
TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2022: INCREASED TRIBUNAL POWERS FOR SMALL BUSINESS TAXATION
DECISIONS

EXPOSURE EXPLANATORY MEMORANDUM

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

<i>Abbreviation</i>	<i>Definition</i>
AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i>
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
TAA 1953	<i>Taxation Administration Act 1953</i>

Chapter 1: Increased AAT powers for small business taxation decisions

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Outline of chapter

- 1.1 Schedule 1 to the Bill amends the TAA 1953 to enable small business entities to apply to the AAT for an order staying, or otherwise affecting, the operation or implementation of a decision of the Commissioner that is being reviewed by the AAT.

Context of amendments

- 1.2 Section 41 of the AAT Act empowers the AAT to make an order to stay, or otherwise affect, the operation or implementation of a decision under review on request from a party to the proceeding. However, current section 14ZZB of

the TAA 1953 relevantly provides that section 41 of the AAT Act does not apply to reviewable objection decisions (within the meaning of section 14ZY of the TAA 1953).

- 1.3 The current section 14ZZM of the TAA 1953 provides that a pending review of a decision does not affect the decision or the recovery of any relating tax debt.
- 1.4 The effect of these provisions is that the Commissioner can commence debt recovery action even if the taxpayer is seeking a review of the liability for, or quantum of, the tax debt. Small businesses objecting to their income tax assessments are not able to request the AAT to make orders relating to the operation or implementation of the decisions while they are under review (such as making an order preventing the Commissioner from using one or more of the Commissioner's powers to collect the disputed debt).
- 1.5 While the taxpayer can seek a court order to stay the operation or implementation of the decision, judicial review proceedings are expensive and the consequences for affected taxpayers may be severe, including business wind-up.
- 1.6 The Commissioner's approach to debt recovery, including factors that are considered in determining what debt recovery actions are taken and when, is outlined in a series of Law Administration Practice Statements (LAPS) that are published by the Commissioner on the ATO's website. In these LAPS, the Commissioner has published the factors that will be taken into account in exercising discretion to defer the time for payment of debts. These generally require the debtor to demonstrate that:
 - payment cannot be (or has not been) made by the original due date because of circumstances beyond their control and the debtor has taken reasonable steps to mitigate the effects of those circumstances;
 - payment in full can be made at a later time, once the circumstances that led to non-payment have been alleviated; and
 - once the circumstances are under control, continuing tax-related liabilities will be paid as and when they fall due (and accordingly, the debt will not escalate after that time).
- 1.7 The Commissioner's published policy with respect to the collection and recovery of disputed debts outlines the various administrative options available to the Commissioner in relation to disputed debts and the factors that are considered when choosing between them. In particular, guidance on high-risk cases states that action may be taken to recover disputed amounts (without limiting other circumstances) where there are reasonable grounds to believe revenue is at risk (for example, funds or assets are being dissipated), or where the objection is considered to be frivolous or without merit. **In practice, there are very few cases in which the Commissioner pursues recovery action in relation to a disputed debt.**

- 1.8 These amendments are not seeking to displace the existing principles underlying the Commissioner's published practice statements, but instead give taxpayers a means by which they can seek a review of the Commissioner's adherence to those principles, particularly in relation to debt recovery practice, while the AAT reviews the Commissioner's decisions (such as where the published guidance is not followed or there is a disagreement as to the facts). It is for this reason that the provisions restore section 41 in a modified form, with the AAT needing to consider further matters before making an order. This protects the Commonwealth's interests in high-risk cases and prevents the new power being misused as mechanism to avoid the due payment of genuine tax debts.

Summary of new law

- 1.9 These amendments will enable the AAT to make an order (including varying or revoking an order that is already in force) under section 41 of the AAT Act in relation to a reviewable objection decision that relates to a small business taxation assessment decision.
- 1.10 A reviewable objection decision may relate to an aspect, or aspects of a small business taxation decision. The applicant will need to specify the part or parts of the decision in relation to which they seek the order, which must be confined to that part of the decision that falls within scope of a review being undertaken by the AAT.
- 1.11 If made, such order could limit or modify actions of the Commissioner under the Commissioner's discretionary powers to recover a tax debt, in whole or in part, while the orders are in force. The amendments do not affect or alter the powers of the courts in any way. The amendments also do not affect any action the Commissioner is required to take under an Australian law (including a taxation law) or in response to an order by the AAT or a court.
- 1.12 The amendments also do not affect a taxpayer's existing rights to seek judicial review of the reviewable objection decision and obtain a court order if they are successful. The powers of the courts in restraining the Commissioner's ability to recover an outstanding debt are not affected by these amendments.
- 1.13 The purpose of the amendments is to provide a cheaper, faster and simpler way to pause the effects of a taxation decision on a small business entity than applying to a court. However, this is balanced by the need to ensure that taxpayers whose disagreements with their debts are not genuine cannot seek relief by avoiding the prompt payment of those debts as and when they fall due.
- 1.14 In making orders under section 41 of the AAT Act, the AAT would consider the circumstances and progress of the application for review to which the orders would relate. In doing so the circumstances and competing objectives of

facilitating the Commissioner's administration of the tax system and ensuring that undue hardships are not imposed on small businesses until decisions relating to them are final will likely need to be balanced.

- 1.15 Importantly, these amendments enable the AAT to prevent the Commissioner from exercising such powers only until the AAT concludes its review of (and amends or remakes if necessary) the reviewable objection decision that relates to a small business taxation assessment decision. They do not affect the AAT's ability to review or remake the reviewable objection decision.
- 1.16 The AAT's approach to remaking any of the Commissioner's decisions in the case of genuine disputes remains unchanged. The AAT will be required to consider the same risk factors and circumstances as the Commissioner, and to do so consistently with the principles underlying the LAPS. The amendments do not affect the AAT's powers or scope of possible orders in relation to the Commissioner's decisions it reviews. They only enable the AAT to make orders staying or otherwise affecting the operation or implementation of the decision under review.
- 1.17 This means that while the reviewable objection decision that relates to a small business taxation assessment decision is under review the AAT would be able to make orders requiring the Commission to exercise the Commissioner's discretion in relation to debt recovery and revenue protection powers (including offering 50/50 payment arrangements, offering to accept security in relation to outstanding debts, or altering the time for payment) in a particular way if the necessary criteria are met.

Preserving the integrity of the taxation system

- 1.18 The amendments provide factors for the AAT to consider before making such orders unless the orders are sought by the Commissioner. These considerations are additional to the considerations already required by section 41 of the AAT Act (such as the interests of any persons who may be affected by the review).
- 1.19 These additional considerations are intended to maintain the integrity of the tax system by mitigating the risk of applicants using an application for a stay order to frustrate the prompt recovery of genuine tax debts. These considerations are explicitly set out in the legislation to ensure that applicants requesting a stay order understand the additional requirements that must be met before the AAT can make such an order.
- 1.20 The AAT must consider these matters in the context of both the particular circumstances of the taxpayer whose decision is under review and on the overall taxation system.
- 1.21 The applicant will need to satisfy the AAT that these additional considerations are satisfied. This requirement is consistent with the general approach of placing burden of proof in taxation matters on applicants seeking relief.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
Schedule 1 to the Bill amends the TAA 1953 to enable small business entities to apply to the AAT for an order staying, or otherwise affecting, the operation or implementation of a decision of the Commissioner that is being reviewed by the AAT.	The AAT cannot make an order staying or otherwise affecting the operation or implementation of a reviewable objection decision.

Detailed explanation of new law

Definition of small business taxation assessment decision

- 1.22 Item 1 of Schedule 1 inserts ‘small business taxation assessment decision’ as a new definition in section 14ZQ of the TAA 1953. This new term is used in the amendments in this Schedule to describe the decisions in relation to which the AAT can make orders under section 41 of the AAT Act.
[Schedule 1, item 1, section 14ZQ of TAA 1953]

Enabling the AAT to make an order under section 41 of the AAT Act in relation to certain taxation decisions

- 1.23 Currently, section 14ZZB of the TAA 1953 provides that section 41 of the AAT Act does not apply in relation to any reviewable objection decisions.
- 1.24 The Bill amends section 14ZZB of the TAA 1953 to apply section 41 of the AAT Act but only in relation to those reviewable objection decisions that relate to small business taxation assessment decisions. However, this application is subject to the modifications to section 41 of the AAT Act.
[Schedule 1, item 2, section 14ZZB of TAA 1953]

Modification of section 41 of the AAT Act

- 1.25 Item 3 of Schedule 1 modifies the application of section 41 of the AAT Act in relation to reviewable objection decisions that relate to small business taxation assessment decisions. The amendments require the AAT to only make an order under section 41 of the AAT Act if:
- the proceeding is in the Small Business Taxation Division of the AAT; and
 - if the party seeking the order is not the Commissioner of Taxation, the AAT is satisfied of the following matters before making such an order:
 - the order is unlikely to prejudice or unduly restrict the Commissioner’s administration of a taxation law; and
 - the order is unlikely to undermine the objective or purpose of a taxation law or a provision of a taxation law, or the integrity of the taxation system as administered by the Commissioner; and
 - the application for review and the request for making the order is not frivolous, vexatious, misconceived, lacking substance or otherwise intended to impede the proper administration of a taxation law.

[Schedule 1, item 3, section 14ZZH of TAA 1953]

- 1.26 These explicit consideration requirements are intended to mitigate the risk that aggressive taxpayers, phoenixing operators, promoters of tax avoidance and evasion schemes, and others without a genuine dispute about an assessed quantum of tax could use applications to the AAT to frustrate the prompt recovery of genuine tax debts, make such debts practically irrecoverable by delaying recovery action, make the Commissioner a source of relatively cheap financing giving them an advantage of their competitors, or continue trading while insolvent adversely affecting the Commonwealth and other creditors by accruing further debts. The additional considerations balance the objective of allowing small businesses to appeal the Commissioner’s decisions before being subject to debt recovery actions with potentially severe impacts against the broader objective of ensuring that objections, applications for review and appeals are not misused to delay or avoid the payment of taxes.
- 1.27 Using the powers given to it by these amendments, the AAT will be able to make orders staying, or otherwise affecting, the operation or implementation of the reviewable objection decisions (or parts of those decisions) that relate to small business taxation assessment decisions for the purpose of securing the effectiveness of the hearings and determination of the application for review.
[Section 41 of the AAT Act]
- 1.28 Such orders could include altering the timing of payments, requiring the Commissioner to offer payment instalment arrangements, requiring the

Commissioner to offer 50/50 payment arrangements, requiring the Commissioner to offer to accept security, or limiting garnishee orders. The AAT would not be able to affect the automatic operation of Commonwealth laws, such as the accrual of the general interest charge, or affect the operation of any judicial remedies obtained by the Commissioner (such as warrants or freezing orders). However, the AAT will be able to prevent the Commissioner from taking discretionary actions (both that do and do not initially require support from the courts) such as commencing winding up proceedings, or the issuing of garnishee notices.

- 1.29 The amendments do not affect the powers and operation of the courts themselves or access to them. They only allow the AAT to make orders limiting the Commissioner's discretionary actions to seek orders from them in some circumstances.
- 1.30 The AAT is also expected to refrain from making orders under section 41 where a taxation law provides an alternate remedy in relation to the review of a decision of the Commissioner of Taxation, such as in relation to the issue of departure prohibition order. The tax law establishes standalone mechanisms for review of those decisions, and it is intended those mechanisms remain the means by which aggrieved taxpayer seek review of those decisions.

Enabling an order under section 41 of the AAT Act to affect implementation of taxation decisions

- 1.31 Currently, section 14ZZM provides that a pending review in relation to a taxation decision does not affect the implementation of the decision.
- 1.32 Item 5 of Schedule 1 provides that in relation to reviewable objection decisions that relate to small business taxation assessment decisions, the operation of section 14ZZM will be subject to orders made under section 41 of the AAT Act in relation to that decision if any such orders are made. This amendment ensures that amendments to section 14ZZB and 14ZZH of the TAA 1953 made by other items operate as intended.

[Schedule 1, items 4 and 5, section 14ZZM of TAA 1953]

Application, and transitional provisions

- 1.33 The amendments made by Schedule 1 will apply in relation to applications for review made on or after the commencement of the Schedule.
- [Schedule 1, item 6]*