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New AAT Practice Directions Effective December 2013

Key Points

- The AAT has issued a new practice direction relating to the Duty to Act in Good Faith in ADR Processes at the AAT
- The direction clarifies the term 'good faith' and outlines the conduct expected of parties whilst engaging in ADR processes at the AAT.

Practice Direction relating to the Duty to Act in Good Faith in ADR Processes at the AAT

Pursuant to section 34A(5) of the AAT Act, parties participating in alternative dispute resolution ("ADR") processes in the AAT must act in 'good faith' in relation to their conduct. Under section 3(1) of the AAT Act, ADR processes are defined to include conferencing, conciliation, mediation, neutral evaluation and case appraisal.

Parties' willingness to act in 'good faith' is considered integral to ADR, and ensures fairness, ability to rely on each other to act honestly, and confidence in agreements reached.

The AAT's practice direction provides guidance on the conduct expected from parties attending an ADR process at the AAT.

Good Faith

Whilst the term 'good faith' is not defined in the AAT Act, it is considered to mean a 'genuine effort' to uphold the following basic principles of ADR:

- responsibility to take steps to resolve or clarify disputes;
- resolution of disputes in a simple and cost effective way; and
- listening to other parties' views and putting forward and considering options for settlement.

Conduct in Good Faith

The following conduct is considered consistent with the duty to act in good faith:

- ensuring persons attending ADR processes on behalf of persons have the authority to settle the matter;
- adopting an honest and genuine approach to resolution;
- maintaining confidentiality;
- treating other parties respectfully;
- acting reasonably and fairly having regard to all parties' interest in a timely manner;
- being prepared to make concessions for the purposes of ADR, and limiting the scope of the issues in dispute at hearing by making appropriate partial concessions;
- having an open mind and a willingness to consider the interests and positions of other

parties;
- willingness to propose options for resolving the dispute and discussing your position in detail;
- explaining the rationale between offers of settlement and offer rejection; and
- being faithful to any agreement reached in the ADR process.

Bearing in mind the above conduct, parties are still able to withdraw from an ADR process if appropriate and are not required to reach settlement at an ADR process. Parties are also not obliged to act against their own interests or to act in the interests of other parties.

However, failure to engage in an ADR process without sufficient notice or reason is not considered acting in good faith. Additionally, representatives for a party must ensure their conduct is professional and ethical, and must not engage in misleading conduct such as remaining silent when a party is aware that another party is relying on a false assumption that a party has induced.

In addition to the duty to act in good faith, decision-makers are also obliged to use their best endeavours to assist the AAT in making decisions in relation to proceedings under s 33(1AA) of the AAT Act.

Australian Government agencies, and their representatives, are also required to act as 'model litigants' under the *Legal Services Directions 2005* (Cth). As a 'model litigant', Agencies are required to consider other methods of dispute resolution prior to initiating litigation, and are expected to participate 'fully and effectively' in ADR processes and have authority to settle. The standards of a 'model litigant' exceed the requirement of lawyers to act in accordance with ordinary ethical obligations of the legal profession.

It is important to bear in mind that anything said or done within an ADR process remains strictly confidential, and must not be used later in any court or tribunal proceeding under section 34A of the AAT act. This protection allows parties to be full and frank whilst engaging in ADR processes, enabling parties the best opportunity to resolve matters.

The AAT practice direction for the Duty to Act in Good Faith in ADR Processes became effective on 11 December 2013.

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