment is excessive. A taxpayer needs to show not only that the assessment is greater than it should have been but also what the correct amount should have been. There is a useful summary of authorities in *Hamed v Commissioner of Taxation* [2010] AATA 684.³ It can be easier for an applicant, particularly a self-represented applicant, to put relevant factual and legal materials before the AAT than it is before a court strictly applying the rules of evidence. However, it is critical to note that the Tribunal, in hearing a tax matter—particularly a high value or complex case—generally follows the pattern of judicial hearings, including the calling of witnesses, their examination and cross-examination, and the tendering of documents. The absence of a requirement to comply with the rules of evidence does not mean that the Tribunal will be indifferent to questions of relevance and weight.

- the difference between merits and judicial decision making, and the availability of a discretion as to penalties;

This factor is often of lesser relevance in the taxation jurisdiction of the AAT because tax law often is detailed and quite prescriptive of a ‘correct’ decision which must inevitably follow a particular factual finding. However, if the case involves the exercise of a discretion (such as a penalty remission question), the AAT can substitute its own decision if it considers the Commissioner’s decision was not the ‘preferable’ one.

- the parties bear their own costs before the AAT so there is no scope for an adverse costs order if a party is unsuccessful;

³ <http://www.austlii.edu.au/au/cases/cth/AATA/2010/684.html>

- confidence in the skill base of AAT members in its tax division; and,

Since the AAT was conferred its tax jurisdiction, the Tribunal has been privileged that some of Australia's most distinguished taxation specialists have served as members—from the days of Dr Paul Gerber who, before his appointment, had been a member of the No.3 Board of Taxation Review to the present. The Federal Court judges who also serve as judicial members of the AAT continue to bring enormous expertise to bear in the resolution of tax disputes. Given that a large proportion of the AAT's work involves taxation matters, the Tribunal has actively sought support from the Attorney-General to recruit such specialists so that applicants and the ATO alike can have confidence in the professionalism and skills of those members. Consultation must occur with the Treasurer before a member is appointed to the Taxation Appeals Division. A full list of current non-judicial members who can hear matters in the Taxation Appeals Division can be found at the end of this paper.

- the retention of a fall-back right to appeal, on a question of law, to the Federal Court.

Workload Taxation Appeals Division and the Small Taxation Claims Tribunal

The number of lodgements in the Taxation Appeals Division rose by 30 per cent in 2011–12 to 1,438 with particular increases noted in relation to applications for review of decisions about income tax and goods and services tax. There was also an increase in the number of lodgements in the STCT in 2011–12 to 274.

Applications for review of tax decisions were the most common type of application lodged with the Tribunal in 2011–12, constituting 30 per cent of all lodgements.

The Tribunal aims to finalise applications in the Taxation Appeals Division within 12 months of lodgement and the Tribunal achieved this in 59 per cent of cases, a significant improvement over the result for previous years. 37 per cent of STCT matters were finalised within 84 days.

The following table shows the figures for the number of lodgements and finalisations for 2011-12 as well as the number of current applications at 30 June 2012 in both the Taxation Appeals Division and the STCT. A percentage figure is also given showing what proportion of the Tribunal's total workload these figures represent.

	TAD		STCT	
	No	% of total	No	% of total
Lodged	1,438	25	274	5
Finalised	1,063	21	101	2
Current	1,722	39	270	6

ALTERNATIVE DISPUTE RESOLUTION AT THE AAT

During 2011–12, 79 per cent of Taxation Appeals Division matters and 90 per cent of STCT matters were finalised other than by way of a decision on the merits following a hearing. The Tribunal was an early adopter of alternative dispute resolution (ADR) processes to assist parties to distil and narrow the issues in dispute and, where possible, arrive at consensual outcomes.

The normal conferencing process used by the Tribunal often incorporates informal use of ADR. Conferencing remains the most important tool used by the Tribunal to facilitate settlement of disputes.

Conferencing

A conference is usually the first case event in an application to the Tribunal. It is generally scheduled around six to ten weeks after receipt of an application. Conferences are usually conducted by Conference Registrars who are lawyers and skilled ADR practitioners.

A conference is an informal meeting with the parties and/or their representatives for the purpose of:

- Discussing and identifying the issues in dispute;
- Identifying what, if any, further factual material needs to be put before the Tribunal to enable it to make a decision on the merits;
- Setting timetables;
- Exploring the potential for settlement; and,
- Determining the future conduct of the matter which may involve a further conference, referral to another type of ADR process or, if it is appropriate to do so, preparing the matter for hearing.

All conference registrars have at their disposal the full range of tools provided by more formal mediation training and the skills and knowledge to draw on these tools as and when appropriate.

It is not unusual for there to be more than one conference. That will often be appropriate when further information is to be provided or where parties will need to consider their position or seek instructions after the initial discussion.

Conferencing is the primary ADR process used by the AAT. Many applications settle during the conferencing process.

The Tribunal has conducted more than 4,000 conferences in tax cases between 1 July 2008 and 30 June 2012.

Formal ADR

Division 3 of Part IV of the AAT Act (sections 34–34H) deals with “*Alternative dispute resolution processes*”. The processes referred to in the Act and used by the Tribunal are conferencing, conciliation, mediation, case appraisal and neutral evaluation. Division 3 provides that parties may be directed to attend an ADR process and must participate in good faith. Section 34C provides for directions to be made about the procedures to be followed, who will conduct the ADR process and what happens afterward.

Process models have been developed for each form of ADR which set out information on:

- the way in which it will be conducted,
- the role of the facilitator,
- the roles of the parties and their representatives, and
- what is likely to occur at the conclusion of the process.

The Tribunal has also developed a policy for guiding referral of applications to these different ADR processes.

The Tribunal has a robust programme of professional development for those who conduct ADR processes. The Tribunal has also become a Recognised Mediator Accreditation Body under the National Mediator Accreditation System so that it can accredit members and staff who conduct mediations in the Tribunal.

The Tribunal conducted the following number of other ADR processes in tax cases in that same period.

Process	No
Conciliation	323
Mediation	41
Case appraisal and neutral evaluation	31

Conciliation and Mediation

Conciliation and mediation are concepts familiar to most tax practitioners. Within the AAT, they are conducted either by a member or Conference Registrar.

Conciliation and mediation are both processes in which the parties to a dispute, with the assistance of the conciliator or mediator, identify the disputed issues, develop options, consider alternatives and seek to reach an agreement. A mediator plays no role beyond guiding the parties through that process. A conciliator, however, may comment on the substantive issues in dispute in assisting the participants to reach an agreement.

If a Conference Registrar forms the view that the matter would benefit from the availability of an independent view on the substantive issues and possible settlement options, that factor may influence the case being referred to conciliation.

Case appraisal and neutral evaluation

Case appraisals and neutral evaluations are generally conducted by a member chosen because of his or her knowledge or understanding of the subject matter. The appraiser or evaluator provides a non-binding opinion on the issue or issues presented to him or her for consideration: this could be a significant issue of fact or law that arises in the matter or the likely outcome of the matter overall. The opinion may be given in person or on the papers. The opinion is then used to assist the parties attempt to narrow the issues in dispute or resolve the matter. This further discussion with the parties is generally held in person or by telephone by the appraiser or evaluation or another ADR practitioner.

The role of the ATO as a party in ADR processes

The ATO's practice is that an officer with authority to settle all outstanding matters will personally attend conciliations and mediations conducted in tax cases.

The AAT greatly appreciates the ATO's commitment to provide those resources.

Sometimes, tax issues not strictly before the Tribunal can hamper attempts to achieve an agreed ADR resolution. Issues relating to debt recovery or the general interest charge (GIC) fall in that category.

Where an outstanding tax debt is being actively pursued, or the GIC represents a large part of a taxpayer's debt, the Tribunal's experience is that conciliations are most effective when the ATO is represented by a person who also has authority to deal with those matters, as otherwise some applicants find it difficult to restrict their focus to those parts of their tax affairs that are within the Tribunal's jurisdiction.

In summary

The full range of ADR processes are used more frequently in tax cases than in any of the Tribunal's other jurisdictions.

While yearly statistics show some variation, over time around 80 per cent of tax applications have been finalised without the need for a hearing and decision.

Those were the cases that were finalised:

- By consent under 34D or 42C of the AAT Act;
- By being withdrawn by the applicant; or
- By dismissal for failure to proceed, failure to comply with a Tribunal direction or failure to appear at a hearing.

CONCERNS AND EMERGING ISSUES

Delays in pre-hearing processes

Tax cases constitute the largest proportion of cases at the AAT that are more than 12 months old. The corollary is that tax is also the jurisdiction with the lowest proportion of cases that are finalised within 12 months.

The Tribunal is concerned about the causes of this delay. While robust data is lacking, there is strong anecdotal evidence that suggests two factors are highly relevant:

1. Underrepresentation and unacknowledged conflicts of interest

Usually, an applicant being represented either by a lawyer or a person with other relevant knowledge assists with the efficient handling of matters, including taking steps to progress the case and explore settlement. Unfortunately some representatives in the tax divisions have only limited knowledge of the AAT's processes and procedures. Many representatives in the tax jurisdiction at the AAT are not lawyers. They can be accountants from a small practice. Some have limited resources to properly advise their clients about their application, their prospects of success or possible areas of agreement between the applicant and the ATO in the Tribunal context.

In some instances such a representative will also have been the applicant's accountant/tax advisor. Where an applicant has a weak position, or if his or her representative was partly responsible for the circumstances giving rise to the application, it can be very difficult to achieve sensible ADR outcomes.

The Tribunal welcomes views from the profession as to whether it or the Tribunal can take any practical steps that will minimise this problem.

2. *Missing documents and delays obtaining documents*

The AAT often encounters difficulty ensuring that an applicant has provided all documents relevant to the decision(s) in dispute. In cases where an application has merit and these documents are finally provided, the ATO will often revise its decision without the application having to proceed beyond the conferencing process. However, a common experience is that an agreement is made at the first conference for the applicant's documents to be provided or directions are made for the documents to be provided. The Tribunal sometimes finds that the agreement is not honoured or the directions are either not complied with or only complied with partially. Requests for extensions are common.

In circumstances where both the applicant and respondent have been aware of the documents needed to resolve the matter since the objection decision stage, and the applicant has had ample time to provide the documents prior to lodging an application at the AAT, such requests are unlikely to be well received.

The Tribunal has recognised this as a problem and will be giving priority to moving matters more speedily to a hearing as soon as it becomes clear that no further documents can or will be provided.

Possible impacts on the Tribunal's ADR workload: the IGT Report

The ATO's adoption of the majority of the recommendations of the Inspector-General of Taxation's *Review into the Australian Taxation Office's use of Early and Alternative Dispute Resolution* should mean that a significant part of the AAT's present workload that currently is resolved by conferencing prior to hearing will instead be resolved before even reaching the AAT.

In the longer term, those changes may result in the AAT ultimately having a smaller but more intractable tax caseload— with the ATO's internal ADR processes weeding out matters which previously the AAT's conferencing resolved—leaving the AAT to deal with only those matters that require more intensive intervention and those fully warranting a hearing.

This is unlikely to reduce either the demand for ADR within the Tribunal's tax jurisdiction or the Tribunal's hearing caseload but logic suggests it will reduce the percentage of matters that settle prior to hearing. Changes in the kinds of matters that will end up in the Tribunal (the more intractable) may require our Members and Conference Registrars to use techniques more towards the formal end of the ADR spectrum. However, an application to the AAT should still represent a valuable opportunity for the applicant and the respondent to resolve the dispute without recourse to a hearing.

WORKLOAD INFORMATION

TAXATION APPEALS DIVISION (EXCLUDING SMALL TAXATION CLAIMS TRIBUNAL) Provisional for 2011-12

Section 1: Applications Lodged, Finalised and Current

Table 1A: Applications lodged, finalised and current and changes

	2009-10	2010-11	% Change from 2009-10 (No.)	2011-12	% Change from 2010-11 (No.)
Lodged	994	1,103	+ 11% (+ 109)	1,438	+ 30.4% (+ 335)
Finalised	2,008	1251	- 38% (- 757)	1,063	- 15% (- 188)
Current	1,571	1,429	- 9% (- 142)	1,722	+ 20.5% (+ 293)

Chart 1B: Applications lodged, finalised and current

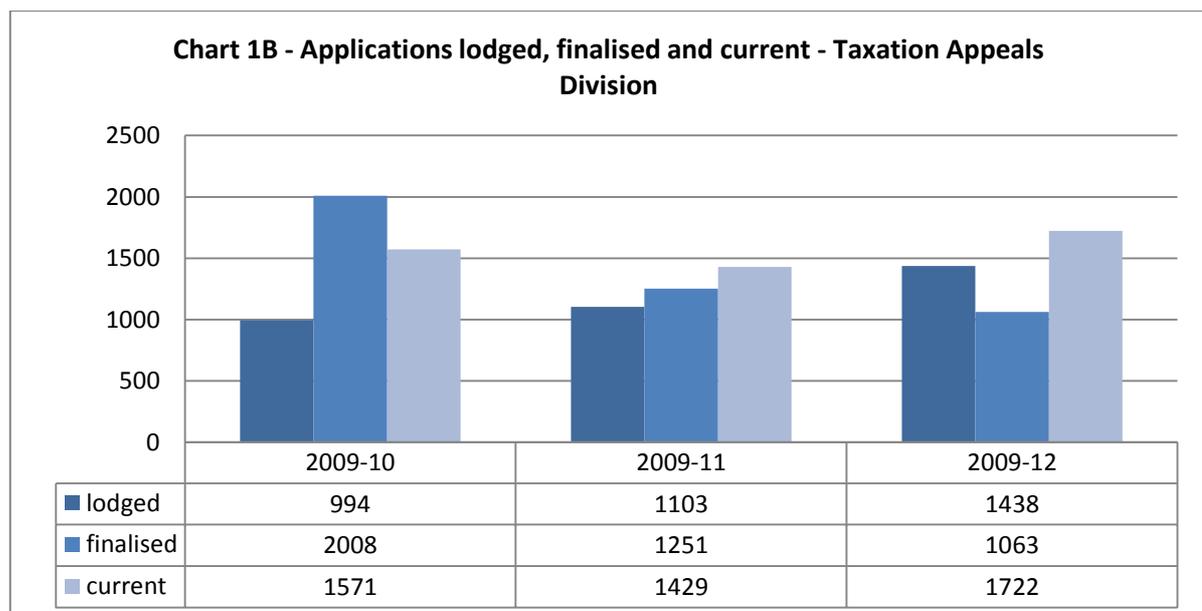


Table 1C: Taxation Appeals Division applications lodged – by case type

Case Type	2009–10	2010–11	2011–12
Fringe benefits tax	19	18	9
Good and services tax	99	97	162
Income tax (other than tax schemes)	712	820	1,112
Income tax (tax schemes)	34	0	0
Private rulings	0	13	26
Self-managed superannuation fund regulation	16	11	5
Superannuation guarantee charge	16	26	18
Taxation administration	13	12	14
Other	85	113	92
TOTAL	994	1,110	1,438

Section 2: Taxation Appeals Division Finalisations

Table 2A: Percentage of applications finalised without a hearing*

Jurisdiction	2009–10	2010–11	2011–12
Taxation Appeals Division	92%	85%	79%

* Applications finalised without a hearing refer to applications that were finalised by the Tribunal without it completing the review and giving a decision on the merits under section 43 of the *Administrative Appeals Tribunal Act 1975*. This includes applications finalised in accordance with terms of agreement lodged by the parties (sections 34D and 42C), applications withdrawn by the applicant (subsection 42A(1A)) and applications dismissed by the Tribunal (sections 42A and 42B).

Section 3: Appeals

Table 3A: Appeals against decisions of the Tribunal in Taxation Appeals Division Matters

2009–10		2010–11		2011–12	
Section 44 ^a	Other ^b	Section 44 ^a	Other ^b	Section 44 ^a	Other ^b
17	0	14	1	17	1

a Appeals lodged in the Federal Court under section 44 of the *Administrative Appeals Tribunal Act*. In some circumstances, a party may lodge an application seeking relief under section 44 of the *Administrative Appeals Tribunal Act* and under another enactment. These applications are treated as section 44 appeals for statistical purposes.

b Applications for judicial review made under other enactments, including the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903*, Part 8 of the *Migration Act 1958* and section 75(v) of the Constitution.

Table 3B: Appeals finalised – by outcome type

Outcome	2009–10		2010–11		2011–12	
	Section 44	Other	Section 44	Other	Section 44	Other
Allowed/Remitted	7	0	3	0	7	1
Dismissed	9	0	9	1	5	1
Discontinued	4	0	1	1	5	0
Total	20	0	13	2	17	2

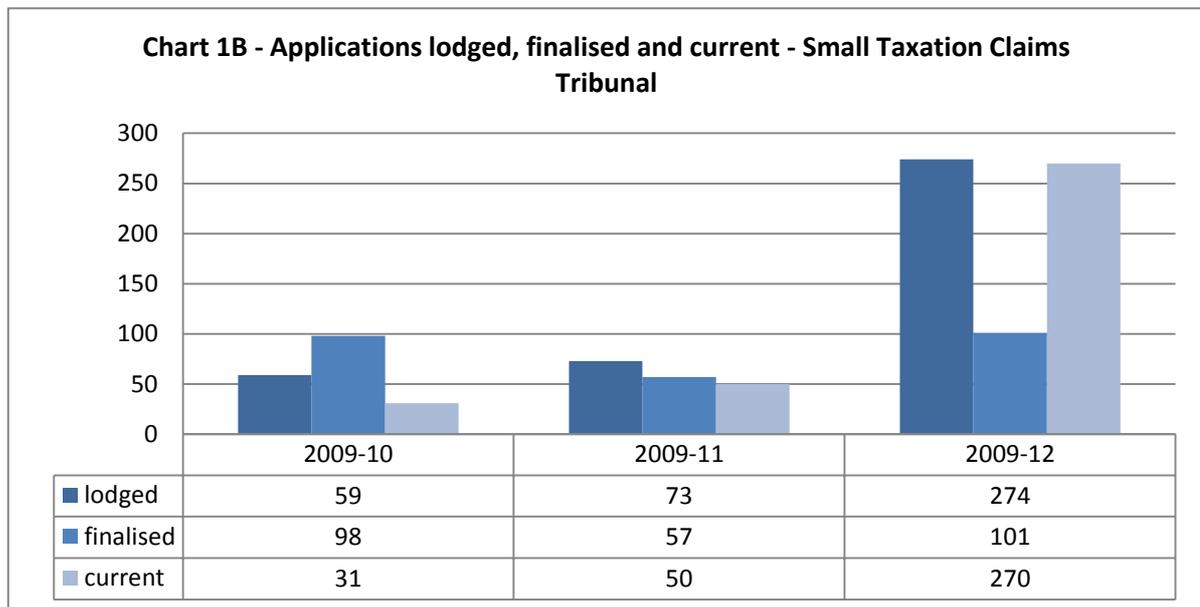
Section 4: Time standards**Table 4A: Time standards – percentage finalised within 12 months**

Jurisdiction (Target % rate for finalisation within 365 days)	2009–10	2010–11	2011–12
Taxation Appeals Division (75% target)	26%	36%	59%

SMALL TAXATION CLAIMS TRIBUNAL (STCT)
Provisional for 2011-12

Section 1: Applications Lodged, Finalised and Current**Table 1A: Small Taxation Claims Tribunal Applications lodged, finalised and current and changes**

	2009-10	2010-11	% Change from 2009-10 (No.)	2011-12	% Change from 2010-11 (No.)
Lodged	59	73	+ 24% (+ 14)	274	+ 275% (+ 201)
Finalised	98	57	- 42% (- 41)	101	+ 77% (+ 44)
Current	31	50	+ 61% (+ 19)	270	+ 440% (+ 220)

Chart 1B: Small Taxation Claims Tribunal Applications lodged, finalised and current**Table 1C: Small Taxation Claims Tribunal applications lodged – by case type**

Case Type	2009-10	2010-11	2011-12
Good and services tax	2	3	3
Income tax (other than tax schemes)	27	30	87
Income tax (tax schemes)	0	0	0
Refusal of extension of time to lodge objection	14	18	94
Release from taxation liabilities	9	7	24
Superannuation guarantee charge	4	2	6
Other	3	13	60
TOTAL	59	73	274

Section 2: Small Taxation Claims Tribunal - Finalisations

Table 2A: Small Taxation Claims Tribunal Percentage of applications finalised without a hearing*

Jurisdiction	2009-10	2010-11	2011-12
Small Taxation Claims Tribunal	95%	82%	90%

* Applications finalised without a hearing refer to applications that were finalised by the Tribunal without it completing the review and giving a decision on the merits under section 43 of the *Administrative Appeals Tribunal Act 1975*. This includes applications finalised in accordance with terms of agreement lodged by the parties (sections 34D and 42C), applications withdrawn by the applicant (subsection 42A(1A)) and applications dismissed by the Tribunal (sections 42A and 42B).

Section 3: Appeals

Table 3A: Appeals against decisions of the Tribunal in Small Taxation Claims Tribunal Matters

2009–10		2010–11		2011–12	
Section 44 ^a	Other ^b	Section 44 ^a	Other ^b	Section 44 ^a	Other ^b
1	0	0	0	0	0

- a Appeals lodged in the Federal Court under section 44 of the Administrative Appeals Tribunal Act. In some circumstances, a party may lodge an application seeking relief under section 44 of the Administrative Appeals Tribunal Act and under another enactment. These applications are treated as section 44 appeals for statistical purposes.
- b Applications for judicial review made under other enactments, including the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903*, Part 8 of the *Migration Act 1958* and section 75(v) of the Constitution.

Table 3B: Small Taxation Claims Tribunal Appeals finalised – by outcome type

Outcome	2009–10		2010–11		2011–12	
	Section 44	Other	Section 44	Other	Section 44	Other
Allowed/Remitted	0	0	1	0	0	0
Dismissed	0	0	0	0	0	0
Discontinued	1	0	0	0	0	0
Total	1	0	1	0	0	0

Section 4: Time standards

Table 4A: Small Taxation Claims Tribunal Time standards – percentage finalised within 12 months

Jurisdiction (Target % rate for finalisation within 84 days)	2009–10	2010–11	2011–12
Small Taxation Claims Tribunal	22%	34%	37%

NB: for further information view a copy of the AAT's latest Annual report:
<http://www.aat.gov.au/Publications/Publications/AnnualReport.htm>

List of Non-judicial AAT members in Taxation Appeals Division

(Deputy Presidents and Senior Members are listed according to the date they were first appointed to that position in the AAT. Members are listed alphabetically.)

Deputy President Stephanie Ann Forgie (Vic)
Deputy President Stanley Desmond Hotop (WA)
Deputy President Deane Graham Jarvis (SA)
Deputy President Philip Edward Hack SC (Qld)
Deputy President Robin Patrick Handley (NSW)
Deputy President James Constance (Vic)
Deputy President the Hon Raymond John Groom AO (Tas)
Deputy President the Hon Bruce McPherson CBE (Qld)
Deputy President the Hon Robert David Nicholson AO (WA)
Deputy President the Hon Brian Tamberlin QC (NSW)
Deputy President Stephen Edward Frost (NSW)
Deputy President Fiona J Alpins (Vic)
Deputy President Robert Deutsch (NSW)

Senior Member John Russell Handley (Vic)
Senior Member Bernard Joseph McCabe (Qld)
Senior Member Egon Fice (Vic)
Senior Member Mason David Allen (NSW)
Senior Member Geri Ettinger (NSW)
Senior Member Peter Malcolm McDermott RFD (Qld)
Senior Member Rodney William Dunne (SA)
Senior Member Steven Penglis (WA)
Senior Member Ann Francis Cunningham (Tas)
Senior Member Peter William Taylor SC (NSW)
Senior Member Kenneth St Clair Levy RFD (Qld)
Senior Member Robert Graham Kenny (Qld)
Senior Member Francis Damien O'Loughlin (Vic)
Senior Member Dean Letcher QC (NSW)
Senior Member Jan Louise Redfern (NSW)
Senior Member Katherine Jane Bean (SA)

Senior Member Chelsea Rebelle Walsh (WA)

Senior Member Gina Lazanas (NSW)

Member Kathryn Lucinda Hogan (WA)

Member Gordon Langford Hughes (Vic)

Member Timothy Charles Jenkins (NSW)

Member Simon Webb (ACT)