



Law Council
OF AUSTRALIA

Small Business Taxation Division of the Administrative Appeals Tribunal

Administrative Appeals Tribunal

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

In the preparation of this submission, the Law Council is grateful for the assistance of:

- the Taxation Committee of the Law Council's Business Law Section;
- the Taxation and Revenue Law Committee of the Law Institute of Victoria; and
- the Victorian Bar's Tax Bar Association, in relation to individual employees falling within the definition of 'small business'.

Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to Administrative Appeals Tribunal's (**AAT**) consultation process to support the formation of a new Small Business Taxation Division (**SBTD**) commencing on 1 March 2019.
2. The Law Council appreciates the short timeframe before the commencement of the SBTD as well as the correspondingly short consultation period.
3. While the Law Council considers the draft '*Guide to the Small Business Taxation Division*' (**the Guide**) and draft '*Practice Direction Review of Small Business Taxation Decisions*' (**the Practice Direction**) to be a large step in the right direction, it invites the AAT to take into account the comments and recommendations provided in this submission in formulating the finalised versions of the Guide and Practice Direction.
4. The Law Council acknowledges the work that has to date gone in to preparing the Guide and Practice Direction in a short space of time. The comments and recommendations provided in this submission are intended to enhance the clarity and user friendliness of the Guide and Practice Direction in order for the SBTD to fulfil the objectives of the Government in making it 'easier, cheaper and quicker for small businesses to resolve tax disputes with the Australian Taxation Office'.¹
5. In addition, the Law Council considers that the Preliminary Information Form (**the PIF**) should be provided in advance for public review and consultation to better inform its comments on the draft Practice Direction and Guide. The PIF is an opportunity for the AAT to indicate to parties the level of information and preparation required by parties. For instance, especially for non-represented small business (herein used interchangeably with taxpayer) parties, clarity around the evidentiary information required and the evidentiary process overall would be desirable.

¹ Stuart Robert, 'Backing Small Business - Easier, Cheaper and Quicker Access to Resolve Tax Disputes' (Press Release, 29 November 2018).

Guide to the Small Business Taxation Division

General comments

6. The Law Council supports the Guide in as far as it strengthens the presumption of early resolution of dispute between the Commissioner of Taxation (**the Commissioner**) and small business.
7. The Law Council considers that it would be helpful, particularly in light of the audience (which the Law Council notes appears to be 'lay persons' or unrepresented parties), to clearly identify how the processes and procedures in the SBTD are different to the usual manner in which the AAT proceeds with tax cases in the Taxation and Commercial Division. For example, the Law Council questions whether, if a taxpayer is unrepresented, the AAT would take a more lenient approach to allowing the grounds of objection to be enlarged upon review in the SBTD.
8. In conformity with alternative dispute resolution (**ADR**) practices generally adopted by the various courts, the Guide should clearly state that any AAT member involved in an ADR process would need to recuse himself or herself from hearing the substantive matter when it comes on for hearing before the AAT, and that an AAT member who has not otherwise had any involvement in the ADR process will hear the matter.
9. There are a number of instances in the Guide where the reader is referred back to the AAT's General Practice Direction. The Law Council considers that a 'lay person' or unrepresented party reading the Guide would find this confusing (for example, what parts of the General Practice Direction apply? Is the Guide inconsistent with the General Practice Direction? And does the Guide override the General Practice Direction, if inconsistent?). An alternative approach may be to incorporate into the Guide with those provisions of the General Practice Direction that are to apply 'side by side' with it. This would provide a more complete document for the reader while aiding overall comprehension.
10. The Law Council also recommends the AAT consider producing a Practice Note to help practitioners understand and adopt practices in line with the Guide. This Practice Note should be developed together with the Commissioner such that it binds the Commissioner to the process and the practice of the AAT.
11. Further, the Law Council considers its and the public's review of the Guide may be better informed if it understood the Australian Taxation Office (**ATO**) and Commissioner's views on the Guide and whether it accepts propositions made in it. The Law Council considers the Guide's processes will work effectively if the ATO agrees with the proposals made.

Recommendations:

- **The Guide clearly identify how the processes and procedures in the SBTD are different to the usual manner in which the AAT proceeds with tax cases in the Taxation and Commercial Division.**
- **The Guide should clearly state that any AAT member involved in an ADR process would need to recuse himself or herself from hearing the substantive matter when it comes on for hearing before the AAT.**
- **Consideration be given to incorporating into the Guide the provisions of the General Practice Direction that are to apply 'side by side' with it.**

- **Consideration be given to producing a Practice Note to help practitioners understand and adopt practices in line with the Guide.**

Specific comments

Paragraph 2.2

12. The Law Council considers that it should be made clear exactly which decisions in relation to a small business entity will fall within the SBTD. Further, the Law Council questions whether the decision as to which small business taxation decisions will be within the SBTD will be determined by administrative process or by way of legislative change, for example, regulation. The Law Council's understanding of the Government's announcement is that the SBTD was to be an administrative concept which would be simpler and more flexible in approach than a rigid, legislative change.

Recommendation:

- **The Guide should make clear exactly which decisions in relation to a small business entity will fall within the SBTD.**

Paragraph 2.3

13. The Law Council notes that the 'aggregated turnover' test was changed from \$2 million prior to 1 July 2016, to \$10 million after that date. The Law Council considers it should be made clear whether, for example, a relevant 'small business taxation decision' that occurred in, for example, 2015 in an amount of \$5 million, is within or outside of the new SBTD. In other words, the Law Council recommends that it should be clarified as to whether the \$10 million turnover test needs to be satisfied as at the date of application to the AAT, or as at the date of the decision that is being reviewed to the AAT.
14. The Law Council considers that the Guide should also clarify which taxpayers are entitled to bring a claim under the SBTD. In this regard, the definition of 'you' is pivotal. For example, if a beneficiary of a trust has been assessed to tax arising from transactions entered into by the trustee of the trust (which is the entity that is carrying on a business and satisfies the aggregated turnover test), is the individual beneficiary precluded from having his or her matter heard in the SBTD because he or she is not carrying on a business? It appears that the purpose of the SBTD is to deal with taxation disputes 'in relation to' such circumstances such that the individual beneficiary in the above example should have a right for his or her case to be heard in the SBTD. The Law Council recommends that the dividing line could be drawn by utilising the concept already contained in the taxation legislation regarding entities that are 'connected with' other entities. In this way, for example, the individual beneficiary in the above example would be 'connected with' the trustee of the trust.
15. A further issue that arises is whether an individual, being an employee, can be said to be carrying on a business. If so, then that individual would be able to access the SBTD. The Law Council notes the decision in *Spriggs v Commission of Taxation* (2009) 239 CLR 1, where the High Court of Australia held that it was possible to obtain and perform an employment contract as part of and during the course of running a business.

16. A broader question also arises as to why a review in the SBTD is limited to 'small business' taxpayers and not, for example, 'small investors'. Provided either entity has a 'turnover' under \$10million per annum, the threshold test would seemingly be satisfied and access to the SBTD should be granted. The Law Council recommends that one way of maintaining flexibility in approach, if entry of a matter into the SBTD is by way of administrative decision, would be for the AAT member to determine if the facts and circumstances of a particular case warrant that case being heard in the SBTD.

Recommendations:

- **The Guide should clarify as to whether the \$10 million turnover test needs to be satisfied as at the date of application to the AAT, or as at the date of the decision that is being reviewed to the AAT.**
- **The Guide should clarify which taxpayers are entitled to bring a claim under the SBTD.**
- **The concept already contained in the taxation legislation regarding entities that are 'connected with' other entities should be used instead of the wording 'in relation to'.**
- **If entry of a matter into the SBTD is by way of administrative decision, the AAT member should determine if the facts and circumstances of a particular case warrant that case being heard in the SBTD.**

Paragraph 2.4.2

17. The Law Council reiterates that the determination of who is 'you' is pivotal. It would appear that, as only an individual can obtain a health care card or a pensioner concession card, paragraph 2.4.2 contemplates that only individuals will be applicants applying to have their matter heard in the SBTD. The Law Council recommends that it should be clarified whether or not this is in fact the case.

Recommendation:

- **The Guide should be clarified as to whether or not paragraph 2.4.2 contemplates that only individuals will be applicants applying to have their matter heard in the SBTD.**

Paragraph 2.5

18. The Law Council recommends that the sentence 'A person does not require legal representation to have their case reviewed by the AAT' be expanded to make clear that although a person does not require legal representation, a party is entitled to appoint legal representation. Further, and in addition to this, is it important that the AAT manages the case in a way that supports any unrepresented persons. The Law Council emphasises the need to uphold the principle of equitable power balance between the taxpayer and Commissioner.

19. On the current words of the Guide, it may be interpreted that where the Commissioner engages internal legal services, the Commissioner does not need to find legal representation for the taxpayer. The Law Council foresees the risk here to be that there will be a power imbalance between the taxpayer and Commissioner. The Law Council wishes to emphasise that if there is a power imbalance, it would be

appropriate for the integrity of the system to ensure that the taxpayer is provided clear information about procedures, for example, information on evidentiary requirements. The Law Council is willing to work with the AAT and ATO to develop information that might be of assistance to self-represented litigants in this context.

20. The Law Council notes the Commonwealth is generally able to engage legal services from law firms at a heavily discounted rate which is not available to the public and ordinary taxpayer party to these matters. The Law Council recommends that the legal advice wording be revised to make clear that taxpayers could use the costs paid by the Commissioner to subsidise their legal costs. This is a difficult issue, as the legal advisers used by the Commissioner often provide a high volume of like services to the Commissioner and have particular expertise and efficiencies. The proposal to pay the taxpayer's legal fees up to the same amount as the Commissioner's external spend does not take these factors into account, and also overlooks that the Commissioner may use the ATO's internal legal team, which would result in no external legal spend for that portion of the work. The Law Council recommends that consideration be given to a different arrangement to support taxpayers, for example, where the Commissioner is assisted by legal practitioners, whether internal or external, this will trigger the Commissioner's obligation to provide legal fee support to the taxpayer.

Recommendations:

- **The sentence 'A person does not require legal representation to have their case reviewed by the AAT' be expanded to make clear that although a person does not require legal representation, a party is entitled to appoint legal representation.**
- **The AAT support the taxpayer through providing procedural assistance, for example, information on evidentiary requirements.**
- **The legal advice wording be revised to make clear that taxpayers could use the costs paid by the Commissioner to subsidise their legal costs.**
- **Consideration be given to a different arrangement to support taxpayers, for example, where the Commissioner is assisted by legal practitioners, whether internal or external, this will trigger the Commissioner's obligation to provide legal fee support to the taxpayer.**

Paragraph 2.5.1

21. The Law Council wishes to emphasise the need to achieve an equitable balance of power between the taxpayer and Commissioner, to the extent reasonably possible.
22. Further to the Law Council's comment on evidentiary information required for the taxpayer, the taxpayer should be provided with proper time and assistance (understanding what evidentiary documents are required) in setting out their case. Equally, the Commissioner should be required to provide clear, detailed and early assistance to the AAT to assist the AAT to understand the real issues in dispute, and thus help achieve early resolution.
23. The Law Council supports the concessionary arrangements considered for small business parties that meet the proposed criteria.
24. The Law Council notes the Commissioner may in some circumstances pay the taxpayer's legal costs for small businesses with no legal representation up to an

amount equal to that expended by the Commissioner on its external legal services. The Law Council queries where the funds for this process will be derived, for example are the funds to come from the ATO test case funding program, as the Law Council understands this program's operation has been reduced significantly, from data available on the number of cases within the program. The Law Council wishes to understand the Commissioner's involvement in and 'buy-in' to the process and the creation of the AAT. The Law Council considers that this is a threshold issue and that without the Commissioner's active participation and agreement to be involved and bound by the Guide it would not realise its intended outcome.

25. It would appear, by virtue of the link to the ATO website, that the decision as to whether or not the costs of an applicant's case will be funded by the Commissioner will be determined by the Commissioner, rather than the AAT. The Law Council recommends that this should be clarified in the Guide. Further, the Law Council notes that the link to the ATO website does not appear to currently work (it cannot be 'clicked' on), so the criteria for such funding is not presently clear.
26. The Law Council recommends there should also be some visibility around the factors that the Commissioner would need to take into consideration in determining whether to meet the costs of legal representation for small businesses, should the Commissioner decide to engage external advisors. Any differences in those facts to those taken into consideration in applying for ATO test case funding, should be made apparent.
27. As the funding of the small business' legal costs is only allowed up to an amount equal to that expended by the Commissioner, presumably in addition to advising of his obtaining external representation, the Commissioner will also be required to advise the costs of so doing. The Law Council recommends that the Guide should clearly state this requirement.

Recommendations:

- **The taxpayer be provided with proper time and assistance (understanding what evidentiary documents are required) in setting out their case.**
- **The Commissioner be required to provide clear, detailed and early assistance to the AAT to assist the AAT to understand the real issues in dispute.**
- **It should be clarified as to whether the Commissioner or the AAT will determine whether the costs of an applicant's case will be funded by the Commissioner.**
- **There should be some visibility around the factors that the Commissioner would need to take into consideration in determining whether to meet the costs of legal representation for small businesses.**
- **As the funding of the small business' legal costs is only allowed up to an amount equal to that expended by the Commissioner, presumably in addition to advising of his obtaining external representation, the Guide should clearly state that Commissioner be required to advise the costs of so doing.**

Paragraph 4.2

28. The Law Council recommends that the Guide should clearly state whether the early case assessment is to occur in accordance with the provisions contained in the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**) or whether the early case assessment process in the SBTD is not so governed (and if so, how so).
29. In relation to the provision of the receipt of the 'T documents', the Law Council recommends that Guide should advise the taxpayer to lodge any relevant documents that have not been included in those 'T documents' as soon as possible. Further, it would assist if there was an ongoing requirement of both parties to file and serve any relevant documents up to the hearing of the matter (i.e. akin to Court rules requiring continuous disclosure).

Recommendations:

- **The Guide clearly state whether the early case assessment is to occur in accordance with the provisions contained in the *Administrative Appeals Tribunal Act 1975* (Cth).**
- **The Guide should advise the taxpayer to lodge any relevant documents that have not been included in those 'T documents' as soon as possible.**
- **There could be an ongoing requirement of both parties to file and serve any relevant documents up to the hearing of the matter.**

Paragraph 5.1

30. The Law Council recommends the AAT take active steps to bring forward the point in time of resolution and encouraging parties taking action required earlier. It is suggested the AAT can achieve this by stepping in early to assist parties by giving them as much information as possible on what their obligations and what information is required. As part of the process, the Law Council recommends that a mandated early conciliation meeting (or alternative form or AAT-run ADR) be attended by both parties with a view to resolution on the preliminary papers.
31. The Law Council foresees that even if early ADR (as many as may be of assistance) is unsuccessful in resolving all issues, it will nevertheless act as a form of informal agreement or understanding between parties that will inevitably assist the resolution process. Further, early ADR is likely to offer an opportunity for parties to narrow down issues by highlighting points any party accepts or will not pursue.
32. To encourage early ADR, the Law Council recommends an emphasis on the 'without prejudice' nature of this process. That is, matters and agreements made at this stage should be disclosed in a later hearing should resolution was not reached, unless the parties agree, as may be appropriate, that the issues in dispute can be formally narrowed (as will be consistent with the Commissioner's obligations where such issues are identified).

Recommendations:

- **The AAT take active steps to bring forward the point in time of resolution and encouraging parties taking action required earlier.**

- **As part of the process, a mandated early conciliation meeting (or alternative form or AAT-run ADR) be attended by both parties with a view to resolution on the preliminary papers.**
- **An emphasis be placed on the ‘without prejudice’ nature of this process.**

Paragraph 8

33. The Law Council notes that the Assistant Treasurer’s press release, dated 29 November 2018, stated that if the ATO appeals the AAT decision to the Federal Court, it will pay the small business’ reasonable costs. The Law Council recommends that this should be clearly outlined in the Guide.

Recommendation:

- **It be clearly outlined in the Guide that if the ATO appeals the AAT decision to the Federal Court, the ATO will pay the small business’ reasonable costs.**

Practice Direction Review of Small Business Taxation Decisions

General comments

34. To make it easier for the reader, the Law Council recommends that the Practice Direction could also include, at the start of the Practice Direction, a section titled ‘How to make an application for review’, outlining how to commence an application in the SBTD (i.e. by way of application for review in the appropriate form or by writing a letter to the AAT requesting such a review), as well as including the applicable form itself or links to the form.
35. The Law Council recommends that consideration should also be given to providing and including in the Practice Direction some examples of the typical documents required during the review process (e.g. affidavits and applications).
36. The Law Council considers that it would be beneficial for the steps involved in a matter before the SBTD to be outlined, and it made clear how they differ from a ‘usual’ tax review in the Taxation and Commercial Division. The Law Council recommends that a table identifying those steps and their differences could be included in the Practice Direction.
37. Material in the Guide, and which should be in the Practice Direction, is not contained in the Practice Direction. The Law Council considers that the Practice Direction should be a standalone document that is able to be understood as a complete set of practices in relation to the SBTD, without requiring resort to the Guide.

Recommendations:

- **The Practice Direction include, at the start of the Practice Direction, a section titled ‘How to make an application for review’, outlining how to commence an application in the SBTD.**

- **Consideration be given to providing and including in the Practice Direction some examples of the typical documents required during the review process.**
- **A table identifying the steps involved in a matter before the SBTD and how they differ from a 'usual' tax review in the Taxation and Commercial Division could be included in the Practice Direction.**
- **The information which is contained in the Guide but not the Practice Direction should be included in the Practice Direction, so that it can be a standalone document.**

Specific comments

Paragraph 1.1

38. The *Administrative Appeals Tribunal Regulation 2015* (Cth) (**the Regulations**) do not appear to currently contain any definition of 'small business taxation decisions' as contemplated in the Practice Direction. Presumably, the Regulations are proposed to be amended before the commencement of the SBTD. The definition is pivotal to the operation of the SBTD. Alternatively, the Law Council recommends that the 'small business taxation decisions' could be defined in the Practice Direction without reference to the Regulations, thereby obviating the need for legislative amendment.

Recommendations:

- **The Regulations be amended to contain a definition of 'small business taxation decisions'.**
- **Alternatively, 'small business taxation decisions' could be defined in the Practice Direction without reference to the Regulations, thereby obviating the need for legislative amendment.**

Paragraph 1.2

39. The Law Council considers the point that the AAT may alter the procedures set out in the Direction to suit individual applications should be made clear in the Guide.

Recommendation:

- **The Guide should be amended so that it states that the process is flexible enough to provide for a tailored outcome in relation to a particular taxpayer.**

Paragraph 1.3

40. The reference to section 18B of the AAT Act should be explained so that the reader does not need to separately look up section 18B to obtain a full appreciation of what paragraph 1.3 is stating.

Recommendation:

- **Section 18D of the AAT Act be explained in full in the Practice Direction. Administrative Appeals Tribunal Act 1975.**

Paragraph 1.5

41. The definitions contained in paragraph 1.5 should include references to the relevant documents required to commence a review in the SBTD and those generally required during the entire review process, together with hyperlinks.

Recommendation:

- **The definitions contained in paragraph 1.5 should include references to the relevant documents required to commence a review in the SBTD and those generally required during the entire review process, together with hyperlinks.**

Paragraph 4.2

42. The Law Council recommends adding in further information to assist the taxpayer to understand what the AAT requires in terms of forms, evidence and other relevant documents. The Law Council considers this express add-in would benefit the (especially unrepresented) taxpayer.
43. The Law Council foresees assistance in this respect will move cases and matters more quickly to resolution. For example, it may address circumstances where the taxpayer is aggrieved but is unable to marshal evidence to substantiate their case due to lack of understanding around what information is useful and the format in which the information should be provided. The Law Council considers the early case assessment stage is the appropriate stage for the AAT to assist to turn the taxpayer's mind to these questions.

Recommendation:

- **Additional information be added to the Practice Direction to assist the taxpayer to understand what the AAT requires in terms of forms, evidence and other relevant documents.**

Paragraph 4.3

44. It is unclear whether the reference to the 'General Practice Direction' is intended to be to the General Practice Direction or is intended to be a reference to 'Practice Direction Review of Taxation and Commercial Decisions'.
45. The Law Council considers that it would be desirable for parties to agree on the facts relevant to the matter (if possible). This may assist in expedition of the review process. Alternatively, the Law Council recommends that the Practice Direction include a requirement for the parties to be directed to confer to try and agree on the facts in order to narrow the issues in dispute. In terms of timing, the parties could have a period of time to agree (say, up until 14 days after the last of the party's SFIC is filed and served).

46. The 'T Documents' section of the Guide should also be included in section 4 of the Practice Direction. There should also be included in this section of the Practice Direction references to the policies and procedures to be adopted in relation to documents/evidence.

Recommendations:

- **It be made clear whether the reference to the 'General Practice Direction' is intended to be to the General Practice Direction or to the 'Practice Direction Review of Taxation and Commercial Decisions'**
- **It is desirable for parties to agree on the facts relevant to the matter (if possible).**
- **Alternatively, the Practice Direction include a requirement for the parties to be directed to confer to try and agree on the facts in order to narrow the issues in dispute within, for example, 14 days after the last of the party's SFIC is filed and served.**
- **The 'T Documents' section of the Guide be included in section 4 of the Practice Direction.**
- **The Practice Direction include references to the policies and procedures to be adopted in relation to documents/evidence.**

Paragraph 7

47. The language of this paragraph is more akin to that usually found in a guide rather than that of a practice direction.