



Administrative Appeals Tribunal

Principal Registry

6 May 2019

Mr Nick Westerink
Review of the Tax Practitioners Board
Individual and Indirect Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: TPBreview@treasury.gov.au

Dear Mr Westerink

Please find attached a submission from the Administrative Appeals Tribunal (AAT) in relation to the review of the Tax Practitioners Board. It sets out a range of information about the AAT and, in particular, our jurisdiction to review decisions of the Board.

We would be happy to provide any further information that might be of assistance to the review. We would also be available to meet with the reviewer to discuss the submission and any matters that might be of interest to him.

If you have any queries regarding our submission, please contact Chris Matthies

[Redacted contact information]

Yours sincerely

[Redacted signature]

**Sian Leathem
Registrar**



Administrative
Appeals Tribunal

Review of the Tax Practitioners Board

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INTRODUCTION

1. The Administrative Appeals Tribunal (AAT) welcomes the opportunity to participate in this review of the Tax Practitioners Board and the *Tax Agents Services Act 2009* (the Act). This submission provides:
 - some general information about the AAT and our role
 - information about the extent to which tax agents are involved as representatives of parties in reviews of tax decisions in the AAT, and
 - information about the AAT's jurisdiction to review decisions made by the Tax Practitioners Board.

ABOUT THE AAT

Establishment, role, jurisdiction and objective

2. The AAT was established by the *Administrative Appeals Tribunal Act 1975* (AAT Act) and commenced operations on 1 July 1976. On 1 July 2015, the Migration Review Tribunal, Refugee Review Tribunal and the Social Security Appeals Tribunal were amalgamated with the AAT.
3. The AAT conducts independent merits review of administrative decisions that have been made under Commonwealth laws. We do not have a general power to review decisions. We can only review a decision if an Act, regulation or other legislative instrument states that the decision can be reviewed by the AAT. Currently, we can review decisions made under more than 400 enactments.
4. Merits review involves taking a fresh look at the facts, law and policy relating to a decision. We consider all the material that is before us and must determine what is the correct or preferable decision in the case. In most cases, the AAT is able to take into account new information that was not available to the original decision-maker.
5. When reviewing a decision, the AAT can exercise all of the powers and discretions available to the original decision-maker. We have the power to:
 - affirm a decision;
 - vary a decision;
 - set aside a decision and substitute a new decision; or
 - remit a decision to the original decision-maker for reconsideration.
6. In carrying out our functions, the AAT must pursue the objective of providing a mechanism of review that:
 - is accessible; and
 - is fair, just, economical, informal and quick; and
 - is proportionate to the importance and complexity of the matter; and

- promotes public trust and confidence in the decision-making of the Tribunal.¹

Structure

7. The AAT consists of:
 - the President who must be a judge of the Federal Court of Australia;
 - Deputy Presidents, some of whom are Family Court and Federal Court Judges;
 - Senior Members; and
 - Members.
8. Members of the AAT are appointed by the Governor-General on a full-time or part-time basis for a term of up to seven years. Their primary role is to conduct hearings and determine applications for review of decisions.
9. Applications to the AAT are managed in one of the following nine divisions:
 - Freedom of Information Division;
 - General Division;
 - Migration and Refugee Division;
 - National Disability Insurance Scheme Division;
 - Security Division;
 - Social Services and Child Support Division;
 - Small Business Taxation Division;
 - Taxation and Commercial Division; and
 - Veterans' Appeals Division.
10. The President and Deputy Presidents can exercise powers in any of the divisions. Senior Members and Members may only exercise powers in the division(s) to which they have been assigned by the Attorney-General following any consultation required with other Ministers.²
11. The Registrar and staff of the AAT assist the members to perform their functions.

TAX AGENTS AS REPRESENTATIVES

12. Parties to applications in the AAT can deal with us directly or be represented by another person, including a lawyer or tax agent.³ Tax agents frequently represent applicants in reviews of tax decisions.
13. The table below shows the number and proportion of applications finalised in the AAT's Taxation and Commercial Division in each of the noted years in which an accountant or tax agent or a lawyer was recorded as the representative. These figures include all

¹ Section 2A of the AAT Act.

² See sections 17A to 17H of the AAT Act.

³ Section 32 of the AAT Act.

applications dealt with in the Taxation and Commercial Division, the majority of which relate to tax decisions.

APPLICATIONS FINALISED IN THE TAXATION AND COMMERCIAL DIVISION – REPRESENTATION BY ACCOUNTANTS/TAX AGENTS AND LAWYERS.				
2015–16 to 2018–19 to 31 MARCH 2019				
	2015–16 (% of total applications)	2016–17 (% of total applications)	2017–18 (% of total applications)	2018–19 to 31 March 2019 (% of total applications)
Accountant/Tax agent	312 (27%)	245 (26%)	198 (28%)	70 (15%)
Lawyer	554 (48%)	476 (50%)	318 (45%)	215 (47%)

AAT REVIEW OF DECISIONS BY THE TAX PRACTITIONERS BOARD

Jurisdiction & allocation

14. The AAT has jurisdiction to review a range of decisions made by the Tax Practitioners Board in relation to tax agents under the *Tax Agent Services Act 2009*⁴, including:

- to reject an application for registration (including renewal of registration)
- to specify a condition, or refuse to vary a condition, to which registration is subject
- to extend the period of time within which an investigation is to be completed
- to make an order under section 30-20 requiring a tax agent to take one or more actions
- to suspend registration, and
- to terminate registration
- to determine a period during which an application for registration may not be made..

15. The AAT also has jurisdiction to review certain decisions made by the Board relating to the recognition of professional associations under the *Tax Agent Services Regulations 2009*.⁵

16. Applications for review of decisions made by the Board relating to tax agents are dealt with in the AAT's Taxation and Commercial Division (see the Tribunal's *Allocation of Business to Divisions of the AAT President's Direction* dated 28 February 2019).

Application fees for review of tax agent decisions

17. Applicants for a review of a decision made by the Board must pay an application fee of:

⁴ Section 70-10 of the Act.

⁵ These are decision relating to the accreditation of professional associations for the purposes of recognising professional qualifications and experience that are relevant to the registration of individuals as registered tax agents, BAS agents and tax (financial) advisers.

- \$500 if they are a small business entity (within the meaning of the *Income Tax Assessment Act 1997*), or
- \$920 if they are not a small business entity.⁶

18. An applicant may qualify for a reduced fee of \$100 in certain concessional circumstances which include, for example, where the AAT considers that paying the full fee would cause, or has caused, financial hardship⁷.

Tribunal procedures

19. The AAT's procedures are designed to ensure that the applicant and the Board have a reasonable opportunity to present their case. Our case management approach pursues the dual goals of attempting to resolve matters by agreement between the parties where possible in the pre-hearing process, while ensuring that appropriate steps are taken to promptly prepare for hearing those matters that do not settle.

20. The procedures that generally apply to applications in the Taxation and Commercial Division are set out in the *Review of Taxation and Commercial Decisions Practice Direction* dated 1 July 2015. The aim is to identify the real issues in dispute early and deal with those issues efficiently and effectively by adopting a case management strategy in consultation with the parties which best meets the need of each application. The key steps in the review process are as follows:

- the decision-maker must prepare and give to the AAT and the applicant the section 37 documents which comprise:
 - a statement setting out the reasons for the decision, including any findings on material questions of fact and referring to the evidence for the findings; and
 - every document that is in the decision-maker's possession or control that is relevant to the review.
- the application is allocated to a Managing Member who will manage the application through the pre-hearing process and will generally preside at the hearing if the matter is not settled prior to hearing
- the Managing Member conducts a case management direction hearing to settle with the parties the case management strategy and issue appropriate directions
 - an Alternative Dispute Resolution process (generally conferencing, conciliation or mediation) will be conducted with a view to encouraging the parties to reach agreement
 - if the application is not resolved, the Tribunal will conduct a hearing.

21. The Tribunal is generally constituted by one member but may comprise two or three members depending on the nature of the legal and factual issues to be determined.

⁶ Sections 20(1) and (1A) of the *Administrative Appeals Tribunal Regulation 2015* (AAT Regulation).

⁷ Section 21 of the AAT Regulation.

22. The Tribunal is empowered to take evidence under oath or affirmation and may summon a person to give evidence or produce documents to the Tribunal. The Tribunal is not bound by the rules of evidence and may inform itself on any matter as it thinks appropriate, subject to the requirements of procedural fairness. The Tribunal conducts its hearings with less formality than the courts where possible, particularly if the applicant is self-represented.
23. The Tribunal may give its decision and reasons orally at the end of a hearing or it may reserve the decision and issue its decision and reasons in writing at a later time. Tribunal decisions are generally made public and published on AustLII.

Statistics relating to the caseload

24. The following table shows the number of applications for review of decisions made by the Board in relation to tax agents that have been lodged and finalised since 1 July 2015. It also shows the types of decisions which were the subject of the applications finalised in each of the noted years.

APPLICATIONS FOR REVIEW OF DECISIONS MADE BY THE TAX PRACTITIONERS BOARD LODGED AND FINALISED – 2015–16 TO 2018–19 TO 31 MARCH 2019					
	2015–16	2016–17	2017–18	2018–19 to 31 March 2019	Total
Applications lodged	28	13	6	14	61
Applications finalised	24	25	12	12	73
<i>Applications finalised by decision type^a</i>					
Reject application for registration	5	2	0	1	8
Reject renewal of registration	7	10	5	1	23
Extend period of time for investigation	0	1	0	1	2
Make an order requiring action	0	0	0	2	2
Suspend registration	0	0	1	3	4
Terminate registration	11	12	5	4	32
Other	1	0	1	0	2

a. figures relate only to the primary decision under review.

25. The following table gives further information about the outcomes in the finalised applications. It shows that, since 1 July 2015, 27 per cent of applications were finalised by a Tribunal decision following a hearing, 18 per cent finalised by agreement between the parties and 37 per cent withdrawn. The Board's decision was varied or set aside by decision or by consent in 16 per cent of applications.

OUTCOMES OF ALL APPLICATIONS FOR REVIEW OF DECISIONS MADE BY THE TAX PRACTITIONERS BOARD – 2015–16 TO 2018–19 TO 31 MARCH 2019					
	2015–16	2016–17	2017–18	2018-19 to 31 March 2019	Total
By decision^a					
Decision affirmed	6	6	4	1	17
Decision varied or set aside	2	1	0	0	3
By consent					
Decision affirmed ^b	2	1	1	0	4
Decision varied or set aside ^b	1	5	1	2	9
Dismissed by consent ^c	0	0	0	0	0
Other					
Withdrawn by applicant	10	9	3	5	27
Dismissed by Tribunal ^d	2	2	1	1	6
No jurisdiction to review ^e	1	1	2	3	7
TOTAL	24	25	12	12	73
Proportion of applications in relation to which decision varied or set aside	13%	24%	8%	17%	16%

^a Applications finalised by a decision of the AAT under section 43 of the AAT Act, generally following a hearing.

^b Applications finalised by the AAT in accordance with terms of agreement reached by the parties either in the course of an ADR process (section 34D) or at any stage of review proceedings (section 42C).

^c Applications dismissed by consent under section 42A(1).

^d Applications dismissed under section 42A(2) (non-appearance at a case event) and section 42B(1) (application is frivolous, vexatious, misconceived, lacking in substance, has no reasonable prospect of success or is an abuse of the process of the AAT).

^e Applications finalised on the basis that the decision is not subject to review by the AAT or the application fee has not been paid.

26. In relation to the 38 applications for review of decisions by the Board to impose a sanction (that is, to suspend or terminate registration and/or to require a tax agent to take one or more actions under section 30-20) which were finalised in the period from 1 July 2015 to 31 March 2019, the decision remained unchanged at the conclusion of the review process in 33 of those applications. The following table sets out information about the five applications in relation to which the decision was changed as a result of the review process.

YEAR	PRIMARY DECISION BY BOARD	MODE OF FINALISATION AT AAT	RESULT FOLLOWING REVIEW
2015–16	Terminate registration	Heard and decided: <i>SHTX and Tax Practitioners Board</i> [2016] AATA 451 (30 June 2016)	Written caution and order to take one or more actions.

YEAR	PRIMARY DECISION BY BOARD	MODE OF FINALISATION AT AAT	RESULT FOLLOWING REVIEW
2015-16	Terminate registration	Heard and decided: <i>SRBP and Tax Practitioners Board</i> [2016] AATA 456 (30 June 2016)	Written caution and order to take one or more actions.
2015-16	Terminate registration	Withdrawn by applicant after the Board made a new decision following remittal of the application for reconsideration under section 42D of the AAT Act	Written caution.
2016-17	Terminate registration	Heard and decided: <i>Kishore and Tax Practitioners Board</i> [2017] AATA 271 (28 February 2017)	Written caution.
2016-17	Terminate registration	Decision set aside by consent	No sanction imposed.