



# ENVIRONMENTAL DEFENDERS OFFICE (ACT)

## Challenging environmental decisions

March 2010 - Fact Sheet 3

There is a range of mechanisms available in the ACT to ensure that government agencies are publicly accountable for their decisions and actions, including through complaints, appeals or investigations. Tribunal or court action provides scope to revoke or make a

different decision. J qy gxgt. "vj gug'ltt o cllgi cll'evkqpu'r qug'uki pkltecpv'r t qegf wt cll' dclttkgt u'wvej "cu'wcpf kpi "cpf 'ugewt kl' 'ltt "equu0Vj g'Qo dwf uo cp"qt "Eqo o kulkqpgt 'ltt " Uuwxkpcdkk' "cpf "vj g'Gpxk qpo gpv'ecp "eqpf wev'kpxguki cvkqpu'dw'f q'p'qv'j cxg"vj g'r qy gt "vq" o cng" c'f kltt gpv'f gekukqp0J qy gxgt. "vj g' "ecp" o cng" t'geqo o gpf cvkqpu'vq"vj g'I qxgt po gpv' y j kej "o c' "ko rcev'qp"vj g'f gekukqp'kp"s wguwkqp"qt "hwwt g'f gekukqpu0

### How to investigate a decision?

If you are unhappy with a government or agency's decision the first step is usually to determine the reasons for the decision. This can be done by seeking a written statement of reasons. This will help you decide whether a decision should be challenged or if there were valid reasons for making the decision.

Some key questions are:

- who was the decision-maker?
- precisely what was the decision?
- under what Act or regulations was the decision made?
- when was the decision made?
- what were the reasons, if any that the decision-maker gave for making the decision?
- what are the time-limits for appealing a decision?



### How to obtain a statement of reasons?

For certain decisions a government agency will automatically be required to provide a written statement of reasons for their decision.

For example, if the ACT Planning and Land Authority approves a development application under the *Planning and Development Act 2007* [s.162(1)(a) or (b)] it must provide the applicant, and anyone who has put in a submission relating to the development application, a notice setting out the reasons for the approval [s.170(3)(c)].

In other cases a person may apply to the decision-maker for a statement of reasons. The *ACT Civil and Administrative Tribunal Act 2008* (ACAT Act) enables a person to apply for a written statement of reasons generally within 28 days of the notification of the decision for a 'reviewable decision'. A 'reviewable decision' is a decision that can be reviewed by the ACT Civil and Administrative Tribunal (ACAT). Decisions which can be reviewed by ACAT are discussed below.

The *Administrative Decisions (Judicial Review) Act 1989* (ACT) provides that a person aggrieved by certain government decisions can apply in writing for a written statement of reasons [s.13], generally within 28 days of notification of the decision. For Commonwealth decisions the *Administrative Decisions (Judicial Review) Act 1977* (Cth) confers the same right [s.5]. However, a decision-maker is not required to give a statement of reasons for all decisions. It is important to seek legal advice and carefully study the legislation in question.

In addition you may seek information through the freedom of information (FOI) process. This

information allows you to make an informed decision as to whether to take the matter further, for example by making representations to a Member of Parliament, complaining to an ombudsman, seeking internal review or review by a tribunal, or commencing proceedings in a court.

### What options do I have to challenge a decision?

If you wish to challenge a decision there may be numerous avenues of review:

- internal review
- merits review to the ACT Civil and Administrative Tribunal (ACAT)
- judicial review to the Supreme Court
- complaint to the Ombudsman or the Commissioner for the Environment and Sustainability.

### Internal review

Certain decisions can be subject to internal review. The relevant legislation will set out if there is a right to have a decision internally reconsidered and who can seek internal review. For example, under the *Tree Protection Act 2005* some decisions by the Conservator of Flora and Fauna, such as approving a tree damaging activity, may be internally reviewed [see Part 1.1 of Schedule 1]. Only the person who has applied to damage a protected tree may seek internal review of the decision. In such a case the internal review must reconsider the conservator's original decision having regard to any advice from the advisory panel [s.106].

### ACT Civil and Administrative Tribunal – merits review

If you think that a decision is not a good decision based on the facts then in some cases you can seek review of the merits of the decision.

In August 2008 the ACT Legislative Assembly passed the *ACT Civil and Administrative Tribunal Act 2008* that amalgamated a number of existing tribunals, including the Administrative Appeals Tribunal (AAT), and consolidated them into a single administrative tribunal, the ACT Civil and Administrative Tribunal (ACAT). The tribunal commenced on 2 February 2009.

The ACAT reviews the merits, rather than the lawfulness, of a decision. That is, the tribunal 'stands in the shoes' of the original decision-maker and decides the matter anew. It can support the existing decision, attach conditions to it, make an entirely new decision, or send the matter back to the original decision-maker with directions on how to reconsider that decision [s.68 ACAT Act].

ACAT differs from a court as a method for dispute resolution in several ways; Court proceedings can take years for resolution and can be expensive in terms of filing fees and ongoing costs in legal fees. ACAT by comparison is characterised by speedy processes and minimal fees. The ACAT allows for self representation (or lawyer representation if you wish); and is characterised by a reduction of formalities and less reliance on the technical rules of evidence.

### What decisions can be reviewed by ACAT?

Not all decisions of all government agencies or authorities can be reviewed by ACAT. There must be a right to have the decision reviewed by the ACAT stated in the relevant legislation. The following are some examples of decisions which may be reviewed by the ACAT:

- a decision to grant an environmental authorisation [s.135, Schedule 3 *Environment Protection Act 1997*];
- a refusal to issue a licence to take water (s.94, Schedule 1 *Water Resources Act 2007*);
- a decision to approve or refuse a development application [ss.407-410, Schedule 1 *Planning and Development Act 2007*];
- a decision to refuse or approve the registration of a tree [s.107, Schedule 1 *Tree Protection Act 2005*];
- a decision to register or not register a place or object on the ACT Heritage Register [ss.111-114, Schedule 1 *Heritage Act 2004*].

Even then, some decisions are specifically exempted from review. For example, single residential development approvals under the Planning and Development Act are generally exempt from review by the ACAT [Schedule 1 of the Planning and Development Regulation 2008]. You should seek advice on whether the decision is reviewable by ACAT from a lawyer, such as the EDO.

## How to apply for review of a decision?

If you decide to seek merits review of a decision you usually have 28 days from the date of the decision to lodge an application for review (Rule 14, ACT Civil and Administrative Tribunal Procedure Rules 2009 (No 2)). In some appeals the time will run from when you are notified of the decision, for example in a review of planning approval decisions [s409 *Ricppkpi "cpf 'F gxgrqro gpv'cev'4229*]. It is advisable to seek specific legal advice and check with the tribunal.

An application for review must be made on the 'Application for Review of Decision' form which is available from the tribunal registry and online. An application for review of a decision made under the *Planning and Development Act 2007* costs \$178.00. An application for review of decisions under other environmental Acts is \$255.00. Check with ACAT for any changes in the fee structure. Application fees can be waived in cases of hardship and may be required to be paid by the other party if the application is successful [s. 48 ACAT Act]. Generally each party will bear its own costs.

## Supreme Court of the ACT – judicial review

In addition you may seek to challenge the legality of a decision, that is whether the requirements and procedures of the law were followed, rather than the merits of a decision. This is referred to as judicial review. Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) a wide range of Commonwealth government decisions are subject to judicial review and in the ACT, the *Administrative Decisions (Judicial Review) Act 1989* (ACT) provides for the judicial review of a wide range of ACT government decisions. In the ACT judicial review cases are heard in the ACT Supreme Court.

In contrast to the ACAT, Supreme Court hearings tend to be more costly and are held in a more formal legal environment. The Supreme Court Registrar can assist with information on filing fees which in some cases may be reduced in public interest matters. Like merits review, strict timeframes apply to seeking judicial review. You usually have 28 days from being notified of a decision to lodge an application for judicial review. The law relating to judicial review is complex and if you are considering seeking judicial review of a decision you should contact a lawyer such as the EDO.



## Who is entitled to seek review of a decision?

Not everyone is automatically entitled to seek review of a decision.

Standing is the right to have an issue heard before a court or tribunal. Standing is often only available to a 'person aggrieved' or a person whose 'interests are affected'. Traditionally this has meant that only persons directly affected by a decision or an action have a right to take legal action. In many cases environmental groups have had to justify that they are 'a person aggrieved'. Who can bring an action may be set out in the relevant legislation. For example, the Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act) provides that any 'interested person' (individual or organisation) can apply for an injunction to remedy or restrain a breach of the Act [s.475]. An interested person is defined as a person whose interests have been or would have been affected, or has engaged in a series of activities for protection or conservation of, or research into, the environment in the previous two years. A 'person aggrieved' for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is defined as including a person whose interests are adversely affected by the decision [s.3(4)].

## Costs can be another barrier to legal action.

Costs include the expenses in conducting the litigation. For example they may include court filing fees, solicitor's and barrister's fees, expert witness fees, out of pocket expenses such as photocopying and telephone. In addition to these there may be up front costs such as an undertaking as to damages or security for costs. Security for costs is where a party to the proceeding must provide evidence that they have sufficient funds to cover costs in the event that they lose; and may be required to provide money in advance of the court proceedings. The money required may go beyond the financial resources of a non-government organisation. Finally, you may be required to pay the other party's costs if you lose.

## What role can the Ombudsman play?

Another avenue if you are unhappy with how the government has dealt with a matter is to make a complaint to the Ombudsman. The ACT Ombudsman has broad powers under the *Ombudsman Act 1989* (ACT) to investigate complaints relating to matters of administration including:

- ACT government agencies;
- how an FOI request was handled;
- ACT policing; or
- whistle blower complaints [s.4A(c)].

The ACT Ombudsman cannot investigate actions taken by:

- the territory or a territory authority for the management of the environment;
- the Commissioner for Sustainability and the Environment;
- a minister; or
- a judge or magistrate or tribunal [s.5(2)].

In some instances, the ACT Ombudsman refers complainants to other review agencies that can more appropriately deal with the issues raised [s.6A and s.6B].

Findings of the ACT Ombudsman are not 'determinative' or final (unlike a court or tribunal), they are recommendatory. He/she investigates and then may recommend that the government agency undertake one of the following:

- reconsider or change its decision;
- apologise;
- change a policy or procedure consider; or
- pay compensation where appropriate [s.18].

The Ombudsman also has the option of providing his/her recommendation to the Chief Minister and to the Legislative Assembly if he/she feels inadequate attention or action has been given to their recommendations by the agency involved [s.19-20].

Complaints may be made by going to the Ombudsman's office, by telephone, in writing (by letter, email or facsimile), or by using the online complaint form on the Ombudsman's website. There are no fees for making a complaint. Complaints will also be accepted anonymously. Before making a complaint you should first raise your complaint with the relevant agency. If the Ombudsman decides not to investigate they must provide reasons to the person complaining. They must also keep you informed of the progress of any investigation.

## What can the Commissioner for Sustainability and the Environment investigate?

The Commissioner for Sustainability and the Environment in the ACT is a sort of environmental ombudsman. The Commissioner is established under the *Commissioner for the Environment Act 1993* and has some powers and authority to investigate environmental decisions and actions of the ACT Government. The Commissioner can investigate:

- complaints about the management of the environment by Government agencies;
- matters as directed by the Minister;
- actions of Government agencies which have a substantial impact on the environment of the ACT. This can be investigated on the Commissioner's own initiative [s.12(1)].

The Commissioner is not authorised to investigate actions taken by certain bodies such as judges, magistrates, the Ombudsman or a panel conducting an inquiry into an environmental impact statement under Chapter 8 of the *Planning and Development Act 2007* (ACT) [s.12(2)].

Complaints are made by contacting the Commissioner's office. The Commissioner has certain discretionary powers in making decisions on whether or not to investigate certain complaints [s.14]. If the Commissioner decides not to investigate, they must give reasons in the Annual Report [s.14(8)].

If the Commissioner does investigate a complaint the Commissioner has to prepare a report which must be provided to the Minister within 28 days of completion [s.21]. The report must be tabled in the Assembly by the Minister within 15 sitting days of receiving the report. [s.22].

**Disclaimer**

*The law described in this Fact Sheet is current at 31 March 2010.*

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