



TASMANIA

# ANTI-DISCRIMINATION TRIBUNAL

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## PRACTICE DIRECTIONS 2021

All persons having conduct of or having responsibility for or a party to matters before the Anti-Discrimination Tribunal (ADT) are expected to comply with these Directions.

The Directions are made to facilitate the resolution of matters before the ADT pursuant to the *Anti-Discrimination Act 1998* (the Act)

### **PART I - REFERRAL OF COMPLAINT TO ADT FOR INQUIRY**

#### **I. Inquiry Process**

- I.1 Within 48 days after a complaint has been referred for Inquiry to the ADT by the Anti-Discrimination Commissioner (Commissioner), the Commissioner or an authorised person, shall provide the ADT with a report (s79) in which the following matters are to be addressed:
- (a) issues raised in the complaint that remain unresolved;
  - (b) a description of the complaint;
  - (c) any amendments that were made to the complaint;
  - (d) application of exceptions and exemptions under Part 5 of the Act;
  - (e) admitted facts;
  - (f) facts to be established;
  - (g) witnesses to be called;
  - (h) a list of the documents provided to the Commissioner by any party;
  - (i) attempts to resolve the complaint by conciliation (excluding details of the matters discussed during the attempts);
  - (j) whether the Commissioner seeks leave to intervene in the hearing of the matter.
- I.2 Prior to forwarding the report to the ADT the Commissioner or authorised person shall advise the ADT that a referral will be made and provide the ADT with the identity and contact details of the interested parties and nature of

complaint. The ADT will create a file and advise the Commissioner of the reference number of that file.

- 1.3 As soon as practicable after providing the report to the ADT the Commissioner or authorised person shall provide to the Tribunal an electronic copy of all documents on the list of documents (1.1(h)) with each document entered as a separate PDF document and titled so it can be identified from the list. The ADT file reference should be included.
- 1.4 The Commissioner, or an authorised person, upon providing the report referred to in para 1.1 to the ADT is also to provide a copy of the report to the complainant and the respondent(s).
- 1.5 Parties may request the ADT to send them copies of any documents in the list that are not in their possession. Such request is to include an email address (if available) as documents will be provided in electronic format once in the possession of the ADT.
- 1.6 The ADT will refer the matter to a registrar or other officer of the ADT who will take steps to attempt to resolve the matter by conciliation or other means before an Inquiry is commenced (s80A).
- 1.7 The steps taken may include telephone or face to face conferences to ascertain what each party needs to be in a position to discuss resolution of the matter or prepare it for Inquiry.
- 1.8 If the matter is incapable of informal resolution, it will be referred to an ADT member.
- 1.9 The ADT member will arrange for a directions conference to be conducted in relation to the complaint. The ADT, by written notice, may require any person to attend a directions conference and provide and produce specified information and documents to a directions conference (s80). The directions conference is to be held in private.
- 1.10 Parties and their legal or other representative are to attend the directions conference in person. If that is not possible the ADT will consider any written request to attend via Microsoft Teams or by phone.
- 1.11 If the complainant does not, without reasonable excuse, comply with a requirement to attend a directions conference, the ADT may dismiss the complaint and order the complainant to pay costs to the respondent (s80).
- 1.12 Formal directions will be given at the directions conference in order to ensure the Inquiry can proceed fairly and expeditiously. Directions may be given in relation to setting a timetable for the provision of:

- (a) any documentary evidence that is intended to be relied upon but not yet provided by a party;
  - (b) witness statements (where appropriate);
  - (c) written submissions
- I.13 There may be a number of directions conferences before the matter is ready to be listed for Inquiry.
- I.14 At the directions conference it will be expected the parties will confirm:
- (a) the provisions of the Act alleged to have been breached;
  - (b) the provisions of the Act relied upon in defence of any alleged breach;
  - (c) the main facts in dispute;
  - (d) any agreed facts;
  - (e) the legal issues to be determined;
  - (f) whether there are any preliminary matters that should be determined at a separate hearing;
  - (g) whether there is scope for narrowing the issues or for part or all of the complaint to be resolved.
- I.15 If the ADT believes it is appropriate in the circumstances of a particular matter, it may, by notice, require any person (not just a party) to attend at a directions conference and require that person to provide and produce specified information and documents to that directions conference.
- I.16 Following the directions conference the parties will be provided with a written copy of the formal directions made by the ADT.
- I.17 If at any time during the Inquiry process the ADT considers it appropriate, it may refer the matter for conciliation (s94).
- I.18 Any conciliation process is to be conducted in private and confidentially. The conciliator is impartial and anything said at the conciliation cannot be used as evidence in a hearing. Any notes of the conciliation are to be placed in a sealed envelope on the file.
- I.19 If the parties agree to resolve the complaint whilst it is before the ADT for Inquiry, the ADT is to record the terms of the agreement and it is to be signed by the parties.
- I.20 If a matter fails to resolve, the ADT will list the matter for hearing.

- 1.21 Prior to the date of hearing a pre-hearing conference will be held at which time the parties are to confirm:
- (a) what witnesses are required and their availability;
  - (b) what witness statements will be admitted without the necessity of the witness appearing;
  - (c) the issues that remain unresolved;
  - (d) what, if any, facts can be agreed.
  - (e) what, if any, documents can be agreed.
  - (f) whether summonses are required to be issued;
  - (g) any other matters necessary to ensure the matter proceeds on the date listed for hearing.
- 1.22 At the conclusion of a hearing, if the ADT finds that:
- (a) the complaint is substantiated it shall make orders in accordance with s89 of the Act.
  - (b) the complaint is unsubstantiated it will dismiss the complaint (s99)

## **PART II – REVIEW OF EXEMPTION DECISION**

### **2. Exemption Review Process**

- 2.1 A person or organisation aggrieved by a decision made by the Commissioner under s57(2) and (3) to:
- (a) grant an exemption;
  - (b) renew an exemption;
  - (c) refuse to grant an exemption;
  - (d) refuse to renew an exemption;
  - (e) impose or vary a condition of an exemption,
- may refer that decision for review to the ADT.
- 2.2 Such referrals must be in writing and clearly identify the relevant exemption that is to be reviewed by the ADT. They must be made within the following time limits:

- (a) a grant of exemption or renewal of an exemption: within 28 days from the publication of the notice of the grant or renewal of an exemption in the *Gazette*;
  - (b) a refusal to grant to an exemption or refusal to renew an exemption: within 28 days after receipt of the reasons provided by the Commissioner for the refusal;
  - (c) an imposition or variation of a condition of an exemption: within 28 days after the condition is imposed or varied.
- 2.3 Within 14 days of receiving a referral relating to an exemption decision, the ADT shall forward an electronic copy of that referral to the Commissioner which shall be endorsed with the ADT file number.
- 2.4 The Commissioner shall, within 14 days of receipt of that referral (or such further time approved by the ADT), provide to the ADT an electronic copy of:
- (a) the application relating to the exemption;
  - (b) a list of documents held by the Commissioner relevant to the exemption determination;
  - (c) a PDF copy of each of the documents in the list of documents, each separately titled so as to be identified from the list.
  - (d) the Commissioner's written statement of reasons in respect of the exemption; and
  - (e) the identity and contact details of any other person or organisation that was involved in the application for exemption process conducted by the Commissioner and who may have an interest in the review of the Commissioner's decision.
- 2.5 Upon receipt of the required documents from the Commissioner, the ADT (via a member, a registrar or other officer of the ADT) will:
- (a) contact any other interested party and supply to them (via electronic means if available) copies of any of the relevant documents not in their possession, should they wish to be involved in the process;
  - (b) request the parties to provide all witness statements, documentary evidence and written submissions that they intend to rely upon.
  - (c) hold a preliminary conference either by phone or in person at which time the person/organisation who made the referral shall be obliged to outline the reasons or grounds relied upon for the review. Any interested person

who has been joined will also be required to outline the nature of the matters relied upon.

- 2.6 The matter will be set down for hearing when the ADT is satisfied that:
- (a) all relevant witness statements, documents and written submissions have been provided;
  - (b) the issues to be decided have been identified.
- 2.7 Upon hearing the review, the ADT may:
- (a) confirm the decision of the Commissioner; or
  - (b) quash the decision and direct the Commissioner to take such action as the ADT considers appropriate.

### **PART III – REVIEW OF REJECTED OR DISMISSED COMPLAINT DECISION**

#### **3. REVIEW OF REJECTED COMPLAINT DECISION**

- 3.1 A person or organisation is aggrieved by a decision made by the Commissioner, under s64, to reject a complaint made to the Commissioner, may make an application to the ADT to review that rejection.
- 3.2 An application for review of rejection is to be in writing and it must identify the rejected complaint. It must be made within 28 days after receipt of the Commissioner's written statement of the reasons for the rejection of the complaint.
- 3.3 If a person does not make an application to review within the time set out in paragraph 3.2, the complaint lapses at the end of that period.
- 3.4 Within 14 days of receiving an application to review a rejected complaint, the ADT shall forward an electronic copy of the application endorsed with the ADT file number to the Commissioner. The Commissioner shall, within 14 days of receipt of that application (or such time approved by the ADT), provide to the ADT in electronic format:
- (a) a copy of the complaint;
  - (b) a copy of the correspondence to the complainant advising of the Commissioner's decision to reject the complaint and the Commissioner's written statement of the reasons for the rejection of the complaint;
  - (c) a list of documents held by the Commissioner that are relevant to the rejected complaint.

- 3.5 As soon as practicable after forwarding the list of documents to the ADT the Commissioner shall provide, by electronic means, a PDF copy of the documents in that list each separately titled so as to be identified from the list and the ADT file number should be included.
- 3.6 Upon receipt of the documents the ADT will provide the list of documents to the complainant who upon request will be provided with a copy (via electronic means if available) of any listed document not in the complainant's possession.
- 3.7 Upon receipt of the required documents from the Commissioner, the ADT (via a member, a registrar or an officer of the Tribunal) will hold a preliminary conference either by phone or in person at which time the complainant shall be obliged to outline the reasons or grounds relied upon for the review and provide any additional evidence or documents that will be sought to be relied upon.
- 3.8 When the ADT is satisfied that:
- (a) it has received all relevant documents and evidentiary material; and
  - (b) the issues to be decided have been identified,
- the matter will, dependent upon the ADT's view and the nature of the review, be determined upon an assessment of the documents before the ADT or alternatively it will be set down for a hearing.
- 3.9 If the matter is set down for hearing the complainant is restricted as to the documents, evidence and issues disclosed during the preliminary conference stage. No new or additional documents, evidence or issues may be introduced without leave of the ADT.
- 3.10 Upon reviewing the rejection of a complaint the ADT will determine whether;
- (a) it is satisfied that the Commissioner made a correct decision in rejecting the complaint and the complaint will lapse.
  - (b) it is not satisfied the Commissioner made a correct decision in rejecting the complaint and refer it back to the Commissioner for investigation.
- 3.11 The ADT will provide to the complainant written reasons for its determination.

#### **4. REVIEW OF DISMISSAL OF COMPLAINT**

- 4.1 A person or organisation aggrieved by a decision made by the Commissioner, under s71(1)(a), to dismiss a complaint, may make an application to the ADT to review that dismissal.

- 4.2 An application for review of dismissal must identify the dismissed complaint and it must be made within 28 days after receipt of the Commissioner's written statement of the reasons for the dismissal of the complaint.
- 4.3 If a complainant does not make an application within the period specified in paragraph 4.2 the complaint lapses.
- 4.4 Within 14 days of receiving an application to review a dismissed complaint, the ADT shall forward an electronic copy of the application endorsed with the ADT file number to the Commissioner. The Commissioner shall, within 14 days of receipt of that application (or such time approved by the ADT), provide to the ADT in electronic format:
- (a) a copy of the complaint;
  - (b) a copy of the correspondence to the complainant advising of the Commissioner's decision to dismiss the complaint and the Commissioner's written statement of the reasons for the dismissal of the complaint;
  - (c) a list of documents held by the Commissioner that are relevant to the dismissed complaint;
  - (d) the identity and contact details of any other person or organisation that was involved in the process conducted by the Commissioner and who may have an interest in the review of the Commissioner's decision to dismiss the complaint (an "interested party").
- 4.5 As soon as practicable after forwarding the list of documents to the ADT the Commissioner shall provide, by electronic means, a PDF copy of the documents in that list each separately titled so as to be identified from the list and the ADT file number should be included.
- 4.6 Upon receipt of the required documents from the Commissioner, the ADT (via a member, a registrar or an officer of the Tribunal) will:
- (a) contact any other interested party and supply to them ( via electronic means if available ) the list of documents and upon request a copy of any document not in their possession should they wish to be involved in the proceedings;
  - (b) hold a preliminary conference either by phone or in person at which time the person or organisation who made the referral shall be obliged to outline the reasons or grounds relied upon for the review. Any interested person who has been joined will also be required to outline the nature of the matters that they may rely upon in relation to the review of the dismissal.

- 4.7 The ADT shall conduct as many preliminary conferences with the parties as may be required in order to ensure:
- (a) the issues to be determined have been identified;
  - (b) all relevant documents and material has been provided;
  - (c) any additional evidentiary material not considered by the Commissioner has been disclosed and provided to the ADT and any other party.
- 4.8 When the ADT is satisfied that all preliminary matters have been concluded the parties will be offered the opportunity to consent to attend a conciliation conference.
- 4.9 If one or both of the parties refuse to attend conciliation or the matter is not resolved at conciliation it shall be referred for hearing before the ADT. At the hearing the parties are restricted as to the documents, evidence and issues disclosed during the preliminary conference stage. No new or additional documents, evidence or issues may be introduced without leave of the ADT.
- 4.10 After hearing the application for review of dismissed complaint the ADT will determine whether:
- (a) it is satisfied that the Commissioner made a correct decision in dismissing the complaint and if so, the complaint lapses; or
  - (b) it is not satisfied that the Commissioner made a correct decision in dismissing the complaint, the ADT will deal with the complaint as if it were an Inquiry.
- 4.11 The ADT will provide to the parties with written reasons for its determination.

## **PART V – MISCELLANEOUS**

### **5. Miscellaneous**

- 5.1 A party may be permitted by the ADT to be represented by a lawyer or other authorised person or accompanied by another person in respect of a matter before the ADT. An application (written or verbal) for such permission must be made to the ADT at the earliest opportunity (s79A).
- 5.2 Any person suffering a disability that may in any way affect their ability to engage in the ADT processes or who may require the assistance of an interpreter, should advise the ADT of this as early as possible in order that steps may be taken to assist that person.

- 5.3 The preliminary conferences, directions conferences and conciliation conferences are held in private. The hearing is held in public unless the Tribunal otherwise directs (s85).
- 5.4 The ADT may order that any oral or documentary evidence not be published or that the identity of any party, witness or child not be publicly disclosed. Any person seeking such an order may request this at any stage either verbally or in writing. The person making the request must provide details as to the reason why such order should be made (s88).
- 5.5 At a hearing of an Inquiry the ADT may be constituted by one or more members, one of whom shall be a legal practitioner. The presiding member of the ADT shall determine how a hearing proceeds. In general proceedings will start with a short opening statement by each of the parties outlining their position.
- 5.6 The ADT may take evidence on oath or affirmation (s87). The applicant presents their case first. This includes evidence given by witnesses. The respondent can then cross-examine the applicant's witnesses and next the respondent presents its case and the applicant can cross-examine the witnesses for the respondent. After cross-examination, a witness may be re-examined by the party who presented that witness to the ADT. Re-examination will be limited to matters raised in cross-examination.
- 5.7 After all the evidence has been presented, each party will be given a chance to make a submission as to what factual findings that party believes the ADT should make on the basis of the evidence, what the relevant law is and how the law applies to the facts of the case. Submissions of this kind would normally be made at the conclusion of the hearing but the Tribunal may allow parties to make submissions at a later stage either in writing or orally.
- 5.8 After an Inquiry if the ADT finds that a complaint is substantiated it can make one or more of the orders in s89, or if it finds the complaint is unsubstantiated it may dismiss the complaint (s99).
- 5.9 At any time the ADT can dismiss a complaint if it is satisfied that it is trivial, vexatious, misconceived or lacking in substance or for some other reason it would be just and appropriate to do so (s99).
- 5.10 The ADT will normally provide written reasons for dismissing a complaint or for making any order/s under s89.
- 5.11 If the ADT does not provide written reasons for making an order or orders under s89, a party can request the ADT to give written reasons. Such request is to be in writing and is to be made within 28 days after the making of the order/s (s93).

- 5.12 Although obliged to comply with the rules of natural justice, the ADT is not bound by the laws of evidence and will ensure that all material that may assist its consideration of a matter is provided to it.
- 5.13 At a hearing of a review of a rejection or dismissal of a complaint by the Commissioner, the ADT must determine whether the Commissioner made a correct decision (s72). The ADT must determine what decision ought to have been made and in doing so the it will make a determination based upon the relevant material before the ADT which is not limited only to the material that was before the Commissioner.
- 5.14 As a general rule each party will pay their own legal costs in relation to matters before the ADT. However, the ADT does have discretion to award costs if it considers the circumstances of a particular matter justify such an order (ss95 and 99A).
- 5.15 A complainant may apply to the ADT to withdraw a complaint from Inquiry or review (s98A). However, the withdrawal of the complaint does not prevent the ADT from conducting an Inquiry in relation to the complaint if it is satisfied that:
- (a) the complaint was not withdrawn voluntarily; or
  - (b) it is in the public interest to do so.
- 5.16 At any stage of an Inquiry the ADT can make interim orders (s98). An application for an interim order/s shall include an outline of the facts and circumstances (in affidavit or statutory declaration form) relied upon by the person making the application (the application and supporting documents can be in electronic format):
- (a) within 14 days of the receipt of such application the ADT will forward a copy (via electronic means if available) to the other party or parties;
  - (b) any party who receives a copy of an application for an interim order has 14 days to provide any responding documents or affidavit/statutory declaration setting out factual matters that party may seek to rely upon (this information and supporting documents can be in electronic format);
  - (c) the ADT will then conduct a preliminary conference at which time it will set a timetable to ensure that the issues relevant to the determination of the application are identified and all relevant evidence and documentary material has been provided for that purpose;
  - (d) the ADT will endeavour to achieve a suitable outcome addressing the issues raised by the application by way of undertakings by the parties or consent orders, if this cannot be achieved the matter will be set down for hearing.

5.17 At any time after during an Inquiry a party may request that the ADT require a person to provide specified information or produce specified documents that such person believes to be relevant to the complaint being considered by the ADT:

- (a) Such request shall be in writing and:
  - (i) identify the nature of the information sought;
  - (ii) identify the documents sought or provide a general description of the nature and type of documents sought; and
  - (iii) outline why it is asserted that the information or documents are relevant to the matter before the ADT.

The ADT may, upon receipt of that request, or after the supply of additional information sought from the party who made the request, require the production of information or documents in accordance with s97.