Statutory Review of the Administrative Appeals Tribunal
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About ASQA

The Australian Skills Quality Authority (ASQA) was established in 2011 as the national vocational education and training (VET) regulator, through the National Vocational Education and Training Regulator Act 2011 (the NVR Act).

ASQA is tasked with regulating registered training organisations (RTOs) that deliver VET qualifications and courses; training providers that deliver VET courses to overseas students (under the Education Services for Overseas Students Act 2000 (the ESOS Act)); accredited VET courses; and certain providers that deliver English Language Intensive Courses to Overseas Students (ELICOS).

ASQA regulates using a standards-based quality framework. This regulation is the cornerstone in promoting a VET system appropriate to Australia’s social and economic needs for a highly educated and skilled population.

Establishment

The national regulatory system was established through:

- a referral of powers to the Commonwealth from most states (except Victoria and Western Australia)
- the exercise of the Commonwealth’s constitutional powers in the regulation of vocational education and training in the territories.

On 1 July 2011, ASQA became the regulatory body for the vocational education and training (VET) sector for the Australian Capital Territory, the Northern Territory and New South Wales. ASQA also assumed responsibility for regulating certain registered training organisations (RTOs) in Victoria and Western Australia from that date, specifically:

- those RTOs that offer courses in any state or territory other than Victoria or Western Australia, including by offering online courses
- those RTOs that offer courses to overseas students.

ASQA became the regulatory body for the VET sector in Tasmania, South Australia and Queensland in 2012.

Legislative framework

ASQA’s regulation of Australia's vocational education and training sector is supported by a framework of legislation and standards.

This framework includes the establishing legislation above, as well as the VET Quality Framework, the Standards for Accredited Courses, and legislation relating to the provision of courses to overseas students.
The VET Quality Framework comprises the:

- **Standards for Registered Training Organisations 2015**—standards to ensure nationally consistent, high-quality training and assessment across Australia's VET system

- **Fit and Proper Person Requirements**—which determine requirements for people with some control or influence over the operation of a registered training organisation. For the purpose of subsection 186(2) of the National Vocational Education and Training Regulator Act 2011, the Fit and Proper Person Requirements are at schedule 3

- **Financial Viability Risk Assessment Requirements 2011**—which relate to the requirement for registered training organisations' and applicant training organisations' ability to meet financial viability requirements

- **Data Provision Requirements 2012**—which sets out the requirement for providers to supply ASQA with data upon request, and to submit quality indicator data annually

- **Australian Qualifications Framework**—which is the national policy for regulated qualifications in Australian education and training.

*Education for overseas students (ESOS) legislation*

As an ESOS agency under the ESOS Act, ASQA assesses the registration and re-registration of courses on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) and monitors providers against the:

- **Education Services for Overseas Students Act 2000**
- **National Code of Practice for Providers of Education and Training to Overseas Students 2018**
- **ELICOS National Standards, if applicable.**
Issues for consideration

1. Giving information to the AAT

To provide documents relating to AAT review applications electronically, that is via email or USB, including the Tribunal (T) documents.

- Practice varies between the different district registries as to requiring hard copies of the T documents.
- ASQA matters are very document “heavy”; printing hard copies is expensive and time consuming and often not very practical given the changing evidence base as the review application progresses – a reflection of the “full merits” review nature of the jurisdiction. The overall resource-intensiveness (and cost) associated with voluminous hard-copy documents is felt more readily in a small agency (with a small Legal Services team) such as ASQA.

Practice directions

- There are two practice directions that deal with giving information to the AAT:
  i. Practice Direction: Lodgement of Documents under sections 37 and 38AA of the AAT Act - 30 June 2015
     - Sections 37 and 38AA of the AAT Act deal respectively with the obligation of the respondent decision maker to lodge with the Tribunal all information relevant to the decision under review and the continuing obligation to do so as the review application progresses.
     - There is no reference in the practice direction on how (that is, what medium) to file documents.
  ii. Practice Direction: Giving Documents or things to the AAT - 21 November 2017
     - At paragraph 3.2 is the following:
       Giving documents or things (including applications for review)

       3.2 A document or thing (including an application) may be lodged with, or given to, the AAT by

       - delivering it to a registry of the AAT;
       - sending it by pre-paid post, reply-paid post to a registry of the AAT
       - faxing it to a registry of the AAT; OR
       - emailing to a registry of the AAT

       Note: Contact details for the registries of the AAT and guidelines you should follow when sending an email to the AAT can be found on the AAT website (www.aat.gov.au)

- A further practical problem is the email capacity of AAT registries.
• Providing documents (electronically) by USB would be more efficient and practical.

• ASQA has also been advised by the AAT that an exception applies in relation to documents ASQA is required to lodge under section 37 of the AAT Act. That is, pending further development of the AAT’s online lodgement systems, section 37 documents need to be provided to the Tribunal in hard copy. The AAT stated that this applies to all types of cases across the General and other Divisions. Regardless, practice across different registries varies greatly.

• In short, clarification around facilitation of giving documents (electronically) to the AAT, such as email and USB would be useful.

• Applicants also often provide a “dump” of documents with nothing in the way of an index, page numbering, tabulation or a matrix/overview cross referencing the documents to the non-compliances identified by ASQA.

• This could be addressed with directions from the AAT as to the presentation of documents/evidence in an orderly form.

2. Stays

To provide for the better management and conduct of stay applications.

• ASQA has recently been invited to have its matters managed under the Practice Direction – Review of Taxation and Commercial Decisions – 30 June 2015 (Practice Direction) and has had productive discussions with the AAT in relation to this.

• ASQA has provided comment on the practice direction to address issues associated with ASQA matters (as attached). However, ASQA now understands that the above Practice Direction is under full review and ASQA’s comments will be considered in the context of the full review.

• One pressing issue is the conduct and management of stay applications and related hearings – an issue only addressed in a general way in the current Practice Direction in any case.

• Current practice does not allow for an orderly and considered assessment of an application’s merits particularly where the decision to be stayed goes to the continued existence of the RTO, for example cancellation of registration, non-renewal of registration, and the “effective” date of that decision is approaching.

• The current practice is ASQA receives from the AAT notification of a review application and any associated stay application.

• The stay application itself provides for the applicant to “state the grounds for the request.” Often there will be very limited information provided by the applicant in support, and may be as brief as “if the decision is not stayed the application for review will be rendered nugatory”.

• The AAT requests ASQA’s position on the stay application by a specified time, depending on when the decisions are to come into effect as stated in ASQA’s notification letter.

• An applicant has 28 days to lodge a review application and the stay application is usually lodged at the same time. Invariably, ASQA gives 35 days from the date of the notice before the decision comes into effect; the longer the applicant takes to make the review application, the shorter the period ASQA is given to notify of its position.
• ASQA can be confronted with a very short turnaround time to advise its position on the stay application (that is, oppose outright, not oppose or not oppose but with conditions) or the stay being listed for hearing shortly after receiving notification.

• Typically, the effective date of the decision will have to be extended to allow for the AAT to hear the stay application before the decisions come into effect; that is contrary to the reason behind the decision ASQA has made.

• For example in a recent review lodged which related to a request to stay decisions to cancel and not renew registration, ASQA received notification on Thursday 1 November 2018 - effective date of decisions, Tuesday 6 November - stay hearing listed Monday 5 November at 5.45 pm.

• ASQA has recommended that the practice direction be amended to specifically cater for managing stay requests and in particular directions for the lodging and serving evidence/submissions by Applicant and Respondent at the time the stay request is lodged.

• This could address supporting evidence required from an Applicant and for ASQA to respond within a specified time thereafter.

• There could also be a call over listing soon after the application is lodged to make directions for the further progress of the stay and deal with an interim stay and/or extending the effective date of the decision in the meantime.

3. Consistency in approach – an overarching issue

• Approaches to case conferences, requirements for Tribunal documents (see above), use of ADR (conciliations etc), varies as between the different district registries, for example, in ASQA’s experience, the Perth registry takes a different approach to the initial telephone case conference, setting aside up to an hour whereas Sydney and Melbourne, each conference is limited to 30 minutes.

• This may come down to the varying levels of workloads as between the different registries.

• Similarly, in a recent matter involving a decision to not allow a shorter period of time to renew a provider’s registration, given the Applicant already had a review lodged with the AAT in relation to a decision not to grant an addition to the RTOs scope of registration, the AAT immediately (and without consultation with ASQA) joined the two matters and proceeded to list both matters for conciliation. In ASQA’s view, the decision to not allow a shorter period of time to renew is a very contained issue and not one that lends itself to a conciliated outcome. The AAT has since ‘unlinked’ these two matters based on ASQA’s argument in order to deal with the matter relating to the decision to not allow a shorter period of time to renew as expeditiously as possible.

• In another significant matter, the AAT recently granted an applicant an immediate stay of a decision to suspend the full scope of an RTO’s registration (a decision that had already been in effect for almost 2 weeks) without any consultation with ASQA on the basis of ‘the availability of members to hear the matter’. When ASQA vigorously opposed the AAT’s approach and outlined its requirement to comply with section 41(4)(a) of the AAT Act and the need to revoke the decision, the AAT subsequently listed a Stay Hearing for approximately 48 hours later but left the stay in place.
Review of Taxation and Commercial Decisions

This Direction is given under section 18B of the Administrative Appeals Tribunal Act 1975 (AAT Act).

1. About this Direction

Application

1.1 This Direction sets out the procedures of the Administrative Appeals Tribunal (AAT) in relation to:

(a) applications in the Taxation and Commercial Division;¹ and
(b) applications relating to decisions made under the:

(i) Airports Act 1996 and legislative instruments made under that Act;
(ii) Civil Aviation Act 1988 and legislative instruments made under that Act;
(iii) National Health Act 1953 in relation to pharmacies; and

1.2 This Direction has effect from 1 July 2015.

1.3 The procedures set out in this Direction may be altered to suit individual cases but only by a specific direction of the AAT.

1.4 If another Direction is inconsistent with this Direction, this Direction applies.

Interpretation

1.5 In this Direction:

decision-maker means:

(a) the agency or other entity that made the decision under review and any representative; or
(b) if another agency or entity is a party and is the contradictor in the review – that agency or other entity and any representative;

¹ The applications that are allocated to the Taxation and Commercial Division are set out in the Allocation of Business to Divisions of the AAT President’s Direction.
2. General principles

2.1 In general, an AAT member will be allocated to manage each case from lodgement to resolution (the Managing Member), assisted by the AAT’s Conference Registrars who will usually conduct any alternative dispute resolution (ADR) processes.

2.2 In carrying out our functions, we must pursue the objective of providing a mechanism of review that:

(a) is accessible;
(b) is fair, just, economical, informal and quick;
(c) is proportionate to the importance and complexity of the matter; and
(d) promotes public trust and confidence in the decision-making of the AAT.2

2.3 You and the decision-maker must use your best endeavours to assist us to fulfil this objective.3 The decision-maker must also use its best endeavours to assist us to make our decision in relation to the application.4

2.4 We expect you and the decision-maker to cooperate with us and with each other to:

(a) identify the real issues in dispute early; and
(b) deal with those issues efficiently and effectively.

We expect you and the decision-maker to think about the best way to run the case and to engage in a dialogue with us to achieve our statutory objective. These expectations apply regardless of the nature or complexity of the matter.

2.5 We aim to reduce cost and delay by:

(a) narrowing the issues in dispute;
(b) limiting factual investigation to what is required in relation to the issues;
(c) holding as few additional case events as possible.

We recognise that the particular steps to be taken in moving each application towards resolution will vary. We will adopt a case management approach that best meets the needs of each application. Flexibility is the key to our approach.

3. Initial procedures

3.1 Shortly after an application is lodged, we will allocate it to a Managing Member. In general, the Managing Member will manage the application and, if the application proceeds to hearing, preside at the hearing.

3.2 In most cases, the first case event will be a case management directions hearing conducted by the Managing Member. However, some applications may be referred to the conference process and managed initially by an AAT Conference Registrar.

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2 Section 2A of the AAT Act.
3 Subsection 33(1AB) of the AAT Act.
4 Subsection 33(1AA) of the AAT Act.

Commented [P1]: Early allocation of an AAT member would be helpful. To some extent it is happening in ASQA matters but it is unclear whether that it is deliberate or coincidental.

Commented [P2]: How long after?

Commented [P3]: Presently, case management directions hearings are not conducted for ASQA matters; aside from a stay hearing, the first case event is a case conference usually some 6 - 8 weeks after the review application is lodged. See discussion under...

There are two issues arising for ASQA, (i) for many ASQA matters, the first case event is usually a stay application, if agreement between the parties cannot otherwise be reached on the stay request. This PD makes no reference at all to stays though a case management directions hearing would be the ideal opportunity to manage the conduct of a stay request; and (ii) "a case management directions hearing" appears to be a different event viz a viz a case "conference" as evidenced by the discussion of these events under the respective headings below.
3.3 We will send you and the decision-maker a listing notice setting out the date, time and location of the first case event.

3.4 The decision-maker must, within 28 days after receiving notice of an application, lodge with the AAT and give to you and any other party the documents required under subsection 37(1) of the AAT Act. These documents are referred to as the ‘Section 37 documents’. We have the power to shorten or extend the 28 day period if an application is made to us.\(^6\) For more information about the requirements relating to the Section 37 documents, see the Lodgement of Documents under Sections 37 and 38AA of the AAT Act Practice Direction.

3.5 If you believe your application needs to be dealt with urgently, you can request an expedited review in accordance with the procedure set out in our General Practice Direction. We will actively facilitate the expedited review of a decision if we are satisfied it requires an urgent determination.

4. Case management directions hearing

4.1 Generally, the Managing Member will hold a first directions hearing to discuss the management of the application before the Section 37 documents are lodged. The Managing Member may hold the directions hearing after the Section 37 documents have been lodged if you or the decision-maker request this.

4.2 The case management directions hearing may be held in person or by telephone.

4.3 At the case management directions hearing, the Managing Member will discuss with you and the decision-maker the case management strategy that will be most effective to achieve early resolution of the application by way of agreement between the parties or by the AAT making a decision. The strategy must be proportionate to the nature and complexity of the application.

4.4 Consideration will be given, in particular, to the following:

(a) whether any orders ought to be made about the Section 37 documents;

(b) in the case of multiple applications or multiple applicants, whether particular procedural directions should be made;

(c) whether there is a related proceeding elsewhere, such as:

(i) a debt recovery proceeding in a court;

(ii) a proceeding under Part IVC of the Taxation Administration Act 1953 in the Federal Court of Australia; and

if so, what impact this may have on the application;

(d) whether an early ADR process should be arranged or the parties be allowed a period for private negotiation;

(e) how evidence is to be presented at any hearing, including:

(i) whether the hearing should proceed on evidence in the form of witness statements or oral evidence with outlines of the evidence anticipated to be given by each witness;

\(^6\) See subsections 37(1) and (1A) of the AAT Act.

For further information about the AAT, please call us on 1800 228 333 or go to www.aat.gov.au.
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(ii) if any experts are to give evidence, whether the evidence will be given other than by way of the concurrent evidence procedure.\(^6\)

(f) making directions about lodging with us and giving to the other party evidence and Statements of Issues, Facts and Contentions; and

(g) the scheduling of hearing dates.

4.5 We expect you and the decision-maker to communicate with each other in a meaningful way about matters to be raised at the case management directions hearing before it takes place, with a view to agreeing about directions in advance of the hearing. If you are representing yourself, we expect the decision-maker to take the initiative in this communication. If agreement can be reached about appropriate directions, you and the decision-maker may ask that the Managing Member make the directions by agreement.

4.6 For the assistance of parties, a template for directions that may be made at the case management directions hearing is at Attachment A. A template of a Statement of Issues, Facts and Contentions is at Attachment B.

5. **Alternative Dispute Resolution**

5.1 We will work actively with you and the decision-maker at all times to encourage the exploration of an early resolution to the dispute through use of ADR.

5.2 In general, the ADR process that will be used in applications relating to taxation and commercial decisions will be:

(a) conferencing;
(b) conciliation; or
(c) mediation.

5.3 You and the decision-maker are required to act in good faith in relation to the conduct of an ADR process.\(^7\)

5.4 More information about ADR processes at the AAT, including about confidentiality in ADR processes, is available on our website.

**Conferences**

5.5 If your application is referred to a conference, we will usually hold the first conference within 6 to 10 weeks after your application has been lodged. The conference may be held in person or by telephone. A further conference may be held if necessary.

5.6 The purpose of the conference process is to:

(a) identify and narrow the issues in dispute;
(b) identify further evidence that may be gathered;
(c) discuss this evidence when it has been received, as well as the merits of the case;
(d) explore whether an agreed outcome can be reached; and
(e) discuss the future conduct of the application.

\(^6\) See our Use of Concurrent Evidence in the AAT Guideline.

\(^7\) Subsection 34A(3) of the AAT Act.

For further information about the AAT, please call us on 1800 228 333 or go to [www.aat.gov.au](http://www.aat.gov.au).
5.7 Conferences are conducted by AAT Conference Registrars who may make directions during the conference process.

Conciliation or Mediation

5.8 A conciliation or mediation will usually be included in the directions made by a Managing Member.

5.9 A person with authority to make decisions on proposed settlement options must attend the conciliation or mediation, or be contactable by telephone.

5.10 At least 3 working days before a conciliation or mediation, you and the decision-maker must:
   (a) give the AAT and each other a list of the people who will attend the ADR process;
   (b) give a Confidential Issues Statement to the AAT [only].

5.11 The Confidential Issues Statements will be viewed only by the Conciliator or Mediator for the purpose of the conciliation or mediation and will not be provided to the other party. It should contain:
   (a) a summary of the issues in dispute;
   (b) what the party hopes to achieve from the ADR process;
   (c) a list of outcomes, from best to worst, if the application is not settled;
   (d) an assessment of the legal, commercial, business and reputation risks of continuing litigation;
   (e) what offers of settlement have been made, if any;
   (f) costs incurred to date;
   (g) for taxation applications, the amount in dispute, including the primary tax, penalties and general interest charge, as well as the amounts that have been paid and the amounts that are outstanding; and
   (h) in the event the application proceeds to hearing, how long you estimate the hearing may take and a proposed list of witnesses.

5.12 The Confidential Issues Statement should be no more than 3 pages.

5.13 For the assistance of parties, a template of a Confidential Issues Statement is at Attachment C.

5.14 Conciliations and mediations are generally conducted by AAT Conference Registrars who may make case management directions at the conclusion of the ADR process if agreement has not been reached.

6. Other matters

Additional directions hearings

6.1 A directions hearing may be listed at any time if required, including if you or the decision-maker has not complied with this Direction or with a specific direction made by the AAT. Either you or the decision-maker may make a request for a directions hearing. The request must be:

Commented [PT]: This is currently done on an ad hoc, informal basis by the ASQA legal officer or on occasions is the subject of a direction from the Tribunal.
6.2 The Managing Member will usually hold any directions hearing.

**Conduct and communication**

6.3 At all times, you and the decision-maker are expected to communicate courteously with each other and with us.

6.4 In general, if you send a document or other communication to the AAT, you or the decision-maker are expected to send a copy to each other and make it clear that the communication has been copied to the other party.

6.5 Any request made to us (for example, to vary a direction) must be in writing and be accompanied by reasons. You must seek the view of the other party in relation to the request before sending it to the AAT and include any views in your request.

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Justice Duncan Kerr  
President  
30 June 2015  

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