



NCAT Administrative and Equal Opportunity Division Procedural Direction 4

ANTI-DISCRIMINATION MATTERS

This Procedural Direction applies to:	Proceedings in the Administrative and Equal Opportunity Division
Effective Date:	28 February 2014
Replaces Procedural Direction:	Administrative Decisions Tribunal's Equal Opportunity Division: Guideline
Notes:	You should ensure that you are using the current version of this Procedural Direction. A complete set of Procedural Directions and Guidelines is available on the Tribunal website at www.ncat.nsw.gov.au

Purpose

1. This Procedural Direction sets out the procedures that the Tribunal will follow in anti-discrimination matters. This includes:
 - (a) applications for interim orders;
 - (b) referred complaints – complaints of discrimination, harassment, vilification and victimisation that have been referred to it by the President of the Anti-Discrimination Board (ADB);
 - (c) declined complaints – applications for leave to proceed when a complaint has been declined by the President of the ADB;
 - (d) applications for the registration of conciliation agreements made at the ADB; and
 - (e) reviews of decisions made by the President of the ADB in relation to applications for exemption from the *Anti-Discrimination Act*.

Relevant Legislation

2. The relevant legislation is the Anti-Discrimination Act 1977 and the Civil and Administrative Tribunal Act

Representation

3. A party may represent him or herself or be represented by an Australian legal practitioner. A corporation is entitled to appear by a director. If a party wants to be represented by a person who is not a lawyer, he or she must first obtain permission from the Tribunal. If a party is either mentally or physically incapable of representing him or herself, an application can be made for a Tribunal appointed guardian to be the representative.

Interim orders

- 4.1 The President of the ADB or an applicant or respondent to a complaint that has been lodged with the board, may apply to the Tribunal for an interim order. The purpose of an interim order is to preserve the status quo or the rights of the parties or to return the parties to the same circumstances that existed prior to the alleged breach of the Anti-Discrimination Act. The President or the party must complete an application for interim order and serve a copy on the other parties to the complaint. The Tribunal will then arrange a time for the application to be heard. If the Tribunal makes an interim order it will usually be effective until a final order is made.
- 4.2 There is no automatic right of appeal to the Appeal Panel against the Tribunal's decision in relation to an application for an interim order. Because such an application is an 'interlocutory' application, a party must obtain the Appeal Panel's permission (obtain 'leave') before such an appeal can go ahead.

Referred complaints

- 5.1 **Case conferences**
All referred complaints will be managed through case conferences. Case conferences are unrecorded meetings with the parties and a Tribunal member. The purpose of a case conference is to enable the parties to discuss how the complaint is to be resolved. In general, a complaint may be resolved by agreement between the parties or by a hearing where a panel of up to three members decides whether there has been a breach of the Anti-Discrimination Act and, if so, the appropriate remedy. The Tribunal member who conducts the case conference may or may not be the member who presides at the hearing.
- 5.2 **Content of case conference**
Matters discussed at case conferences include:
 - (a) whether permission should be given for a party to be represented by a person who is not a lawyer;
 - (b) the possibility of self-represented parties obtaining legal advice and/or representation;
 - (c) the correct names of the parties and any issues in relation to joining other parties;
 - (d) the period covered by the complaint;

- (e) the provisions of the *Anti-Discrimination Act* that are said to have been breached;
- (f) the provisions, if any, of the *Anti-Discrimination Act* that the respondent is relying on in its defence;
- (g) the main factual issues in dispute;
- (h) the evidence that may be relevant to those issues;
- (i) the main legal issues in dispute;
- (j) whether there is scope for the narrowing of issues or for part or all of the complaint to be resolved;
- (k) any applications for summonses to be issued;
- (l) a timetable for the filing and service of statements and documents; and
- (m) whether or not mediation is appropriate and if so, whether the matter should be referred to mediation.

5.3 **Summary of complaint form**

At the first case conference the Tribunal member will complete a 'Summary of Complaint' form summarising the matters listed above. The Tribunal member will provide a copy of the form to each party after the case conference. The form is not binding on the parties but is intended to provide a guide as to the content of the complaint and the factual and legal matters in dispute.

5.4 **Amendments to the complaint**

An applicant may apply to the Tribunal for the complaint to be amended. The amendment may add other conduct within the period of the complaint, extend the period covered by the complaint or characterise conduct as an alleged breach of a provision which has not previously been identified. If the respondent objects to the amendment the Tribunal will decide whether the complaint should be amended at a short hearing.

5.5 **Legal advice and/or representation for self represented parties**

At the first case conference the parties will be given an opportunity to make an appointment to see a duty solicitor from the Legal Aid Commission. This appointment should normally be made after the first case conference and prior to any mediation or second case conference. The duty solicitor will be able to give a party preliminary legal advice. If a party is eligible for legal aid, he or she can apply through the duty solicitor. Registry officers can also help parties find ways to obtain legal advice and/or representation.

5.6 **Mediation**

At the first case conference the parties may be referred to mediation if the case is an appropriate one for mediation. If possible, a date, time and venue for the mediation will be allocated at the first case conference. (See the Tribunal's Mediation Procedural Direction for more information)

5.7 **Legal basis for complaint**

The Tribunal member will discuss the legal basis for the complaint with the parties at the first case conference and attempt to identify the precise provisions of the *Anti-Discrimination Act* which are relied upon by all parties. If parties are legally represented, and Points of Claim and Points of Defence

would be useful because of the complexity of the matter, the Tribunal member may direct that those documents be filed.

5.8 Evidence

The Tribunal member will ask the parties to identify the witnesses and the documents on which they intend to rely. The Tribunal member may discuss what has to be proved and assist parties to identify evidence that would be relevant to prove a contravention or a defence.

5.9 Summonses

The procedure for issuing a summons for documents to be produced or for a person to give evidence is dealt with in the Summons Procedural Direction.

5.10 Preparation for hearing

At the first case conference, the Tribunal member will generally make directions for the filing and service of statements and documents. Those directions will come into effect straight away or, if the matter is referred to mediation, after the conclusion of the mediation if the matter does not settle. The applicant will normally be given a maximum of 28 days to file and serve witness statements and any other documentation on which he or she relies. Similarly the respondent/s will normally be given a further 28 days to file and serve their material. Where necessary, a further short period will be given to the applicant to file and serve any material in reply to the respondent's material. In complex cases more time may be allowed. In cases where there is doubt about the nature or scope of the applicant's complaint, the Tribunal member may schedule a second case conference before directing the respondent/s to file and serve material in reply.

5.11 Compliance with directions

All parties are expected to comply with the directions of the Tribunal. If a party cannot comply with directions within time, then that party should contact the other parties to seek their agreement on an amended timetable, as long as that timetable does not interfere with the hearing date. If a party does not consent to a revised timetable, or if the changes affect the hearing date, the party in breach of the directions should contact the Tribunal before the time for complying with the directions has expired. A party who fails to comply with directions, or who fails to contact the Tribunal as outlined above, without a reasonable excuse, may not be able to rely on material that is eventually filed. In addition, a party who fails to comply with directions or causes the proceedings to be adjourned may be ordered to pay costs.

5.12 Further case conferences and hearings

In general, following the date that the timetable is due to be completed, a second case conference will be held. Further case conferences may be necessary depending on the complexity of the complaint. The Tribunal member will ensure that the matter is ready for hearing before allocating hearing dates.

5.13 Applications for dismissal

The Tribunal may dismiss a complaint at any stage of the proceedings on the following grounds:

- (a) the complaint, or any part of the complaint, is frivolous, vexatious, misconceived or lacking in substance;

- (b) the complaint does not disclose a contravention of the *Anti-Discrimination Act*;
- (c) for any other reason no further action should be taken in relation to the complaint or any part of the complaint.

If a respondent applies for the complaint or part of the complaint to be dismissed because it does not disclose a contravention of the *Anti-Discrimination Act*, because the Tribunal does not have jurisdiction to hear it, or because it is frivolous, vexatious or misconceived, that application will normally be heard prior to any timetable being set for the filing and service of statements or documents.

If a respondent applies for the complaint or part of the complaint, to be dismissed because it is lacking in substance, the appropriate time to hear that application will generally be after all the applicant's evidence has been filed and served.

Declined complaints

- 6. The President of the ADB may either decline a complaint or accept it. If a complaint is declined, the applicant may still require the President to refer the complaint to the Tribunal. However, a declined complaint cannot go ahead unless the Tribunal gives the applicant permission. A Tribunal member will determine whether or not to grant permission on the basis of whether it is "fair and just" to do so. In most cases, the Tribunal member will assess the merits of the complaint based on the content of the President's Report and the parties' submissions. If leave to proceed is granted, the Tribunal will make further directions. If leave is refused, then the complaint will be dismissed. There is no right of appeal to the Appeal Panel against a decision of the Tribunal to refuse to grant leave in these cases.

Registration of conciliated agreements

- 7.1 If a party to a conciliation agreement made at the ADB has not complied with that agreement, the other party may apply to the Tribunal for the agreement to be registered. The effect of registration is that the agreement can be enforced as an order of the Tribunal.
- 7.2 Before an order can be made registering an agreement:
 - (a) the application to the Tribunal must have been made within 6 months of the date of the agreement;
 - (b) the party making the application must have served the application, a copy of the agreement and the Notice of Hearing on the respondent; and
 - (c) the applicant must have filed an affidavit of service with the Tribunal.
- 7.3 The respondent to the application must complete a Response to the application and give a copy to the Tribunal and the applicant before the hearing date.

- 7.4 If an affidavit of service has been filed with the Tribunal and the respondent does not attend the hearing, then the application may be dealt with in the absence of that party

Reviews of exemption decisions

- 8.1 If a person who is directly affected disagrees with a decision of the President of the ADB in relation to an application for exemption from the *Anti-Discrimination Act*, that person may apply to the Tribunal for a review of the President's decision.
- 8.2 The application will be listed for directions and then for hearing.

Costs

9. The general rule is that each party pays his or her own costs. However, one party may be ordered to pay another party's costs in certain circumstances. For more information, see section 60 of the *Civil and Administrative Tribunal Act 2013*.

(Sgd)

28 February 2014

MAGISTRATE NANCY HENNESSY

Deputy President