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# Tax litigation in the AAT – What, Why and How?

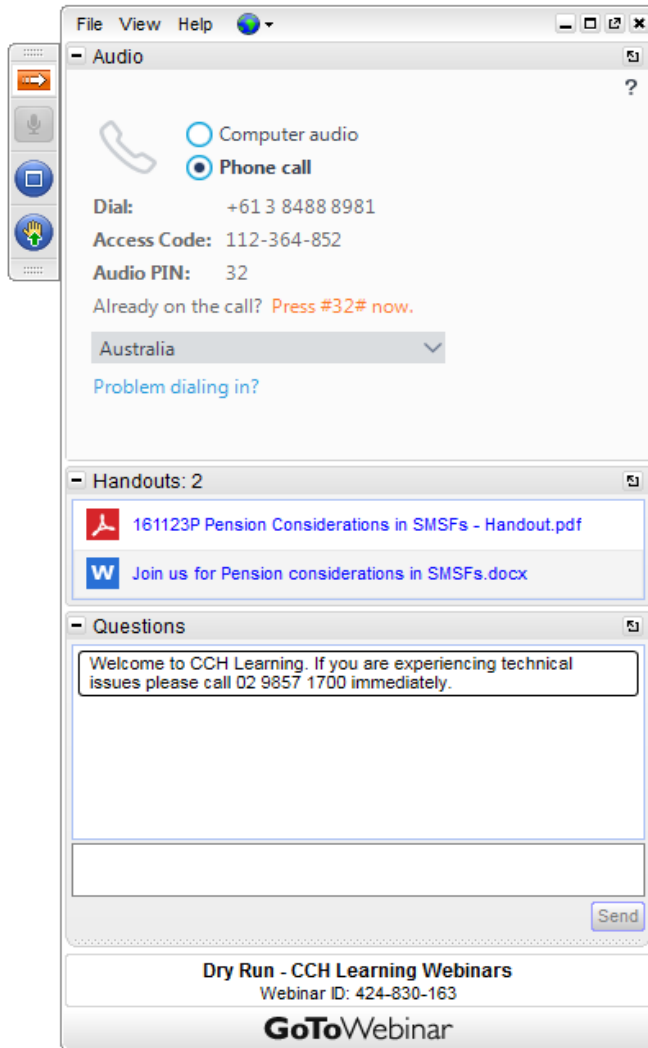
Bruce Collins

Tuesday 28 February

 Wolters Kluwer



# How to participate today



- Handouts Section - PowerPoint
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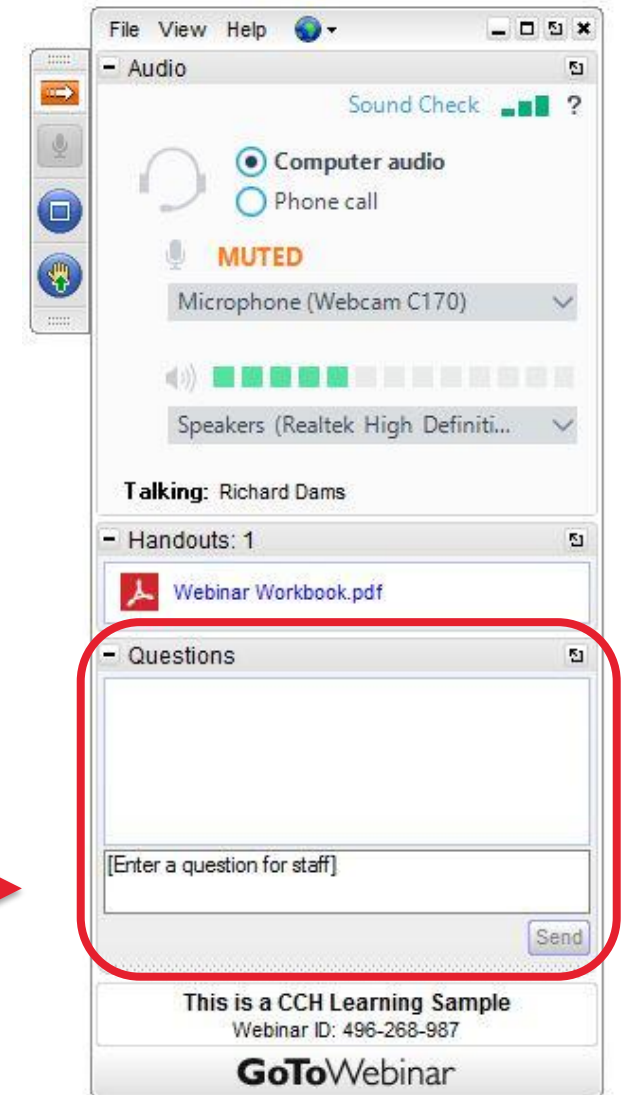
# Questions?



Susannah Gynther  
Moderator



Type your  
question and hit  
'Send'





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# Your Presenter

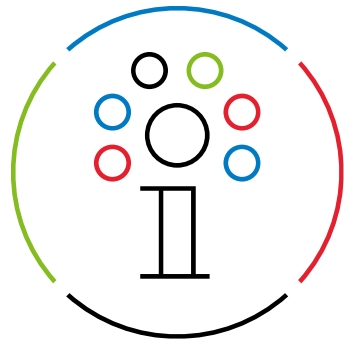


Bruce is the founder and principal solicitor at Tax Controversy Partners Pty Limited, currently helping clients to resolve all types of tax issues with the ATO and SROs. Before moving into private practice in 2017, Bruce worked for over 35 years in the Tax Office, a third of this time as a Senior Executive in what is now Client Engagement Group, covering most ATO functions.

Bruce was the leader of the Technical & Case Leadership area in Private Wealth for several years prior to leaving the ATO, as well as having previously been the strategic, technical and compliance leader for many of the ATO's litigation and law clarification programs, as well as at times being a member of the ATO Test Case Litigation Panel.

**Bruce Collins**  
Founder and Principal Solicitor  
Tax Controversy Partners

# Today's session will cover

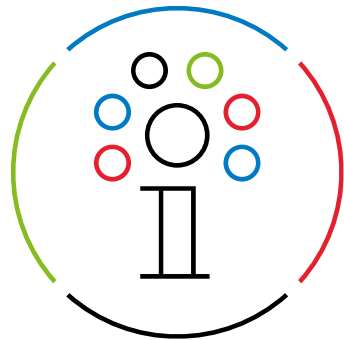


- Introduction to the AAT
- Recap of ATO objections
- What cases can be heard in the AAT?
- Small business tax decisions
- Other tax decisions
- ATO Test Case Funding
- Case Management/Directions
- s37 Statements – “T-documents”
- Statement of Facts, Issues & Contentions
- Applicant Evidence & ATO Response Evidence
- Conciliation/ ADR
- Hearings in the AAT
- Powers of the Tribunal
- Decisions by the Tribunal
- Next Steps

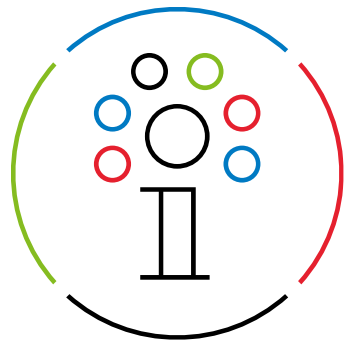
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# Who are you?

- a) Accountant or tax agent
- b) Lawyer
- c) Financial planner
- d) Student
- e) Other



# Who are you?



- a) In private practice, and have had experience with tax cases in the AAT
- b) In private practice, and have no experience with tax cases in the AAT
- c) In public practice, and have had experience with tax cases in the AAT
- d) In public practice, and have no experience with tax cases in the AAT
- e) Other



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# Introduction to the AAT

- The Administrative Appeal Tribunal (**AAT**) was established by and operated under the *Administrative Appeals Tribunal Act 1975* (**AATA75**) to conduct independent merits review of administrative decisions made under Commonwealth laws.
- The AAT conducts a merits-based review that it will take a fresh look at the relevant facts, law and policy and arrive to its own decision. In making a decision the AAT has the power to:
  - Affirm a decision
  - Vary a decision
  - Set aside a decision and substitute a new decision, or
  - Remit a decision to the decision-maker for reconsideration
- The review process is intended to be:
  - Accessible,
  - Fair, just economical, informal and quick,
  - Proportionate to the importance and complexity of the matter, and
  - Promotes public trust and confidence in the decision-making of the Tribunal

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## Changes announced on 16 December 2022

- The Federal Government announced plans to legislate in 2023 to abolish the AAT and replace it with a new federal administrative review body.
- The purpose of the new review body will be to provide a review system that is user-focused, efficient, accessible, independent and fair. Key features of the reform will include:
  - A transparent and merit-based appointments process
  - Providing additional capacity to enable the rapid resolution of existing backlogs
  - Consistent funding and remuneration arrangements to enable the new system to respond flexibly to fluctuating case numbers
  - Improving the accessibility of merits review by providing additional support services and emphasising early resolution where possible
- The AAT will continue to operate as normal until the new review body is established. All cases currently before the AAT will continue to be progressed and new cases can be lodged with the AAT. Arrangement for how AAT cases on-hand will be transitioned to a new review body will be in place before the AAT is abolished.
- The new review body will not reconsider decisions made by the AAT.
- See: <https://www.aat.gov.au/about-the-aat/a-new-federal-administrative-review-body>

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# Part IVC of the Tax Administration Act 1953

- The AAT is given the power to review an objection decision made by the Commissioner under Part IVC of the *Tax Administration Act 1953 (TAA53)*.
- Section 14ZZ gives a person who is dissatisfied with an objection decision the right to [either] apply to the AAT for a review of the objection decision or to appeal to the Federal Court against that decision.
- Objections can be lodged against a range of assessments:
  - Income Tax (s175A *Income Tax Assessment Act 1936 (ITAA36)*), including Medicare Levy (s251R *ITAA36*) and HECS debt (s106V *Higher Education Funding Act 1988*)
  - GST and Fuel Tax (ss155-90 *TAA53*)
  - Fringe Benefits Tax (s78A *Fringe Benefit Tax Assessment Act 1986*)
  - Superannuation Guarantee (s42 *Superannuation Guarantee Administration Act 1992*)
- Similar rights apply to seeking a review of objections to private ruling decisions (as discussed below)

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# Objection rights

- A taxpayer who is dissatisfied with an assessment (or private ruling) may object against it in the manner set out in Part IVC TAA53
- Assessment – Relevant tax acts adopt Pt IVC:
  - Must have taxable income and tax payable
  - Includes original, deemed, default and amended assessments
- Private ruling - s359-60 ITAA97 adopts Pt IVC
  - BUT limits the rights to object to a private ruling where:
    - there is an assessment made for the relevant year/s,
    - withholding taxes have become due/payable for the relevant period/s and
    - involving excise duty decisions.
- Taxpayer
  - Person deriving income or gains of a capital nature and includes a company and a liquidator but not a partnership
- Dissatisfied
  - Generally, the assessment (or private ruling) decision is adverse to the taxpayer by increasing a tax liability or decreasing a tax credit or offset

**NB:** Part IVC provides a prescribed channel for review and is protected by 'privative' or 'ouster' clauses that make it very difficult for a taxpayer to challenge an assessment or private ruling decision through other forms of judicial review – such as under s.39B of the Judiciary Act.

# Why choose the AAT (over the Federal Court)?

AAT	Federal Court
The AAT will undertake a merits-based review of the ATO's decision by effectively <u>standing in the shoes of the Commissioner</u> and can make a new decision	The Federal Court undertakes a judicial review which means it can only order the Commissioner to change an assessment if it wrong in law – it <u>cannot</u> a make new decision.
The AAT <u>will not</u> review the process by which the ATO made its decision, it can only review the decision of that process.	
The AAT can exercise discretion as part of its decision if it reaches a different decision.	The Federal Court will generally have to remit such matters back to the Commissioner.
The AAT is a lower cost option – for a tax matter is \$1,011 (or \$543 for the Small Business Tax Division). There are no ongoing fees to the AAT (however the taxpayer may continue legal fees).	The Federal Court filing fee is \$4,450 for a corporation or \$1,530 for an individual. There can be additional fees during the matter.
The AAT <u>cannot</u> make an order in relation to costs.	The Federal Court <u>can</u> make a costs order.
The AAT <u>is not</u> bound by the strict rules of evidence and the process is less formal.	The Federal Court is bound by the strict rules of evidence and the process is more formal
In the AAT, the taxpayer can request that the hearing be held in private and that they remain anonymous.	While the Federal Court may hear some proceedings confidentially, it is relatively exceptional

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# Small Business Taxation Division

- The Small Business Taxation Division (**SBTD**) of the AAT review small business tax decision- for an entity with an aggregated turnover of less than \$10million for the current income year. The ATO will generally tell you if you are eligible.
- Advantages of the SBTD include:
  - If Commissioner engages external legal services for the AAT case (first), then it they will meet the costs of legal representation at the same level for small business with no legal representation up to a certain amount – sometimes called ‘matching’
  - The AAT may grant a stay order preventing the ATO from taking action to recover any outstanding tax debts that are in dispute for the period of the AAT case
  - Fees are lower and may be remitted
- Further, the ASBFEO will (to a limited level) financially assist small businesses to manage the review process, including in getting general and legal advice about whether or not it is advisable to seek review of the Commissioner’s decision at the AAT, as well as advice during the review process

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# Other tax decisions

- The other types of decisions made by the Commissioner that can be appealed to the AAT include:
  - Applications for Relief for serious hardship
  - 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 an objection
- Other forms of ATO decision 'under an enactment' may be reviewable under the Administrative Decisions (Judicial Review) Act (noting that assessment and private ruling matters are specifically excluded from the scope of ADJR actions and the limited scope of such review rights and that ADJR reviews are on the process, not on the merits)

# The taxpayer's burden of proof

- Under s14ZZK TAA53, the taxpayer has the burden of proving that the assessment they are disputing is excessive.
- This is a high standard as the taxpayer needs to prove what the correct amount of the assessment is and not merely show that the assessment is wrong.
- As Mason J said in *Gauci v Commissioner of Taxation*<sup>1</sup> at 89:
  - *The Act does not place any onus on the Commissioner to show that the assessments were correctly made. Nor is there any statutory requirement that the assessments should be sustained or supported by evidence. The implication of such a requirement would be inconsistent with s190(b) [now, relevantly, s14ZZK TAA53] for it is a consequence of that provision that unless the appellant shows by evidence that the assessment is incorrect, it will prevail.*
- The taxpayer must establish and prove the facts on which they rely to ascertain the correct amount of tax – this can be by providing supporting documents or witnesses giving evidence by filing witness statements and presenting evidence at the hearing.
- The outcomes in Applicant taxpayers trying to meet this burden can still vary – such as in contrasting outcomes in *FC of T v Ross*<sup>2</sup> and *Le v FC of T*<sup>3</sup>.
- In many cases, this is a matter of the Applicant taxpayer addressing the formula of Burchett J in *Ma v FC of T*<sup>4</sup> at 230:
  - *if a taxpayer denies any undisclosed income, provides acceptable evidence of how he spends his time, and demonstrates a reasonable explanation for any appearance of the possession of assets, he will generally discharge his burden of proof unless some positive reason is shown why he is to be disbelieved ...*

<sup>1</sup> [\(1975\) 135 CLR 81](#)

<sup>2</sup> [\[2021\] FCA 766](#)

<sup>3</sup> [\[2021\] FCA 303](#)

<sup>4</sup> [\(1992\) 37 FCR 225](#)



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# Process in an AAT Review – Lodging a request

- A taxpayer generally has 60 days from the date of the Commissioner's objection decision to seek an AAT review.
- The application must be in writing, stating the reasons for seeking the review but generally the grounds for review are limited to the taxpayer's grounds for objection
- For example, if the objection decision was to disallow a deduction for work-related expenses the taxpayer cannot also seek review of an interest deduction disallowed at audit which was not subject to that objection
- An extension of time can be sought to lodge a request for review after 60 days, but the ATO will be asked if it opposes the extension of time being granted. In either case, the applicant taxpayer will have to provide an explanation (and perhaps supporting evidence) as to why their request was delayed.

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# Process of an AAT Review – Initial procedure

- The AAT will:
  - Appoint a Managing Member to manage the application process and to preside at the hearing if the application is not resolved before this point
  - Advise the ATO that the application has been received and request that the s37/T-documents be lodged by them with the AAT within 28 days
  - Hold a conference with each party individually to understand their position (may be done via a Registrar, such as in the SBTD)
  - Hold a directions hearing to discuss with both parties steps in case management to try to achieve early resolution of the application by way of agreement between the parties or by the AAT making a decision. It is usually held before the s37 statement is lodged. This directions hearing may consider:
    - Whether any orders ought to be made about the s37 documents
    - Whether there are related proceedings elsewhere (eg debt)
    - Use of ADR processes
    - How evidence may be presented at a hearing (ie witness statement, oral evidence and expert witnesses)
    - Making directions about lodging with the AAT and giving to the other party evidence and Statement of Issues, Facts and Contentions

# Process of an AAT Review – s37 statement / T-documents

- Pursuant to s37 AATA75 the ATO has 28 days to file the following material with the AAT (also known as the T-Documents), including:
  - A statement giving reasons for the decision
  - The notice of the taxation decision concerned
  - The taxation objection concerned, and
  - Every other document that is in the Commissioner's possession or under the Commissioner's control and is considered by the Commissioner to be necessary to the review of the objection decision concerned
- Sometimes, issues arise where there are documents that have a claim of privilege or other claim for confidentiality or immunity and are argued by the Commissioner should not be provided.
- The AAT may require the Commissioner to lodge an additional statement containing further and better particulars where appropriate.
- A taxpayer may seek to have the AAT require the Commissioner to give further documents and particulars where the failure to have done so has resulted in some definite lack of procedural fairness.
- There are also issues with materials relevant to the decision created or obtained by the Commissioner AFTER the time of the decision sought by the Applicant taxpayer (s38A AATA75)

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# Process of an AAT Review – Preparing your SFIC

- A Statement of Issues, Facts and Contentions (commonly referred to as a **SFIC**) needs to include the following:
  - File Number(s)
  - Name of Applicant
  - Name of Respondent
  - Issues
    - Explain what the problem is with the decision
    - What questions do you want the Tribunal to answer?
  - Facts
    - Briefly explain what happened (establishing the Applicant taxpayer's narrative)
    - Do not include opinions, do not attempt to provide evidence, but should instead refer to the T-Docs (and/or other evidence already filed)
  - Contentions
    - Explain the conclusions (fact and law) you want the Tribunal to draw and why these conclusions should be made
  - Decision Sought
    - Outline the decision/s (tax and penalty) that you are seeking (in substitution for the ATO objection decision/s)

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# Process of an AAT Review – Preparing your evidence (Form required and purpose)

- Evidence needs to be provided by the Applicant in support of the facts and contentions.
- Such evidence can be provided in a written statement or oral statements.
- Documents (including digital files) generally need to be adduced as attachments to such a written statement – including explaining the ‘provenance’ of those documents.
- In a sense, the Applicant taxpayer’s evidence is often intended to support them providing a convincing ‘contrary narrative’ about relevant transactions/events that they will then argue changes the tax outcomes (or those for penalty imposition/remission) from the original story alleged to exist as the basis of the Commissioner’s objection decision.
- While business taxpayers may attempt to rely upon the evidentiary presumptions in favour of company records (under s1305 for accounts or s251A for company meetings), these are rebuttable presumptions – so the Commissioner may present some evidence argued to be inconsistent and thus rebut that presumption.

# Process of an AAT Review – Preparing your evidence (Informality of small business family dealings)

- However, in a lot of circumstances of family transactions or smaller expenses, documentary evidence can be hard to find years later. In *Snaird v Commissioner of Taxation*,<sup>1</sup> the AAT commented that it was not unreasonable for an Applicant not to have obtained documentary evidence for private expenses.
- Further, Logan J in *Melbourne Corporation of Australia Pty Ltd v Commissioner of Taxation*<sup>2</sup> variously commented that about the generally accepted informality of record-keeping business dealings within small business private groups, stating:

45. Sometimes, the informality in relations will be such that one is left just to infer the existence of an agreement by conduct: *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, at [369].

46. A great disservice can be done to the Australian business community, especially the small business community, by a failure on the part of the Commissioner, in his administration of national taxation laws, to recognise, as the courts do in cases great and small and in circumstances extending across a wide range of controversies, these ordinary features of Australian commercial life.

47. All this said, where, as here, informality is present, much can depend on the credibility one affords the accounts given by participants and, where they exist, representations in business records created under their supervision or with their approval.

<sup>1</sup> (1997) 37 ATR 1238

<sup>2</sup> [\[2022\] FCA 972](#)

# Process of an AAT Review – Preparing your evidence (Fraud of Evasion – Passage of Time)

<sup>1</sup>(1949) 49 SR (NSW) 195

<sup>2</sup>[\[2016\] AATA 1041](#)

<sup>3</sup>[\[2015\] FCA 973](#)

<sup>4</sup>[\[2016\] FCAFC 163](#)

- There are no time limits on amending assessments where the Commissioner makes a finding of fraud or evasion – see, for instance, s170 ITAA36
- ATO PS LA 2008/6 – Principle 2
  - *If we consider that fraud or evasion may apply we will generally express these concerns in a position paper sent to the taxpayer who will be given an opportunity to respond before an opinion is formed.*
- Evasion requires a ‘blameworthy act or omission’ - per Dixon J in *Denver Chemical Manufacturing Co v C of T (NSW)*<sup>1</sup>– so to succeed in an objection to a ‘fraud or evasion’ finding, the taxpayer needs to demonstrate that their originally reported tax position was correct
- Practical experience shows that this can be extremely difficult, as where a significant period of time has passed [frequently beyond record retention periods], business and bank records may no longer be available – creating significant problems for Applicant taxpayers in addressing cases from many years ago re-opened under alleged ‘fraud or evasion’.
- These practical difficulties are demonstrated in cases like *Nguyen and Commissioner of Taxation (Taxation)*<sup>2</sup>; *Bai v FCT*<sup>3</sup> and *Binetter v Commissioner of Taxation*<sup>4</sup>
- Despite those difficulties in such cases – the Applicant taxpayer has to prove their case with convincing evidence or they will fail to meet the required burden of proving the assessment excessive.

# Process of an AAT Review – Preparing your evidence (Credibility of witnesses and their evidence)

- Ultimately, an Applicant taxpayer has the burden of ‘proving’ that the relevant objection decision was incorrect/excessive and by ‘how much’.
- Given that so much of a taxpayer’s affairs are uniquely known to themselves and close associates, the Commissioner will often argue that such evidence the taxpayer/associates may provide is ‘self-serving’, unless corroborated by ‘independent’ third-parties.
- As a result, much may ultimately turn on the credit given to particular witnesses (usually on behalf of the Applicant taxpayer) in their oral testimony before the Tribunal – see *Krew v FC of T*<sup>1</sup> where the taxpayer convincingly testified to alleged income instead being gambling winnings (not sure this would fly as well today).
- Of course, if there are argued to be conflicts between such a witness’ testimony and written documentation or even their own previous statements, then their credibility is likely to be called into question.
- However, even such questions are not automatically fatal to the taxpayer’s case – if the taxpayer can provide sufficiently convincing explanations as to such apparent variations from other evidence (even in after-hearing submissions) – see *VTBL and Commissioner of Taxation (Taxation)*<sup>2</sup>

<sup>1</sup> [\(1971\) 2 ATR 230](#)

<sup>2</sup> [\[2023\] AATA 168](#)



# Process of an AAT Review – Preparing your evidence (‘Expert’ evidence vs corroboration from professionals)

- ‘Expert’ evidence – [Persons Giving Expert and Opinion Evidence Guideline](#)
  - Reports from an expert must include:
    - Details of the person’s area of knowledge and qualifications/experience
    - Letter of instructions received and questions asked
    - Details of facts and assumptions relied on
    - Reasons for opinion expressed
    - Details of any examinations, tests, investigations
    - Details of literature and other material relied on
    - Include the declaration
  - Importantly, such an ‘expert’ can’t act as an ‘advocate’ for the client’s position and their ‘independence’ may be questioned if they have otherwise acted for the taxpayer in other matters/contexts.
- The role of such ‘expert’ evidence provided as ‘opinion’ after-the-fact is quite different from a contemporaneously engaged professional adviser giving evidence about events during their engagement to provide services to the taxpayer. The former is a professional ‘opinion’, while the latter is direct evidence of observation of events or transactions. This can become confusing where that professional refers to their previous ‘opinions’ that they contemporaneously communicated to the taxpayer.

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# Process of an AAT Review – ATO Response Evidence

- Going second in this process gives the Commissioner a tactical advantage in the evidentiary part of the Tribunal process.
- Generally, the Commissioner's evidence in response will include anything further (beyond the s37 statement) that (from the ATO's perspective) appears to either directly contradict or at least call into question evidence provided by the Applicant taxpayer regarding relevant/material facts.
- Many cases revolve around the Commissioner raising what the ATO sees as being contrary material that raises concerns about the reliability of the Applicant taxpayer's evidence.
- However, to address that risk, the Applicant may then seek to provide rebuttal or explanatory evidence intended to counter the Commissioner's allegedly contrary evidence – although this can then lead to the Commissioner being given a further round of response evidence, too.

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# Process of an AAT Review – the Commissioner's SFIC

- Again, going second in this part of the process gives the Commissioner a tactical advantage in the argumentation part of the Tribunal process.
- Generally, the Commissioner's SFIC will therefore contain a response to the Applicant taxpayer's arguments, as well as [generally] defending the basis of the original ATO objection decision.
- Referring to any evidence argued to be contrary to the Applicant taxpayer's evidence from either/both the s37 statement and the Commissioner's response evidence, the Commissioner's SFIC will then try to counter the Applicant taxpayer's narrative and to defend the story upon which the Commissioner's objection decision was based.

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# Process of an AAT Review – Use of ADR

- The AAT encourages the early resolution of disputes by using different types of alternative dispute resolution (ADR) and the taxpayer and the ATO are expected to act in good faith when engaging in ADR.
- Types of ADR used are:
  - Conferencing
  - Conciliation or Mediation

## Conferences

- The purpose of a conference is to:
  - Identify and narrow the issues in dispute
  - Identify further evidence that may be needed and discuss when it has been received and the merits of the case
  - Explore if an agreed outcome can be reached
- Conferences are conducted by AAT Conference Registrars and are usually planned to be held within 6-10 weeks of the application being lodged with the AAT.

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# Conciliation or Mediation

- The Managing Member may make a direction for the parties to undertake conciliation or mediation which is conducted by the AAT Conference Registrars and must be attended by a person with authority to make decisions on any proposed settlement.
- At least 3 working days before a conciliation or mediation, both parties must:
  - Give the AAT and each other a list of the people who will attend the ADR process
  - Give a Confidential Issues Statement to the AAT which will be used for the purposes of the conciliation/mediation and will not be given to the other party
- The Confidential Issues Statements must be no more than 3 pages and contain:
  - A summary of the issues in dispute
  - What the party hope to achieve from the ADR process
  - A list of outcomes, from best to worst, if the application is not settled
  - An assessment of the legal, commercial, business and reputation risks of continuing litigation
  - Any settlement offers tat have been made
  - Costs incurred to date
  - The amounts in dispute
  - In the event the application proceeds to hearing, how long you estimate the hearing may take and a proposed list of witnesses

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# Conciliation or Mediation

- If the parties reach agreement about the decision, the terms of agreement must be put in writing, signed by all parties and sent to the AAT, who make a decision, known as a consent decision based on the agreement.
- The AAT will do this if:
  - The terms of the agreement are consistent with a decision the AAT can make, and
  - The AAT considers it appropriate to make the decision
- A consent decision following an agreement made at an ADR process will not be made by the AAT until 7 days after receiving the notification to allow the parties to change their mind.
- Importantly, all discussions and communications in such ADR processes are protected from disclosure and cannot be admitted as evidence in the substantive Tribunal processes (except for enforcement of consent orders – which seems to rarely happen in practice)

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# Process of an AAT Review – Role of Submissions

- Each element in a submission (whether oral or written and depending on the Tribunal's directions) should put forward as a coherent argument on a particular point – a collection of propositions intended to establish a desired conclusion
- Submissions need to be framed to consider and effectively rebut the other side's contrary arguments (whether in advance or in response).
- It is no good only considering your own position, you have to consciously workshop what the other side has or will say – to make your position stronger by effectively rebutting theirs.

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# Process of an AAT Review – Submissions on issue of facts

- Submissions designed to establish a desired conclusion on the existence/non-existence of a material fact should provide clear signposts to guide the Tribunal to which part of the evidence they need to consider and then provide propositions as to why the Tribunal should accept the client's position/narrative on the facts (as opposed to the other party's)
  - Where there are two potential narratives, the submission will also need to provide convincing rationale for why the client's version should be preferred (rebutting the predicted/actual arguments from the other side)
  - If credibility is in issue or there are conflicting indications in the evidence, it is quite important to shore up the witness's credibility by responding to those issues in advance to explain why the client's version should be preferred, rather than trying to ignore them or pretend that those issues don't exist by attempting sweeping statements – as the Tribunal members will usually focus on such inconsistencies themselves, even in the unlikely event that the other side doesn't highlight them



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# Process of an AAT Review – Submissions on issue of law

- Submissions on the operation of the law (and its application to the material facts) should articulate the relevant authorities (legislation, extrinsic materials, case law and even ATO rulings) and then distil the key propositions from those authorities that are intended to support the desired conclusion.
  - Where there are two potential legal propositions, the submission should consider each line of authority and then explain why the desired conclusion should be preferred (again rebutting the predicted/actual arguments from the other side)
  - If there are multiple alternative arguments that need to be made, then it is helpful to put them into a logical running-order and clearly refer to them as alternatives in that order – such as for shortfall penalties, where ‘in the taxpayer’s true circumstances’:
    - the first alternative is usually that there wasn’t a shortfall,
    - second that there was reasonable care exercised,
    - third that any relevant culpable conduct should be lowered to merely lack of reasonable care,
    - fourth that the ‘safe harbour’ might apply for a registered tax practitioner’s conduct if there was any lack of reasonable care and
    - then lastly finish with the s.298-20 discretion should be exercised for whatever penalty may remain.

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# Process of an AAT Review – The Hearing

- The hearing will be conducted by a Tribunal Member (or rarely a panel of members), who will make a decision about the review. If the matter involves a question of law, it may be heard by a Presidential Member.
- It will be held if the matter has not been resolved before that point and is the opportunity for both parties, to present their evidence and arguments to the AAT.
- Who will be at the hearing?
  - The Member, plus one or more AAT staff
  - The Applicant and their representatives (legal/tax/accounting)
  - A representative of the Respondent and their legal representatives (if applicable)
  - Any witnesses, and anyone summoned to give evidence

# Conduct of hearings

- In G T Pagone's book, *Tax Disputes*,<sup>1</sup> he describes the 'usual order for presentation of evidence' with reference to *Re Spoodler and Secretary, Department of Social Security*<sup>2</sup> as follows:

*(7) The usual procedure is that the applicant, after outlining its case will present any evidence, written and oral, in support of that case. The respondent may cross-examine any witnesses. The respondent will then outline its case and present any evidence. The applicant may cross-examine the respondent's witnesses. The applicant may lead evidence in rebuttal to answer point made in the respondent's case in certain instances. At the conclusion of the evidence, each party then has an opportunity to make submissions.*

*(8) There are often occasions on which the usual procedures are varied. So, for example, when the respondent is the department, it may be asked by the tribunal to present its case when the application for review has been brought by a person who is unrepresented. At other times, when the department is the applicant and, as in this case, it requests that the respondent give evidence first, the respondent may consent to presenting all or some of its evidence at the outset. An application may be made from time to time for evidence to be interposed. Calling a witness out of order (eg calling one of the respondent's witnesses while the applicant is still presenting its case), can be convenient for witnesses and not disadvantage wither parties or the tribunal. Looking again at an example, it may be that in a compensation case there is no difficulty in calling one of the respondent's doctors after the applicant has given his or her evidence as to how the injury is claimed to have arisen and the effect upon him or her but before all of the applicant's other evidence has been led. If the respondent seeks to interpose the doctor before the completion of the applicant's own evidence then there may be difficulty. What is appropriate will depend very much on the facts of each case.*<sup>3</sup>

<sup>1</sup> G T Pagone, *Tax Disputes*, (Federation Press, 2018) 93, <sup>2</sup> (1991) 24 ALD 786 <sup>3</sup> Ibid, 786-787

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# Process of an AAT Review – The Hearing

- What happens at the hearing?
  - The Member will explain what will happen during the hearing
  - If represented by a professional, they will talk on behalf of their party/client
  - The parties will be asked to take an oath or make an affirmation that they will tell the truth at the hearing
  - Both parties will have an opportunity to present information/evidence and the Member, the decision-maker's representative and any other party can ask questions of them
  - Any witnesses will be asked to give evidence and may be questioned
  - Each party will have an opportunity to give a brief summary of all the main arguments in the review
  - The length of the hearing varies from case to case
  - The Tribunal may agree to accept or even request written submissions within a set timeframe after the hearing
  - The decision can be received at the end of the hearing, or 'reserved' to be provided at a later date

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# Process of an AAT Review – The Decision

- The AAT can:
  - **Affirm** the decision: the decision is not changed
  - **Vary** the decision: the decision is changed
  - **Set aside** the decision and substitute a new decision: the decision is replaced with a new decision
  - **Set aside and remit** the decision: the matter is sent back to the ATO to make a new decision
- An oral decision including reasons for the decision may be given at the end of the hearing.
- If the decision is not made at the hearing, the AAT will send the parties a notice of the decision and the written reasons, usually within 2 months of the hearing (but may be far longer during periods of backlog).
- The decisions and reasons for decision are published unless the disclosure is prohibited.
- Adverse decisions can be appealed by either party (or cross-appealed) to the Federal Court within 28 days after receiving the decision.

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# Powers of the AAT

- The Tribunal is given “the powers and discretions conferred upon the Commissioner but only for the purpose of reviewing the Commissioner’s objection decision”.<sup>1</sup>
- It’s commonly said that the Tribunal “sits in the shoes of the Commissioner” – BUT their power is limited to ‘doing over again what the Commissioner did “to work out, as a step in administration, what it considered [the taxpayer’s] legal situation to be”’.<sup>2</sup>
- This means that the Tribunal is able to exercise the same powers that would be available to the Commissioner, which is also dependent on the decision under review.
- The Tribunal is not bound by the taxation rulings.<sup>3</sup>
- From this year, the Tribunal can now also order a stay on recovery proceedings where a reviewable objection decisions decisions relating to a small business taxation assessment decision before the SBDT, where the application for review is made on or after 13 December 2022.

<sup>1</sup> *Liedig v Commissioner of Taxation (Cth)* (1994) 50 FCR 461, 464 <sup>2</sup> G T Pagone, *Tax Disputes*, 104, referencing *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 502; *Liedig* 464-465 <sup>3</sup> *Federal Commissioner of Taxation v Swift* (1989) 18 ALD 679

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## Next steps ...

- Either party who is dissatisfied with the AAT decision can lodge an appeal to the Federal Court within 28 days of receiving the AAT Notice of Decision.
- An appeal from the AAT is limited to a question of law (s44 AATA75).
- An appeal cannot generally be lodged on an incorrect AAT finding on matters of evidence – as this would involve a question of fact.
- In limited circumstances, the court may make new findings of fact in order to completely dispose of the matter rather than remit it to the AAT (ss44(7) AATA75).
- A new issue can only be raised at the Federal Court if it is about the construction of law and is in the interests of justice.
- On appeal from the AAT, the Federal Court may make any order, including order affirming or setting aside the AAT decision, or an order remitting the case to the AAT to be heard/determined again.
- If dissatisfied with the Federal Court decision, a party may appeal to the Full Federal Court.
- If dissatisfied with the Full Court decision, a party may apply to the High Court for special leave (permission to appeal) but this is granted at the High Court's discretion (and is often refused).

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# Recommended reading for preparing for the AAT

- [General Practice Direction](#), Administration Appeals Tribunal, Practice Direction (updated as of 28 February 2019)
- [Giving Documents or Things to the AAT](#), Administrative Appeals Tribunal, Practice Direction (updated as of 4 December 2020)
- [Lodgement of Documents under Sections 37 and 38AA of the AAT Act](#), Administrative Appeals Tribunal, Practice Direction (updated as of 30 June 2015)
- [Review of Taxation and Commercial Decision](#), Administrative Appeals Tribunal, Practice Direction (updated as of 30 June 2015)
- [Guide to the Small Business Taxation Division](#), Administrative Appeals Tribunal, Guide (updated as of January 2023)
- [Alternative Dispute Resolution \(ADR\) Guidelines](#), Administrative Appeals Tribunal, Guideline (updated as of June 2006)
- G T Pagone, *Tax Disputes*, (Federation Press, 2018)
- G T Pagone, *Tax Effective Writing* (Federation Press, 2013)



# Questions

You can type them in the “Questions” box now  
Or contact me via:



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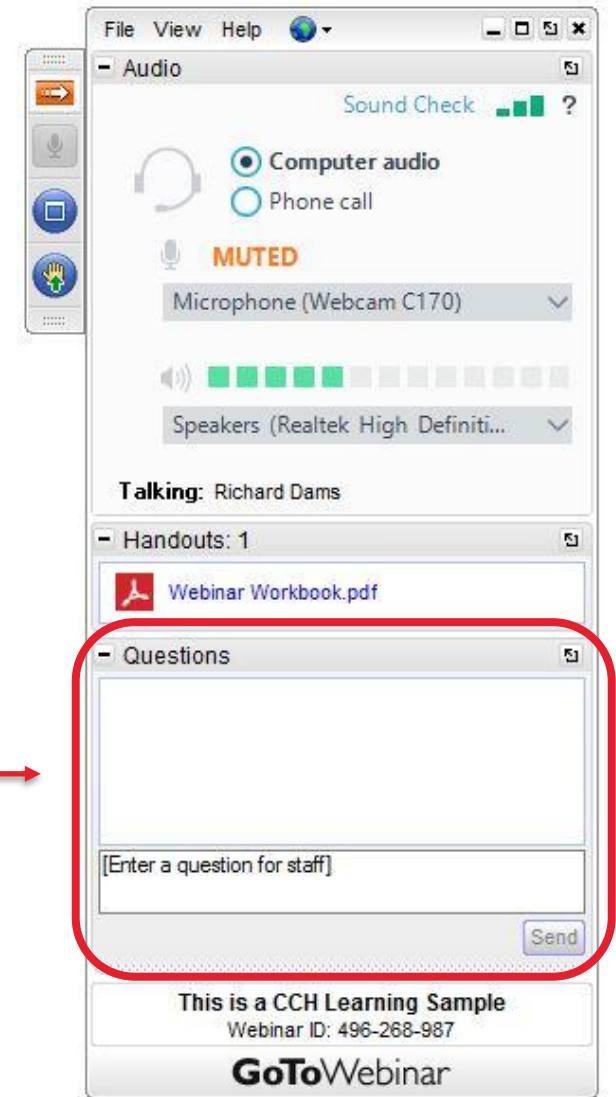
# Questions?



Susannah Gynther,  
Moderator

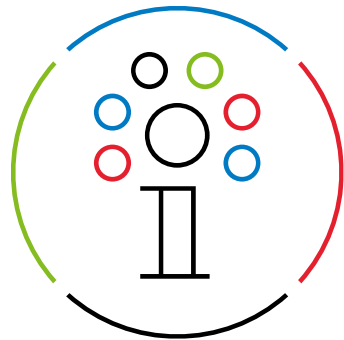


Type your  
question and hit  
'Send'



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# Upcoming Webinars



- 28 February - FBT 2023 – Return Preparation
- 2 March – FBT 2023 – Motor Vehicles (including Electric Vehicles)
- 7 March – FBT 2023 – Car Parking
- 7 March – Tax Risk Management and Tax Governance
- 8 March – SMSFs and Death Benefits – The Ultimate Beneficiary
- 8 March – Tax issues for Property Developers

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# Next steps

Please complete the Feedback Survey when the webinar ends

Within 24-48 hours you will be enrolled into the E-Learning which includes:



- a PDF of the PowerPoint
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# Thank you for attending

