



Law Council  
OF AUSTRALIA

*Business Law Section*

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SYDNEY NSW 2001  
**Via email:** [enquiries@aat.gov.au](mailto:enquiries@aat.gov.au)

21 September 2015

Dear Ms Leathem,

### **Review of Taxation and Commercial Decisions – Practice Direction**

The Taxation Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to make submissions to the Administrative Appeals Tribunal (**AAT**) in accordance with the AAT Service Charter.

This submission responds to the Review of Taxation and Commercial Decisions Practice Direction given under section 18B of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) effective from 1 July 2015 (**Practice Direction**). In particular, the submission responds to the 'Instructions for completing Statement of Issues, Facts and Contentions' (**FIC Instructions**) attached at Attachment B of the Practice Direction, and the initiation of communication in respect of matters to be raised at case management directions hearings at paragraph 4.5 and Attachment A of the Practice Direction. The Committee has set out its submissions below.

### **Outline of Submission**

The FIC Instructions provide that:

*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.*

The Committee submits that in an application for a review of a decision made by the Commissioner of Taxation (**Commissioner**):

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- the AAT should not expect that an Applicant who is represented lodge with the AAT a Statement of Issues, Facts and Contentions (**FIC Statement**) first. Rather, the AAT should expect that the Commissioner lodge a FIC Statement first. This is discussed in more detail in Part 1 of these submissions; and
- the process of the AAT should not vary depending on whether or not an Applicant is self-represented. This is discussed in Part 2 below.

Paragraph 4.5 and Attachment A of the Practice Direction provide in respect of matters to be raised at case management directions hearings that where the Applicant is self-represented, the AAT expects the Commissioner to initiate communication. The Committee submits that, similarly, this process should not vary depending on whether or not an Applicant is self-represented. This is discussed in Part 3 below.

## **Part 1 – The AAT should expect that the Commissioner lodges a FIC Statement first**

### *Purpose of a FIC Statement*

The High Court has held that despite having the burden of proof, the taxpayer is entitled to know the basis on which the Commissioner has made an assessment. In *Bailey*,<sup>1</sup> the High Court discussed the Commissioner's obligation to provide particulars in the context of section 260 of the *Income Tax Assessment Act 1936* (Cth). Barwick CJ observed, at 217–218:

*The taxpayer should be told the taxable facts. This inevitably, in my opinion, requires the Commissioner to inform the taxpayer of the operation of s 260 which has warranted the adoption of his view of the taxable facts. This involves the identification and disclosure of the contract, agreement or arrangement which has been treated as avoided by s 260 ... [T]he Commissioner must, in my opinion, be specific in his identification of the contract, agreement or arrangement ... which justifies the amount of the assessment.*

In *Bailey*, Aicken J commented that, at 227:

*The purpose of particulars is to assist in the defining of issues and there is in my opinion no reason why in appropriate cases the Commissioner should not give particulars where they are necessary in order that both the appellant and the court may understand the basis upon which the assessment has been made.*

...

*It is not in the interests of the proper administration of justice that, when the matter comes before the court, the appellant should have to speculate about, and adduce evidence to negate, every possible kind of agreement ...*

Importantly, the High Court did not regard the obligation to provide particulars as inconsistent with, or in any way compromising, the taxpayer's burden of proof. Rather their view was to the contrary. Gibbs J commented that, at 219:

*The fact that the taxpayer bears the onus of proving that the assessment is excessive makes it all the more necessary that he should be given particulars of the basis of the assessment.*

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<sup>1</sup> *Bailey v The Commissioner of Taxation of the Commonwealth of Australia* (1977) 136 CLR 214 (**Bailey**).

In *Rio Tinto v Federal Commissioner of Taxation* (2004) 55 ATR 321, Sundberg J commented, at 342, that:

*It is now well-established that the statement [of facts, issues and contentions] takes the place of pleadings so that after the exchange of statements the parties to a tax appeal know the case each has to meet. A statement that leaves a taxpayer uncertain as to how the case is put against it is embarrassing and oppressive. A statement that does not disclose the facts on which the respondent has based his assessment and the manner in which he has arrived at it, suffers from these twin vices.*

#### *FIC Statements in tax applications at the AAT*

Section 37 of the AAT Act requires a decision-maker to lodge a statement with the Tribunal, and provide a copy to the other party to the proceeding, which:

- (a) sets out the findings on material questions of fact;
- (b) refers to the evidence or other material on which those findings were based; and
- (c) gives reasons for the decision.

The material facts in a review of an assessment decision include the view of the facts on which the Commissioner has based his assessment and the manner in which he arrived at his assessment.<sup>2</sup> In *Bailey* both Barwick CJ and Mason J emphasised that the process of assessment required the application of the relevant legislative criteria to the material facts. This is the reasoning that underlies the Tribunal's analysis in *Sharkey*, where in considering the interplay between the AAT's specific powers under section 43 of the AAT Act and the terms of section 14ZZK(b) of the *Taxation Administration Act 1953* (Cth) (**TAA**), the Tribunal said that an Applicant could discharge the onus of proof in various ways including:

- (d) reliance on new or additional material;
- (e) a re-evaluation of the appropriateness of the result of the original decision; or
- (f) providing a different evaluation of the elements of the reasoning involved in the original decision.<sup>3</sup>

Therefore, in tax applications, it is necessary to know in sufficient detail, the basis of the Commissioner's assessment and the facts supporting that view. This assists the parties to the proceeding, and the AAT, define the real issues in the dispute. These facts are not within the knowledge of the taxpayer; they are within the knowledge of the Commissioner.

Where a taxpayer faces the burden of showing that an assessment decision is excessive, that burden can only *realistically* be discharged by the application of the relevant facts (including those known only to the Commissioner at the time of assessment) to the statutory criteria that creates the potential tax liability. It is therefore paramount that the Commissioner provides these material facts (as required under the AAT Act) at the

<sup>2</sup> Ibid 217 (per Barwick CJ), 221 (per Mason J).

<sup>3</sup> *Sharkey v Commissioner of Taxation* (2007) 66 ATR 878 [22].

earliest possible stage of the proceeding, to narrow the scope of the proceeding and enable the taxpayer to know the case that needs to be met.

*Efficiency and the purpose of the AAT procedure*

Section 2A of the AAT Act provides that in carrying out its functions, the AAT must pursue the objective of providing a mechanism of review that:

- (g) is accessible;
- (h) is fair, just, economical, informal and quick;
- (i) is proportionate to the importance and complexity of the matter; and
- (j) promotes public trust and confidence in the decision-making of the AAT.

Additionally, in a proceeding before the AAT, it is intended that:

*...the proceeding shall be conducted with as little formality and technicality, and with as much expedition as the requirements of this Act and every other relevant enactment and a proper consideration of the matters before the Tribunal permit...<sup>4</sup>*

In a proceeding before the AAT, both an Applicant and the decision-maker must use their best endeavours to assist the AAT to fulfil the objectives in section 2A of the AAT Act.<sup>5</sup> The decision-maker must also use its best endeavours to assist the AAT to make its decision in relation to the proceeding.<sup>6</sup> The obligation to assist the Tribunal is distinct from the model litigant rules discussed below. The obligation to assist goes much further than the model litigant rules, and reflects the close relationship between the Tribunal and the original decision-maker, and the level of assistance that must be provided for the Tribunal to reach the correct or preferable decision.

Paragraph 2.4 of the Practice Direction provides that the AAT expects an Applicant and a decision-maker to cooperate with the AAT and each other to:

- (k) identify the real issues in dispute *early*; and
- (l) deal with those issues efficiently and effectively.

Paragraph 2.5 of the Practice Direction provides that the AAT aims to reduce cost and delay by:

- (m) narrowing the issues in dispute;
- (n) limiting factual investigation to what is required in relation to the issues; and
- (o) holding as few additional case events as possible.

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<sup>4</sup> AAT Act, s 33(1)(b).

<sup>5</sup> AAT Act, sub-s 33(1AB).

<sup>6</sup> AAT Act, sub-s 33(1AA).

Where the Commissioner lodges his FIC Statement first, the Commissioner frames the facts and issues of the proceeding at the earliest opportunity. This would serve to advance all of the aforementioned purposes of the AAT, particularly identifying the real issues in dispute early and dealing with those issues efficiently and effectively.

*Objection decisions are inadequate to provide these material facts*

Objection decisions are not always an adequate substitute for a FIC Statement for the following reasons:

- (p) section 14ZY(3) of the TAA merely requires the Commissioner to serve on a person who has lodged a taxation objection *written notice* of the Commissioner's objection decision (note (q) below);
- (q) the Commissioner will generally provide reasons for the objection although this is not the case in every instance;<sup>7</sup> and
- (r) an objection decision does not cross-reference the 'Section 37' documents that must be provided in accordance with the AAT Act.

Therefore, at the time of serving an objection notice, there is a potential 'information gap' between the material facts (including the view of the facts on which the Commissioner has based his assessment and the manner in which he has arrived at his assessment) and the information in the hands of the taxpayer.

In addition, between the time the Commissioner makes his objection decision and the time his FIC Statement is due, there could be developments in the case such that the issues in dispute could be narrowed. For example, if the Applicant provides further facts such that the Commissioner no longer wishes to pursue an issue in dispute, then his FIC Statement could reflect that, such that the Applicant could avoid the need to address an issue in its FIC Statement that would ultimately not be before the AAT.

*Commissioner's Model Litigant Obligations*

The Commissioner is obligated to act as a model litigant. The Commonwealth's guidance on the obligation to act as a model litigant is set out in Appendix B of the *Legal Services Directions 2005* issued by the Attorney-General pursuant to section 55ZF of the *Judiciary Act 1903* (Cth) (**Model Litigant Rules**). In essence, being a model litigant requires that the Commissioner, when a party to litigation, act with complete propriety, fairly and in accordance with the highest professional standards.<sup>8</sup>

Specifically in relation to lodging a FIC Statement, the Model Litigant Rules require the Commissioner to act honestly and fairly in litigation by 'endeavouring to avoid, prevent and *limit the scope of legal proceedings* wherever possible...'<sup>9</sup>

The Model Litigant Rules were recently considered in the Victorian Supreme Court in *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* [2015] VSC 294 (**Comaz**) in the

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<sup>7</sup> Taxation Ruling TR 2011/5: 'Income tax: objections against tax assessments' [199]

<sup>8</sup> Model Litigant Rules Note 2.

<sup>9</sup> Model Litigant Rules s 2(d).

context of the Victorian model litigant rules, which are largely based on the provisions issued by the Commonwealth Attorney-General.

In considering the Victorian model litigant rules in *Comaz*, Croft J made the following observations (emphasis added):

*...As with most broad generalisations, the burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases. The courts have, for example, spoken positively of a public body's obligations of **conscientious compliance with the procedures designed to minimise cost and delay and of assisting 'the court to arrive at the proper and just result'**. And they have spoken negatively, of not taking purely technical points of practice and procedure; of not unfairly impairing the other party's capacity to defend itself; and of not taking advantage of its own default.*

*The Model Litigant Guidelines have evolved from the recognition at common law that governments should play fairly, and seek to bridle excessively adversarial behaviour by setting acceptable standards and boundaries for the conduct of litigation. It has been said that the guidelines reflect the expectations citizens have of their government and its agencies to respect the rule of law, to observe the spirit as well as the letter of the law, and to be fair, honest and even-handed when dealing with members of the public.<sup>10</sup>*

From the above, it can be concluded that the Model Litigant Rules (which are applicable at all times) require the Commissioner to:

- (s) limit the scope of legal proceedings wherever possible;
- (t) ensure that all relevant material is before the Tribunal;
- (u) assist the Tribunal to arrive at the proper and just result; and
- (v) not take purely technical points of practice and procedure.

The Committee respectfully submits that expecting the Commissioner to lodge a FIC Statement first is more consistent with the Model Litigant Rules as it will limit the scope of the proceeding and ensure that all relevant material is before the Tribunal at the earliest stage.

#### *Consistency with the appeal process in the Federal Court*

The Federal Court Practice Note TAX 1 provides that:

#### *4.2 Time for Filing and Serving of Appeal Statements / Rule 33.03 documents / Pro Forma Questionnaire -*

- (a) *Commissioner's Appeal Statement and Rule 33.03 Documents - The Commissioner's Appeal Statement (or Appeal Affidavit) and Rule 33.03 documents must be filed and served upon the Applicant within 28 days of the date on which the application was served on the Commissioner.*

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<sup>10</sup> *Comaz* [73] – [74].

*(b) Applicant's Appeal Statement - The Applicant's Appeal Statement must be filed and served upon the Commissioner within 40 days of the date on which the application was served on the Commissioner.*

The appeal statement in the Federal Court is "intended to be a practical document that informs the taxpayer of the Commissioner's view, at that time, of the bases of the Commissioner's rejection of the objection to the amended assessment."<sup>11</sup> Requiring the Commissioner, in the ordinary course of Federal Court proceedings, to file an appeal statement first, is an important step in framing the issues to be resolved. The Committee respectfully submits that the AAT process should be consistent with the Federal Court with respect to the order of lodging FIC Statements.

#### *Consistency with other regulatory decision-makers*

The FIC Instructions in the Practice Directions provide that:

*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, Fact and Contentions first, followed by the Applicant.*

The Committee respectfully submits that a taxpayer in a tax application for review of a decision should be treated the same as other applicants seeking a review of decisions by other regulatory bodies. The fact that the taxpayer bears the onus of proving that the assessment is excessive makes it critical that the taxpayer should be given the material facts at the earliest possible stage of the proceeding, including the basis of the assessment and the manner in which the Commissioner arrived at the assessment.

### **Part 2 – The process of the AAT should not vary depending on whether or not an Applicant is self-represented**

#### *Principles of the AAT procedure*

As noted, in accordance with section 2A of the AAT Act, in carrying out its functions, the AAT must pursue the objective of providing a mechanism of review that:

- (w) ...
- (x) is fair, just, economical, informal and quick; and
- (y) ...
- (z) promotes public trust and confidence in the decision-making of the AAT.

A process that is consistent is more likely to be fair and just and more likely to promote public trust and confidence in the decision-making of the AAT. The process of the AAT should further the objectives of the AAT as set out in section 2A and should not vary depending on whether an Applicant is self-represented. Therefore, the order of lodging FIC Statements should not be dependent on whether or not the taxpayer is represented.

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<sup>11</sup> *BAE Systems Australia (NSW) Pty Ltd v FCT* (2008) 69 ATR 567 [2].

While the Committee acknowledges that providing self-represented Applicants with assistance that helps them to understand and present their case contributes to the fairness and justice of the review process, the Committee does not consider that the fact that a party is self-represented *alone* warrants the expectation that the Commissioner will lodge his FIC Statement first. Rather, it is the fact that the basis of the assessment and the manner in which the assessment was made are material facts, solely within the knowledge of the Commissioner, which are essential to the taxpayer knowing what case need to be met at the Tribunal, that warrants the Commissioner lodging the FIC Statement first.

In order to achieve its objectives, the AAT must seek to ensure that, as far as possible, all relevant material is available to be considered. It is on this basis that the Commissioner should be expected to lodge its FIC Statement first. Furthermore, the Commissioner's obligation to bring to the Tribunal's attention matters adverse to its case applies irrespective of whether or not the taxpayer is represented.

#### *Potential disadvantage to represented parties*

Representation is permitted as a right at the AAT.<sup>12</sup> Representation facilitates the Tribunal process and ensures an efficient resolution of the real issues in dispute. The AAT should adopt a process that acknowledges and encourages the important role representation plays at the AAT.

As stated in the Practice Direction, where a taxpayer is represented, they will be expected to lodge their FIC Statement first. There is a potential disadvantage to a taxpayer when that taxpayer has decided to seek representation by requiring them to lodge first. The current AAT process fails to acknowledge the important role representation plays at the AAT, and in fact, potentially disadvantages a taxpayer who seeks representation. The Committee submits that the AAT procedure should not pose a potential disadvantage to a represented taxpayer and should be consistent regardless of whether or not a party is represented.

### **Part 3 – The process of initiating communication should not vary depending on whether or not an Applicant is self-represented**

The Committee submits, for consistency with our submissions regarding the FIC Statement, that the process for initiating communication in respect of matters to be raised at case management directions hearings should not vary depending on whether or not an Applicant is self-represented.

In practice, this may be a simple matter of the Commissioner initiating communication with the Applicant in respect of such matters in the event he has not heard from the Applicant within a reasonable time prior to the directions hearing, irrespective of whether or not an Applicant is self-represented.

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<sup>12</sup> AAT s 32.

Should the Principal Registrar wish to discuss these views with the Committee, discussions can be initiated by contacting the Committee Chair, Adrian Varrasso on (03) 8608 2483 or via email: [adrian.varrasso@minterellison.com](mailto:adrian.varrasso@minterellison.com)

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John-ISK' followed by a long horizontal stroke.

John Keeves, Chairman  
**Business Law Section**