



27 July 2011

ACT Civil and Administrative Tribunal
GPO Box 370
Canberra City ACT 2601

by email: tribunal@act.gov.au

Dear Sir/Madam

Operations and Procedures of ACT Civil and Administrative Tribunal

Thank you for the opportunity to make a submission about the operations and procedures of the ACT Civil and Administrative Tribunal.

The submission set out below largely relates to matters arising in the Administrative Review jurisdiction of the Tribunal. The Environmental Defender's Office is a community legal centre specialising in public interest environmental law. The submission arises out of the Office's experience in advising people who are exercising their rights in relation to review of decisions on town planning and environmental matters.

The structure of the submission is as follows:

- (a) submissions relating to particular provisions of the *ACT Civil and Administrative Tribunal Act 2008*;
- (b) submissions relating to other aspects of the procedures of the Tribunal.

Particular provisions

Section 48 - costs

The operation of s.48 of the Act has been considered in *Mainore Pty Ltd v ACT Planning & Land Authority* [2011] ACAT 24. The EDO considers that legislative clarification of the operation of s.48 is necessary to make it clear whether there is a general power to award costs under s.48. The EDO's position is that in administrative review proceedings relating to

planning and environmental matters, costs should not be awarded. That could be achieved by making clear in s 48 that any power to award costs does not apply in the administrative review jurisdiction of the Tribunal (as opposed, for example, to the small claims jurisdiction). Alternatively, an amendment could be made to s 25 of the Act so as to specifically authorise the Tribunal to make rules governing the award of costs in administrative review proceedings relating to planning or environmental matters. This would allow the Tribunal itself to make rules which identified the circumstances or categories of cases in which it might make an award of costs. The EDO would wish to be able to provide comments on any redrafted s 48 because it appears that the drafting of the current section lacks coherence and fails to express any clear legislative policy in relation to legal costs of matters in the Tribunal.

Section 53 – interim orders

The power to grant interim orders in s 53 of the Act needs to be reviewed. The scope of the power is unclear. Section 53(3)-(4) appear to limit the powers of the Tribunal to granting a stay for a maximum of 12 weeks plus an additional two weeks. On the current wording of s 53 it is not clear that a series of 12 week stays may be granted, although we understand that this has in fact occurred in practice. The limitation of the power of the Tribunal to grant a stay of 12 weeks is an inappropriate constraint on the powers of the Tribunal. The Tribunal should have power to grant an interim order that predicts the position of the parties up until it makes its final decision. That power should not be limited by some arbitrary time frame.

Further, it should be made clear that the power to make an order extends up until the determination of the proceedings. Section 53(1)(b) arguably constrains the power of the Tribunal to make an order to an order made “before the hearing of the application” rather than at any time up until the determination of the application. It is quite possible that the need for an interim order might arise only after the hearing has commenced or even when it has been completed but before a decision has been made. The EDO recommends that the wording of s 53(1)(b) be changed so as to permit the making of an interim order at any time up until the determination of an application. Further, where there is an entitlement to appeal under s 79 of the Act the power of the Tribunal to grant interim relief should continue.

Other Aspects

Mediation in Environmental and Planning Matters

The EDO’s view is that any alternative dispute resolution mechanism adopted in relation to environmental and planning matters must be presided over by a person with experience in

environmental and planning matters in the Tribunal. That experience and authority is much more useful than the generic mediation skills held by someone who is a registered mediator but does not have experience in determining cases in the Tribunal. Therefore the EDO considers that as a matter of practice, in environmental and planning cases the Tribunal should exercise the power under s 33 of the Act to conduct a preliminary conference before a member of the tribunal with relevant experience rather than the power in s 35 to refer matters to mediation. Such an approach will make the process more likely to be a useful one both in cases where parties are legally represented and in cases when they are not.

Administrative review application forms

The EDO is of the view that a single application form for applications for administrative review is problematic, as previously raised in our letter dated 13 September 2010. EDO recommends changes to the form to reflect the different procedures for different reviews, or the development of separate forms for different administrative review applications (for example in planning matters).

The current application for review of a decision form, AF2009-278, includes a paragraph at the end of the form for an 'application for extension of time to lodge the application for review'. It invites an applicant to 'explain in detail why your application is out of time and why an extension of time should be given to lodge the application'. The *Planning and Development Act 2007* prohibits the extension of the time for review of a decision on a development application if the person is not the applicant for the development application.

The EDO has been contacted by third party objectors seeking review of planning decisions who have assumed that there is a right to seek an extension of time on the basis of this form.

The EDO recommends that the form be amended to make it clear to applicants for review that the time for lodging the application cannot always be extended, or alternatively that a separate form be developed. This would help ensure that timely applications are made in matters where no extensions of time are permitted.

Expert evidence

The Tribunal's use of its power to make directions has been used to require the production of joint expert's reports in a range of matters before the Tribunal, although not often in relation to environmental or planning matters.

The EDO submits that the Tribunal should give further consideration to the use of expert conferencing in applications dealt with by the Tribunal. This process has the potential to

substantially limit the range of matters of expert evidence in dispute, structure the expert evidence in a way which is more readily understood by the Tribunal and more clearly articulate the reasons for any differences of opinion between experts.

We note in this regard the comments of Judge Rackemann in his article “Expert evidence reforms – how are they working” *National Environmental Law Review* 2011:1 at 40-49 and, in particular, his Honour’s comments on the management of experts (pp43-45). Enclosed as annexures to this submission are copies of Judge Rackemann’s article as well as an article by Neil Sutherland “The efficacy of joint reports in narrowing technical issues during litigation” *National Environmental Law Review* 2011:1 50-53.

Please do not hesitate to contact me on 6243 3460 if you wish to discuss this submission further.

Yours sincerely

Environmental Defender’s Office (ACT) Inc.

Kirsten Miller
Principal Solicitor

Encl.