

THE LAW SOCIETY
OF NEW SOUTH WALES

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14 July 2009

The Hon. John Hatzistergos, MLC
Attorney General for New South Wales
Level 33, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General

Submission on Costs in the Administrative Decisions Tribunal (ADT) Revenue Division

I am writing to you at the request of the Law Society's Litigation Law & Practice Committee (the Committee).

The Committee requests a review of the power of the ADT to award costs in the Revenue Division and in appeals to an Appeal Panel of the ADT from decisions of the Revenue Division (collectively called the "Revenue Division").

In September 2005 the President of the Law Society wrote to the then Attorney General requesting such a review. Although the Administrative Decisions Tribunal Act 1997 (ADT Act) has been subsequently amended since that submission, the Committee submits that the amendment has not made any substantive difference to the position or affected the existing practice of the ADT in relation to costs. The Committee's concerns as set out in the original submission remain.

The Committee endorses the case for amendment of the ADT Act set out in the 2005 submission. It is the Committee's view that if an application to the Revenue Division of the ADT is successful, whether originally or in an appeal to an Appeal Panel of the ADT, the ADT should have power to award costs against the Chief Commissioner of State Revenue, without the need to be satisfied as to special circumstances or as contained in the new section 88(1A) of the ADT Act. The Committee does not advocate any amendment to the power of the ADT to award costs in relation to an unsuccessful application by a taxpayer, whether originally or in an appeal.

Background- submission on costs in the ADT Revenue Division dated 22.9.05

A copy of the Law Society's submission to the then Attorney General dated 22.9.05 is attached for your ease of reference.

At that time, the Revenue Division of the ADT only had power to award costs to parties "in special circumstances".

The Law Society submitted that legislative change was necessary to achieve what was the Parliament's intention in establishing the Revenue Division of the ADT. The result, in

the Society's view would be a more cost effective review mechanism for taxpayers and so give effect to Parliament's intention in establishing the Revenue Division of the ADT.

Developments since the original submission dated 22.9.05

The Society received a written response to its submission from the then Attorney General for NSW dated 10 October 2005 which stated:

"My department reviewed the Tribunal's power to award costs as part of the 5 year review of the Administrative Decisions Tribunal Act 1997. However, I will instruct the department to consider your proposal as part of the review. The review report will shortly be finalised."

A Review Report on the Review of the ADT Act 1997 (Review Report) was tabled in Parliament last year and subsequently on 24 September 2008, the Administrative Decisions Tribunal Amendment Bill 2008 (Bill) was introduced into NSW Parliament and received Royal Assent on 28 October 2008 (ADTA Act).

The Explanatory Notes to the Bill recite that the objects of the Bill are, relevantly:

- "(a) to amend the *Administrative Decisions Tribunal Act 1997* (the Principal Act) so as:
 - (i) to give effect to certain recommendations made as a consequence of a review carried out under section 147 of the Principal Act (the statutory review)...."

The Review Report relevantly included Recommendation 4: "*That the Tribunal be given power to award costs on terms similar to section 109 of Victorian Civil and Administrative Tribunal Act 1997*". (VCAT Act)

Since the date of assent to the ADTA Act on 28 October 2008, Sections 88(1) and 88(1A) of the ADT Act mirror Sections 109(1) to 109(3) of the VCAT Act, as recommended in the Review Report.

However, the amendment to Section 88 of the ADT Act does not make any substantive difference in NSW or affect the existing practice of the ADT as reflected in Practice Note 12 issued by the President of the ADT, or address the issues of concern raised in the submission that was made by the Law Society on 22 September 2005.

The Review Report referred to Practice Note 12 of the ADT and stated:

"It is relevant that Practice Note 12 reproduces much of section 109(3) of the Victorian Civil and Administrative Tribunal Act 1997, which one respondent suggested as a precedent for defining 'special circumstances' under section 88 of the Act.¹ The Tribunal has declared itself in favour of legislative amendment to create a clear statutory basis for awarding costs, and there seems to be merit in incorporating in the Act a provision similar to section 109(3), that provides such a basis.

Section 109(3) permits the VCAT to make a costs award by reference to criteria related to conduct, delay, the 'relative strengths of claims made', the nature and complexity of proceedings, and 'any other matter the Tribunal considers relevant'. The grant of costs is still discretionary, but the bases on which an award may be made are unambiguously stated in the principal legislation.

While introduction in the Act of a provision similar to section 109 is unlikely to have a radical effect on Tribunal costs practice, its potential effect should not be underestimated. By deleting the term 'special circumstances' the new provision would remove a source of interpretive ambiguity, and the enumerated grounds for awarding costs would provide members with a mandate for making awards in some of the circumstances referred to in submissions." (bold emphasis added)

The Review Report itself explicitly acknowledged that introduction of a provision similar to section 109 of the VCAT Act was unlikely to have a radical effect on ADT costs practice.

Although the Review Report recited that "A separate submission proposed that if applications heard in the Revenue Division are successful, the Tribunal should have the power to award costs against the Chief Commissioner of State Revenue, without the need to be satisfied as to special circumstances", the Review Report did not deal with the issues raised in that submission (of the Law Society).

The Review Report stated the following:

"Conversely, some matters in the Tribunal are complex and expensive, with large sums of money at issue, and in some instances, unequal legal resources. For instance, the NSW Law Society has pointed out that in revenue cases, the outcomes of which may have significant taxation implications, the Office of State Revenue (OSR) invariably commits considerable resources to opposing an application. Matters in the Revenue Division, which are mainly about an applicant's tax obligations to the State, suggest applicants of some sophistication who are not without means."

This does not take into account the position of applicants to the Revenue Division who may not be "of some sophistication who are not without means". It also does not address the concerns raised by the Law Society in its 2005 submission.

It is submitted that the circumstances of concern raised by the Law Society in its submission of 22 September 2005 remain. The instances of disparity in representation between applicants and the Chief Commissioner of State Revenue (CCSR) before the Tribunal have only worsened since the date of that submission.

The 2005 submission referred to statistics for 2005 (from 1 January to 9 September 2005) of 23 first instance decisions in the Revenue Division, where the representation of the CCSR was stronger than the Applicant in 12 of those cases. This translated to the CCSR having stronger representation than Applicants in **52%** of first instance Revenue Division matters. In 2008, for the same period (from 1 January to 9 September 2008), there were 32 first instance decisions in the Revenue Division. The representation of the CCSR was stronger than the Applicant in 23 of those 32 cases. This translates to the CCSR having stronger representation than Applicants in **71.88%** of first instance Revenue Division matters. If the decisions to date since 9 September 2008 are included, the representation of the CCSR has been stronger than the Applicant in 25 of the 34 cases which translates to an even higher **73.53%** of first instance Revenue Division matters.

As previously stated one of the objects of the establishment of the Revenue Division was "to give taxpayers access to cheap review mechanisms". This object is not being satisfied to the extent that successful taxpayers are unable to be awarded costs against the CCSR, except in special circumstances or, the circumstances described in new Section 88(1A) of the ADT Act which are unlikely to be established. No order of costs

has ever been awarded by the ADT in favour of an Applicant in the Revenue Division. Since the Revenue Division was first established 8 years ago on 1 July 2001, only one order for costs has been made by the Revenue Division, and that was in favour of the CCSR in *Hallin Holdings Pty Ltd & anor v Chief Commissioner of State Revenue* [2004] NSWADT 209 in circumstances where the application was described as hopeless and the applicants had made false statements, failed to lodge submissions within time, and caused unwarranted delays.

Applicants to the Revenue Division of the ADT, because they are unable to be awarded costs other than in the exceptional circumstances of special circumstances or, under the new Section 88(1A) of the ADT Act, are effectively required to "pay" for due administration of tax or first home buyer legislation. Such "payment" can amount to time and expenses for two (or more if directions hearings are also included), hearings in the ADT, if the CCSR appeals to an Appeal Panel. Even if the CCSR is unsuccessful on a appeal to an Appeal Panel, just as at first instance costs of the applicant can not be recovered, costs of the taxpayer respondent at the Appeal Panel level can not be recovered, unless special circumstances or, Section 88(1A) of the ADT Act applies. This is unlikely, given that "special circumstances" has been interpreted in line with Section 109(3) of the VCAT Act upon which new Section 88(1A) is modelled. This does not give taxpayers access to cheap review mechanisms contrary to the stated object of the Revenue Division of the ADT.

If costs can be awarded as of right, to successful Applicants/Taxpayer Appellants or Respondents in the Revenue Division, there is a chance that taxpayers who would otherwise appear without legal representation in the ADT, could then afford to employ the services of a legal adviser (even if on a no win no fee basis) to better present, or where applicable, even withdraw the matter in or from the ADT, instead of appearing unrepresented in the ADT, against legal representation by the CCSR (as is always the case and often, a Barrister) and usually failing in the application or appeal.

It is submitted that the requirement that costs may only be awarded in the Revenue Division against a taxpayer where special circumstances exist, (or, a matter described in new Section 88(1A) exist), should remain, to ensure that a Revenue Division review is a cheap review mechanism for taxpayers, being one of the objects of the Revenue Division. This is so particularly because the standard of representation employed by the CCSR in Revenue Division proceedings is high (mostly barristers). As such, costs of the CCSR are unlikely to be minimal. It is in the interests of the CCSR to employ a high standard of representation in Revenue Division proceedings because the outcome of any particular proceedings will affect not only the revenue involved in the application, but potentially also, revenue from other matters already assessed or to be assessed in the future. It would be unfair for a taxpayer, unsuccessful on a genuinely arguable application, to be required to pay such potentially disproportionately high costs.

Conclusion

The Committee urges you to consider making the amendments sought. The result would be a more cost-effective review mechanism for taxpayers and give effect to Parliament's intentions in establishing the Revenue Division of the ADT.

Yours sincerely,



Joseph Catanzariti
President

NSW ADT Revenue Division Decisions 2008				
Name	Representation Comm. OSR	Representation Taxpayer	Matter	Outcome
<u>Lifestyle Ret Proj No.2 P/L v CCSR [2008] NSWADT 256</u>	Barrister	Agent	Land Tax	CCSR Affirmed
<u>Dynset Pty Ltd v CCSR [2008] NSWADT 245</u>	Crown Solicitor	Agent	Land Tax	CCSR Affirmed
<u>Lee v CCSR [2008] NSWADT 211</u>	Barrister	In Person	Land Tax	CCSR Affirmed
<u>Larsson v CCSR [2008] NSWADT 208 (interest reduced)</u>	Crown Solicitor	Agent	Land Tax	CCSR Affirmed
<u>Bhatti and ors v CCSR [2008] NSWADT 205</u>	Barrister	Agent	Interest	CCSR Affirmed
<u>Burbar v CCSR [2008] NSWADT 197</u>	Barrister	Solicitor	FHOG	CCSR Set Aside
<u>Reysson Pty Ltd v CCSR [2008] NSWADT 196 PA</u>	Barrister	Barrister	Land Tax	CCSR Affirmed
<u>Gangemi v CCSR [2008] NSWADT 194</u>	Crown Solicitor	In Person	Interest	CCSR Affirmed
<u>JRS Pty Ltd and Associates v CCSR [2008] NSWADT 192</u>	-		Summons	
<u>Smith v CCSR [2008] NSWADT 171</u>	Crown Solicitor	In Person	Land Tax	CCSR Affirmed
<u>Smith v CCSR [2008] NSWADT 170</u>	Crown Solicitor	In Person	Land Tax	CCSR Affirmed
<u>Kouayder and anor v CCSR [2008] NSWADT 169</u>	Crown Solicitor	Agent	FHOG	CCSR Set Aside
<u>Kassir v CCSR [2008] NSWADT 133</u>	Crown Solicitor	In Person	Land Tax	CCSR Affirmed
<u>Blackwell v CCSR [2008] NSWADT 130</u>	Crown Solicitor	In Person	FHOG	CCSR Set Aside
<u>Beashel and anor v CCSR [2008] NSWADT 103</u>	Barrister	Solicitor	Land Tax	CCSR Affirmed
<u>Portaplant Aust P/L and anor v CCSR [2008] NSWADT 101</u>	Barrister	Solicitor	PayRTax	CCSR Affirmed
<u>Mcllroy and anor v CCSR [2008] NSWADT 90 PA</u>	Crown Solicitor	Barrister	LandTax	CCSR Set Aside
<u>Knight and anor v CCSR [2008] NSWADT 83</u>	Solicitor Agent	In Person	Penalty	CCSR Set Aside
<u>Colusso and ors v CCSR [2008] NSWADT 79</u>	Barrister	Barrister	Land Tax	CCSR Affirmed
<u>Wood v CCSR [2008] NSWADT 77</u>	Crown Solicitor	No appearance	FHPlus	CCSR Affirmed
<u>Avitaia and ors v CCSR [2008] NSWADT 65</u>	Barrister	Solicitor	Land Tax	CCSR Affirmed
<u>Dickson Carriers P/L and anor v CCSR [2008] NSWADT 64</u>	Barrister	Solicitor	PayR Tax	CCSR
<u>Fisk v CCSR [2008] NSWADT 59</u>	Solicitor Agent	Barrister	FHOG	CCSR Affirmed
<u>Haagen and anor v CCSR [2008] NSWADT 40</u>	Crown Solicitor	In Person	FHOG	CCSR Affirmed
<u>Britten v CCSR [2008] NSWADT 38</u>	Solicitor Agent	In Person	FHOG	CCSR Affirmed
<u>Sacco v CCSR [2008] NSWADT 32 A</u>	Crown Solicitor	Solicitor	Land Tax	CCSR Set Aside
<u>Blanch v CCSR [2008] NSWADT 24</u>	Barrister	In Person	Costs	CCSR

<u>Agiostratis v CCSR [2008] NSWADT 23</u>	Barrister	In Person	FHOG	CCSR Affirmed
<u>Restaurants of the Rocks Pty Ltd & Ors v CCSR PA</u>	Barrister	Barrister	Land Tax	CCSR Affirmed
<u>Abadier v CCSR [2008] NSWADT 16</u>	Crown Solicitor	Solicitor	FHOG	CCSR Affirmed
<u>Vassiliou and anor v CCSR [2008] NSWADT 15</u>	Barrister	Barrister	Land Tax	CCSR Set Aside
<u>De Carle v CCSR [2008] NSWADT 9</u>	Crown Solicitor	In Person	Interest	CCSR Affirmed
<u>Aronstan v CCSR [2008] NSWADT 8</u>	Barrister	Barrister	Land Tax	CCSR Affirmed
<u>Powell v CCSR [2008] NSWADT 289</u>	Solicitor Agent	In Person	FHOG	CCSR Affirmed
<u>Western City Developments Pty Ltd v CCSR [2008] NSWADT 293</u>	Barrister	In Person	Duties Act	CCSR Affirmed

Statistics for Revenue Division Decisions of the NSW ADT for 2008:

- 34 Decisions (Plus one Decision re Summons).
- 27 of 34 decisions in favour of the CCSR (79.1%). 7 of 34 decisions in favour of the Applicant (20.59%).
- CCSR representation was stronger than taxpayer in 25 of the 34 Revenue Division matters (73.53%).
- In 19 of the 34 Matters (55.5%) the CCSR was represented by a Barrister as compared to 7 of the 34 Matters (20.59%), the Applicant was represented by a Barrister.
- In the remaining 15 Matters, the CCSR was represented by a Solicitor as compared to 7 where the Applicant was represented by a Solicitor.
- Applicants had no legal representation in 20 of the 34 matters (58.8%)

NSW ADT Appeal Panel (Revenue Division) Decisions 2008				
Name	Representation OSR	Representation Taxpayer	Matter	Outcome
<u>CCSR v Greenish [2008] NSWADTAP 66</u>	Barrister	Agent	LandTax	Allowed to C
<u>Castle v CCSR (RD) [2008] NSWADTAP 62</u>	Crown Solicitor	Solicitor	LandTax	Dismissed
<u>CCSR v Sacco (RD) [2008] NSWADTAP61</u>	Crown Solicitor	Solicitor	LandTax	Allowed to C
<u>Avitaia and ors v CCCSR (RD) [2008] NSWADTAP 57</u>	Barrister	Solicitor	LandTax	Dismissed
<u>Faith Baptist Church Inc v CCSR (RD) [2008] NSWADTAP 31</u>	Barrister	Barrister	Duties Act	Dismissed
<u>CCSR v White and anor [2008] NSWADTAP 27</u>	Barrister	Solicitor	LandTax	Allowed to C
<u>Philpot v CCSR (RD) [2008] NSWADTAP 18</u>	Solicitor Agent	In Person	FHOG	Dismissed
<u>B&L Linings P/L & anor v CCSR (No4)(RD)[2008] NSWADTAP 14</u>	Barrister	Agent	Costs	In favour of C
<u>CCSR v Clapoudis [2008] NSWADTAP 7</u>	Barrister	Agent	FHOG	Allowed to C

Statistics for Appeal Panel Decisions from the Revenue Division of the NSW ADT for 2008:

- 9 Appeal Panel Decisions.
- All Decisions in favour of the CCSR: 4 Appeals were by CCSR - all were allowed and 5 Appeals were by taxpayers - all were disallowed.
- CCSR representation was stronger than taxpayer in 6 of the 9 Appeals.
- In 6 of the 9 Appeals, a Barrister represented the CCSR as compared to 1 where the taxpayer was represented by a Barrister.
- In 4 of the 9 Appeals, a Barrister (in 3) or a Solicitor (in 1) represented the CCSR against non-legal representation for the taxpayer.



**The Law Society
of New South Wales**

ACN 000 000 699

Our Ref: JM:P7:LI:CO:2005

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22 September 2005

The Hon. Bob Debus, MP
Attorney General for NSW
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Dear Attorney,

NSW Administrative Decisions Tribunal ("ADT") Revenue Division – Submission on Costs

The Law Society requests a review of the power of the ADT to award costs in the Revenue Division and in appeals to an Appeal Panel of the ADT from decisions of the Revenue Division (collectively called the "Revenue Division").

The Revenue Division of the ADT only has power to award costs to parties "in special circumstances". It is the view of the relevant Committees of the Law Society that if an application to the Revenue Division of the ADT is successful, whether originally or in an appeal to an Appeal Panel of the ADT, the ADT should have power to award costs against the Chief Commissioner of State Revenue, without the need to be satisfied as to special circumstances. The Society does not advocate any amendment to the power of the ADT to award costs in relation to an unsuccessful application by a taxpayer, whether originally or in an appeal. The power of the ADT in relation to these applications should, it is submitted, remain limited to special circumstances.

If this view is accepted, amendment to the relevant legislation is required as stipulated later in this submission.

The Law Society's grounds for advocating this amendment are set out below.

Background - Power of ADT Revenue Division to award costs

Unlike the NSW Supreme Court, the Revenue Division of the ADT only has power to award costs to parties "in special circumstances". Section 88(1) of the Administrative Decisions Tribunal Act 1997 provides as follows:

S88 Costs

- (1) Subject to the rules of the Tribunal and any other Act or law, the Tribunal may award costs in relation to proceedings before it, but only if it is satisfied that there are special circumstances warranting an award of costs.
- (2) The Tribunal may:
 - (a) determine by whom and to what extent costs are to be paid, and
 - (b) order costs to be assessed on the basis set out in Division 6 of Part 11 of the Legal Profession Act 1987 or on any other basis.
- (3) However, the Tribunal may not award costs in relation to proceedings for an original decision unless the enactment under which the Tribunal has jurisdiction to make the decision provides for the awarding of costs.
- (4) In this section, costs includes:
 - (a) costs of or incidental to proceedings in the Tribunal, and
 - (b) the costs of or incidental to the proceedings giving rise to the application, as well as the costs of or incidental to the application.

Section 88(1) is subject to any other Act or law. There are other Acts relating to other Divisions of the ADT which empower those other Divisions to award costs other than in special circumstances (see Practice Note 12 on Costs of the ADT). However, no such other Act currently so empowers the Revenue Division.

Statistics on awards of Costs in the Revenue Division

Since the Revenue Division was first established 4 years ago on 1 July 2001, only **one** order for costs has been made by the Revenue Division, in favour of the Chief Commissioner. That order was made against the applicant taxpayers in *Hallin Holdings Pty Ltd & anor v Chief Commissioner of State Revenue* [2004] NSWADT 209 in circumstances where the application was described as hopeless and the applicants had made false statements, failed to lodge submissions within time, and caused unwarranted delays. Schedule 1 includes an extract from that decision.

In the NSW ADT Appeal Panel decision of *Chief Commissioner of State Revenue v Group and General Finance Pty Limited* (RD) [2004] NSWADTAP 14, the Appeal Panel held at paragraph 40:

“40 In her submissions counsel for the Commissioner sought an order for costs if the Commissioner succeeded in the appeal. An award of costs in this matter is subject to S. 88 of the Administrative Decisions Tribunal Act 1997 . There were no special circumstances identified by either counsel that would justify an award of costs, no matter which party succeeded. We make no order for costs.”

Also included in Schedule 1 are extracts from other Revenue Division related decisions dealing with the subject of costs.

Meaning of “special circumstances”

The expression “special circumstances” has been narrowly interpreted by the ADT. The Appeal Panel of the ADT held in *Prasad & anor v Fairfield City Council* (RLD) [2002] NSWADTAP 2, that an order as to costs will **not** be made by the ADT:

- simply as a matter of course in favour of the winner
- if conduct in litigation has been reasonable
- if both parties fail to be reasonable and the degree of dereliction is equal.

The Appeal Panel of the ADT also held in the *Prasad Case* that possible grounds for an order of costs might include:

- unnecessary preliminary applications
- failures to comply with directions
- failure to accept an offer greater than or equal to the ultimate amount decided
- matters referred to in Section 109 of the Victorian Civil and Administrative Tribunal Act 1998 provide a good check list of factors that may be relevant to making a “special circumstances” costs award

In *Citadin Pty Ltd (No. 2) -v- Eddie Azzi Australia Pty Ltd & General Pants Co Pty Ltd* (RLD) [2001] NSWADTAP 31, the Appeal Panel indicated that where unmeritorious appeals are lodged in retail leases cases, they should be met with a costs order. The Tribunal held at paragraphs 23 & 24:

“23 In the present case the appeal was dismissed as disclosing no sufficiently arguable questions of law. It was reasonable for the respondents to engage counsel given the financial significance of the dispute and the factual and legal complexity inherent in retail leases disputes.

24 These in our view are factors sufficient in the context of an appeal to amount to ‘special circumstances’ for the purposes of s 88 and ones that warrant the respondents being given some relief as to costs.”

Applying *Citadin Pty Ltd (No. 2) -v- Eddie Azzi Australia Pty Ltd & General Pants Co Pty Ltd*, the Appeal Panel in *Ktenas -v- Scott* (RLD) [2002] NSWADTAP 15, made an order that the appellant (whose appeal was dismissed, there having been no arguable question of law) pay the costs of the respondent in respect of the appeal but not in respect of the original proceedings.

It follows that without evidence of at least some wrongdoing on the part of the Chief Commissioner, the fact that an application to the Revenue Division is successful does not, of itself, amount to special circumstances.

Given the statutory role and responsibility of the Chief Commissioner, and the standard of representation employed by the Chief Commissioner, it would not be expected that there would ever be wrongdoing on the part of the Chief Commissioner. Accordingly, the likelihood of any application for an award of costs against the Chief Commissioner ever being successful is remote, if not almost non-existent. This fact is reflected in there having been no award as to costs against the Chief Commissioner in the Revenue Division since establishment of the Revenue Division, 4 years ago.

Statistics on reviews by Revenue Division

The number of reviews made by the Revenue Division has not been anywhere near the **200 per annum** number originally foreshadowed when the Revenue Division was first established (see extract from Second Reading speech in Schedule 2). The following is a Table from information obtained from the ADT website.

ADT Revenue Division

Year	Number of Decisions	Number of Applications Filed
2001-2002	11	48
2002-2003	22	55
2003-2004	26	56
2004-2005	22	TBA in 04-05 Annual Report
July – 9 September 2005	8	TBA in 05-06 Annual Report

The shortfall in the number of applications to the Revenue Division appears to be attributable in part, to the fact that:

- costs can only be awarded by the ADT in “special circumstances” which is interpreted narrowly;
- state taxes, particularly stamp duties, being a difficult area, taxpayers tend to need to get specialist advice; and
- even if a taxpayer is of the view that it has a high percentage chance of success on an ADT application, the burden of the taxpayer’s legal costs (in making a successful application) outweighs the possible benefit to be gained in making the application.

Recently, a decision in the NSW Supreme Court was delivered just 17 days after the hearing (*Affinity Health Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 663 (7 July 2005)) in relation to an appeal under the Taxation Administration Act. The taxpayer elected to appeal directly to the NSW Supreme Court and not the ADT. The assessment involved was in excess of \$10 million plus interest. Gzell J upheld the appeal, resulting in no duty being payable. Accordingly, the appeal by this taxpayer directly to the NSW Supreme Court, not only achieved a fast outcome and, according to the decision, access to the same powers as the ADT, but also, having been successful, the right to an award of costs without having to prove special circumstances as would have been the case in the Revenue Division of the ADT. The inability of the Revenue Division of the ADT to award costs to successful applicants except in special circumstances puts taxpayers appealing to the ADT at a disadvantage compared to those appealing to the NSW Supreme Court.

The Second Reading speech to the Bill which on enactment established the Revenue Division of the ADT did contemplate that taxpayers may choose to access the judicial expertise of the NSW Supreme Court where the amount of tax in issue is substantial (as was the position in the Affinity Health Case). However, this does not derogate from the fact that irrespective of the amount of tax involved, an unqualified right to recover costs on a successful application for review can be integral to the decision on whether or not to make the application. It can, in fact, often be more important where the amount of tax involved is **not** substantial.

Costs against Applicants only in special circumstances

The Revenue Division hears applications for review in respect to taxation laws (as defined) made under the Taxation Administration Act. In addition, since 12 August 2005, pursuant to the Administrative Decisions Tribunal (General) Amendment (Revenue) Division Regulation 2005, the Revenue Division hears applications for review in respect to the First Home Owners Grant Act 2000. In the latter case, taxpayers have no choice of jurisdiction. In the former case, taxpayers have a choice of review either by the NSW Supreme Court, or, the ADT. If a taxpayer appeals directly to the NSW Supreme Court, it takes the risk of an award of costs against it, if it is unsuccessful. Such a risk (of an award of costs against the taxpayer) does not currently apply in the ADT unless special circumstances exist. It is submitted that this position should be maintained, in order to ensure that the risk of an award of costs against a taxpayer, if it is unsuccessful, does not operate as another deterrent to the making of applications to the ADT.

One of the objects of the Revenue Division is to give **taxpayers** access to **cheap** review mechanisms. This object is not being satisfied to the extent that successful taxpayers are unable to be awarded costs against the Chief Commissioner, except in special circumstances, which as stated earlier are unlikely ever to be established. On the other hand, the requirement that costs may **only** be awarded in the Revenue Division **against a taxpayer** where special circumstances exist, ensures that a Revenue Division review

is a cheap review mechanism **for taxpayers**, being one of the objects of the Revenue Division.

This is so particularly because the standard of representation employed by the Chief Commissioner in Revenue Division proceedings is high (mostly barristers). As such, costs of the Chief Commissioner are unlikely to be minimal. It is in the interests of the Chief Commissioner to employ a high standard of representation in Revenue Division proceedings because the outcome of any particular proceedings will affect not only the revenue involved in the application, but potentially also, revenue from other matter matters already assessed or to be assessed in the future. It would be unfair for a taxpayer, unsuccessful on a genuinely arguable application, to be required to pay such potentially disproportionately high costs of the Chief Commissioner. Such costs are presently to the account of the Chief Commissioner unless special circumstances exist against the taxpayer. This position should not be changed. It is appropriate that costs only be awarded against taxpayers where special circumstances exist such as occurred in the *Hallin Holdings Case*.

If the requirement of special circumstances were to be removed against taxpayers, the object of "cheap" review mechanisms of the Revenue Division would be defeated and individual taxpayers would be unfairly burdened with potentially disproportionately high costs of the Chief Commissioner.

It is for these reasons that this submission is that the requirement that there be special circumstances be removed **only** in respect to costs **against the Chief Commissioner** and **not** for costs against taxpayers.

The following statistics on first instance decisions of the Revenue Division this year support the Law Society's proposition.

Statistics on Chief Commissioner representation in the Revenue Division

Schedule 3 contains a Table of information obtained from the ADT website in connection with first instance decisions of the Revenue Division this year, from 1 January to 9 September 2005.

That information indicates that:

- a) 23 first instance decisions have been delivered in the Revenue Division from 1 January to 9 September 2005;
- b) in the majority of these 23 cases, namely, 12 of them (ie 2, 4, 5-9, 13, 15, 20, 21 & 23) the representation of the Chief Commissioner exceeded the representation of the applicant:
 - in 6 of those 12 cases, (5, 7,9,13, 21 and 23), the application was refused completely;
 - of the remaining 6 of the 12 cases:
 - 3 involved applications refused in part (2, 4 and 8) and to the extent that the application was allowed, the Chief Commissioner has appealed in 2 of those cases (4 and 8);
 - 3 involved applications that were allowed in full (6, 15 and 20) however, the Chief Commissioner has appealed two of those decisions (6 and 15) and one of those (6) has already been set aside by an Appeal Panel in circumstances where the Chief Commissioner was represented at the appeal by a barrister and the applicant by an agent who was excused because of cost;

- c) in only one case (19) was the representation of the Chief Commissioner less than the representation of the applicant and the result was that the application was allowed however, the Chief Commissioner has lodged an appeal against that decision;
- d) in the minority of cases, namely 10 out of 23 (ie 1, 3, 10-12, 14 and 16-18), the representation of the Chief Commissioner was equal to the representation of the applicant, however, in 5 of those 10 cases, the Chief Commissioner was represented by an OSR Senior Review Officer (ie 1, 12,17,18 and 19) and, although not representing the Chief Commissioner in that capacity, 4 of those 5 cases (1,12, 18 and 19) involved the OSR Senior Review Officer being a qualified solicitor as compared to representation of the applicant by a non-legal practitioner. The following is the outcome of those 10 cases:
- in 5 of those 10 cases (ie 1, 10, 12, 14 and 18), the applications were refused and only one of those is being appealed by the applicant (14);
 - in 3 of those 10 cases (ie 3, 11 and 17), the applications were allowed in part. The Chief Commissioner has appealed one of those cases to the extent that the application was allowed (3) and none have been appealed by the applicant; and
 - in 2 of those 10 cases (ie 16 and 22), the application was allowed and the Chief Commissioner has lodged an appeal against one (16) and the appeal period for the other (22) has not yet expired.

These statistics indicate that the Chief Commissioner is in a more advantageous position on costs than taxpayers in proceedings in the Revenue Division. This submission is directed towards correcting this imbalance.

Submission

The Law Society submits that legislative change is necessary to achieve what was NSW Parliament's intention in establishing the Revenue Division of the ADT.

Section 88 of the ADT Act or, Part 10 of the Taxation Administration Act (and, following the Administrative Decisions Tribunal (General) Amendment (Revenue) Division Regulation 2005 which commenced on 12 August 2005, Part 2 Division 6 of the First Home Owners Grant Act 2000) should be amended to give the Revenue Division power to award costs against the Chief Commissioner, without the need to be satisfied as to special circumstances, in both original and appeal panel proceedings. Such amendment will give effect to Parliament's intention to provide taxpayers with a genuinely efficient and cost effective avenue for appeal for matters involving State Taxes.

Such amendments should have the effect that if an applicant to the Revenue Division is successful, whether originally or in an appeal to the ADT, the ADT has power to award costs against the Chief Commissioner, without the need to be satisfied as to special circumstances. It is also submitted that the power of the ADT to award costs against an unsuccessful taxpayer, whether originally or in an appeal, should **not** be changed and should remain limited to special circumstances.

Suggested Amendments for Submission

A suggested form of the amendment to accommodate this submission could be to include a new subsection (1A) after subsection (1) in Section 88 of the Administrative Decisions Tribunal Act 1997 OR a new Section into Part 10 of the TAA and Part 2 Division 6 of the First Home Owners Grant Act 2000 along the following respective lines:

Section 88 of the Administrative Decisions Tribunal Act 1997

(1A) If an applicant to the Revenue Division of the Tribunal is successful in whole or in part, in proceedings before the Revenue Division of the Tribunal, or in appeal

proceedings before an Appeal Panel of the Tribunal in respect to an appeal by an applicant or by the Chief Commissioner of State Revenue against a decision in the Revenue Division of the Tribunal, the Tribunal may award costs against the Chief Commissioner of State Revenue in relation to such proceedings before it, without having to be satisfied that there are special circumstances warranting such an award of costs.


New Section in Part 10 of the TAA and Part 2 Division 6 of the First Home Owners Grant Act 2000

If an applicant to the Administrative Decisions Tribunal is successful in whole or in part, in proceedings before the Revenue Division of the Tribunal, or in appeal proceedings before an Appeal Panel of the Tribunal in respect to an appeal by an applicant or by the Chief Commissioner against a decision in the Revenue Division of the Tribunal, the Tribunal may award costs against the Chief Commissioner of State Revenue in relation to such proceedings before it.

Conclusion

The Law Society urges you to consider making the amendments sought. The result would be a more cost-effective review mechanism for taxpayers and give effect to Parliament's intentions in establishing the Revenue Division of the ADT.

Yours sincerely,


for **John McIntyre**
President

SCHEDULE 1

Hallin Holdings Pty Ltd & anor v Chief Commissioner of State Revenue [2004] NSWADT 209, Block J held at 33 and 34:

“33 The realities are that the Applicants having set up Hallin either solely or mainly for pay-roll tax purposes were assessed for pay-roll tax following an investigation. They responded by seeking the exclusion of Hallin on grounds which were demonstrably false in the light of the statements made by Mr Nohra. The relevant connection is demonstrated in overwhelming fashion by the evidence before me. And having done so they then proceeded to conduct the application on the basis of barrister difficulties (doubtful) and inability to furnish instructions, which were untrue. The fact that they sought extensions of time for submissions when on the evidence before me the probabilities are that they never intended to furnish them is again regrettable. It is relevant to note that Mr Pelosi was quick enough to respond on two, but not other occasions. The Respondent seeks an order for costs on the basis that there are special circumstances which warrant an order. Mr Young based his application on the bases that the application was hopeless from the outset and in addition that delays were caused (solely) by the conduct of the Applicants and as referred to in this decision, and evidenced by the correspondence in the Bundle. (In general terms the behaviour of Mr Pelosi in this matter has not been appropriate).

34 There are numerous cases dealing with costs applications but I do not think that it is necessary for me to refer to them; in particular I need not go into the cases which deal with the question of what constitutes special circumstance. This is quintessentially a case where there are special circumstances and which warrant a costs order. The Respondent has sought an order for costs against the Applicants and not against anyone else and the Respondent has not sought costs other than on a party and party basis. The conduct of the Applicants in this case has been such that an order is altogether justified. Accordingly the Tribunal orders that the Applicants, jointly and severally, bear the costs of the Respondent; in the absence of agreement as to the amount of the Respondent's costs they must be assessed as set out in Division 6 of Part 11 of the Legal Profession Act 1987.”

Macquarie Industrial Management Limited v Chief Commissioner of State Revenue (RD) [2003] NSWADTAP 17, the Appeal Panel held at 35:

“35 The Appellant asked that, if the appeal were upheld, an order should be made for costs, on the ground that the Respondent changed his attitude to the construction of the section during the course of the transaction. Undoubtedly he did so, but we do not regard that as being such a special circumstance as calls for the making of an order for costs.”

In the Revenue Division decision of William J Padget Pty Limited v Chief Commissioner of State Revenue (No 2) [2005] NSWADT 110, Block J held at 34:

“34 The Applicant seeks an order costs upon grounds which need not be specified. Suffice it to say that in my view this is not case in which a costs order would be appropriate.”

SCHEDULE 2

Second Reading Speech

The Second Reading speech on 11 October 2000 by the NSW Treasurer for the ADT Legislation Amendment (Revenue) Bill 2000 which on enactment, established the Revenue Division of the ADT, included the following (emphasis added):

*"It is anticipated that, by conferring concurrent jurisdiction on the Administrative Decisions Tribunal and the Supreme Court, taxpayers who are presently deterred from pursuing a review of the Chief Commissioner's decision past the objection stage because of **the complexity, expense and delay** associated with Supreme Court proceedings will take advantage of access to the **cheap and flexible review mechanisms** offered by the Administrative Decisions Tribunal. Conversely, those taxpayers who wish to access the judicial expertise of the Supreme Court because their particular matter involves **highly technical and difficult legal issues** or because the **amount of tax in issue is substantial** can do so."*

*"...access to the Administrative Decisions Tribunal for review of decisions as permitted by the Taxation Administration Act may jump from the present figure of approximately **15 appeals per year** in the Supreme Court to approximately **200 reviews per year** in the Administrative Decisions Tribunal".*

SCHEDULE 3

NSW ADT Revenue Division First Instance Decisions - 1 January to 9 September 2005

Applicant	Applicant Representation	Chief Commissioner Representation	Outcome
1. Giunta	Self	OSR Senior Review Officer	Refused [Affirmed AP]
2. Nikaed P/L	Agent	Barrister	Allowed – Penalty Tax Refused – Interest
3. Ettamogah Mob Australia	Barrister	Barrister	Allowed – Penalty Tax [AP] Refused – Interest
4. RET Enterprises P/L	Agent	Barrister	Allowed – Penalty Tax [AP] Allowed – Premium Interest Refused – Market Interest Refused - Assessment
5. Dann	Self	Barrister	Refused
6. Pacific General Securities	Agent	Barrister	Allowed [Set Aside by AP]
7. Jagovac	Self	Barrister	Refused
8. Gunlake P/L	Agent	Barrister	Allowed – Penalty Tax [AP] Refused - Interest Refused - Assessment
9. Della-Franca	Solicitor	Barrister	Refused
10. Anderson	Barrister	Barrister	Refused
11. William J Padget P/L	Barrister	Barrister	Allowed – Lot 11 Refused – Lot 12
12. Condous	Agent	OSR Senior Review Officer	Refused
13. Murdocca	Self	Solicitor	Refused
14. B&L Linings P/L	Barrister	Barrister	Refused [AP]
15. Doney	Solicitor	Barrister	Allowed [AP]
16. Hayson Group	Barrister	Barrister	Allowed [AP]
17. Simons	Self	OSR Senior Review Officer	Allowed – Interest Refused - Assessment
18. Smith	Self	OSR Senior Review Officer	Refused
19. Timbs	Barrister	OSR Senior Review Officer	Allowed [AP]
20. Full	Self	Barrister	Allowed
21. Tuck	Self	Solicitor	Refused
22. Yachting Australia Incorporated	Barrister	Barrister	Allowed
23. Meillis	Self	Barrister	Refused