

THE NORTHERN TERRITORY CIVIL & ADMINISTRATIVE TRIBUNAL

A Guide to the Tribunal
and its Jurisdiction in
Environmental Matters

About the Environmental Defenders Office (NT) Inc

The Environmental Defenders Office NT (EDO) is an independent non-for-profit, community legal centre that specialises in environmental law.

The EDO provides legal advice, representation and education on environmental law matters across the Northern Territory. THE EDO also advocates for stronger environmental laws by participating in law reform, including by making submissions.

The EDO is the only legal centre in the Northern Territory that practises public interest environmental law. The EDO is an incorporated association established under the Associations Act (NT).

In addition to its work in the Northern Territory, the EDO is a member of a national network of EDOs working collectively to protect Australia's environment through public interest environmental law.

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Legal advice should be sought in specific cases.

While all care has been taken in the preparation of this publication, it is not a substitute for legal advice in individual cases. For any specific questions you should seek legal advice.

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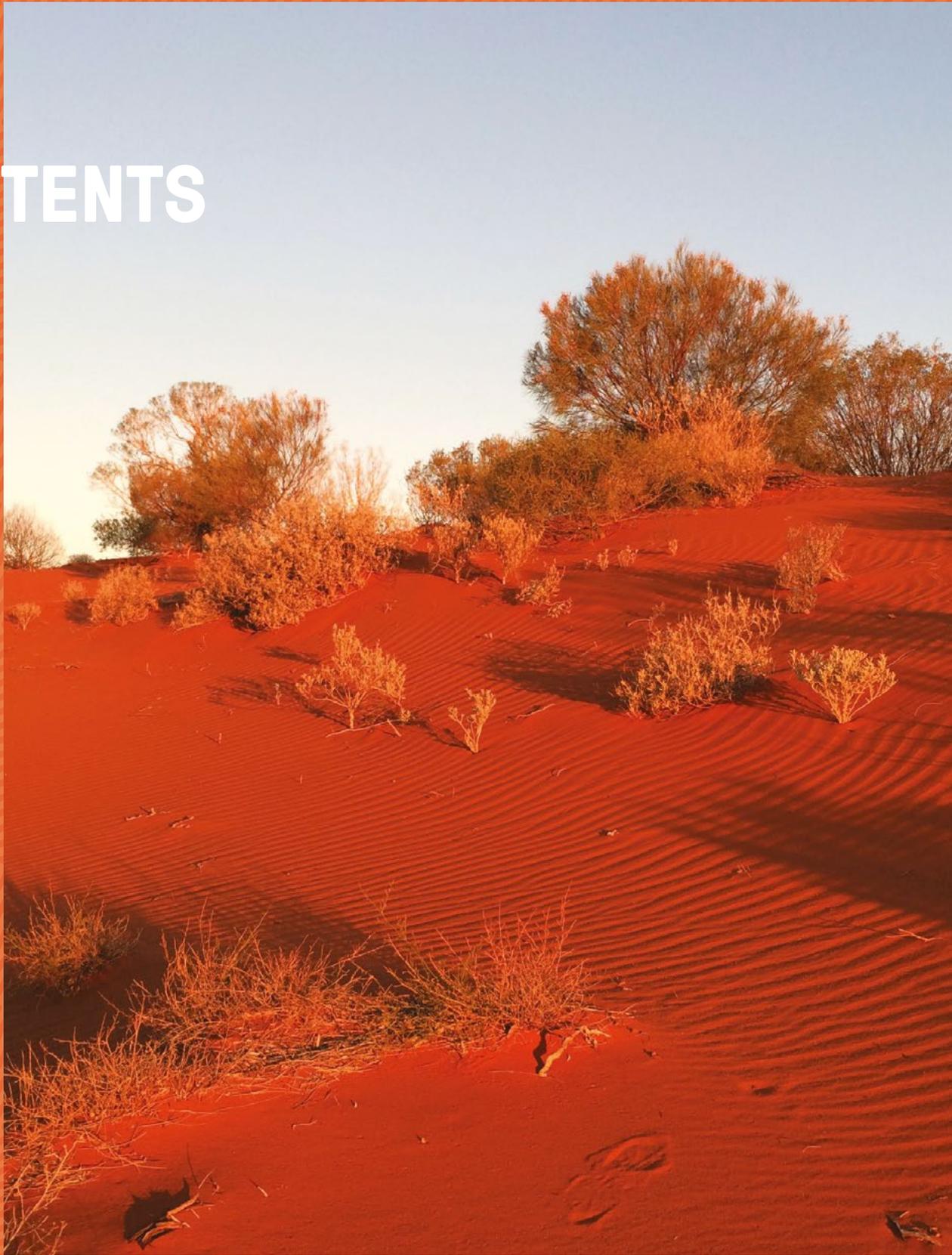




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INTRODUCTION





This guide is intended to provide a useful go-to document for potential users of the Northern Territory Civil and Administrative Tribunal (NTCAT or the Tribunal). It is written particularly with users of NTCAT’s ‘environmental jurisdiction’ in mind.

There is a range of legislation conferring jurisdiction on NTCAT that could broadly be regarded as having “environmental” subject matter. For example, NTCAT has jurisdiction to review various decisions under (among other Acts) the Darwin Waterfront Corporation Act, Fences Act, Geothermal Energy Act and Ports Management Act.

The scope of this guide is limited to NTCAT’s jurisdiction under the following pieces of Northern Territory legislation:

- Heritage Act
- Information Act
- Minerals Titles Act
- Pastoral Land Act
- Petroleum Act
- Planning Act

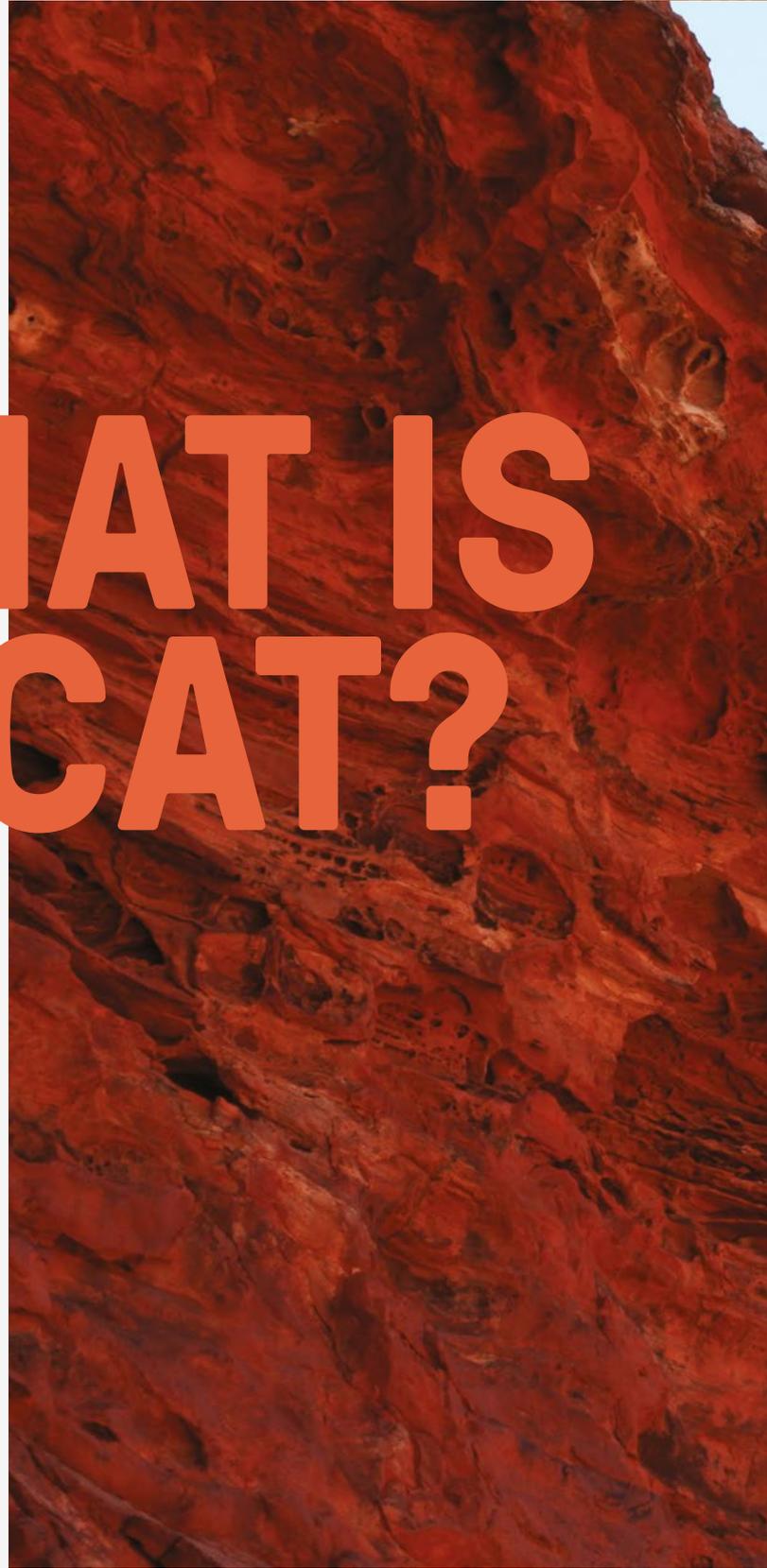
Together these are referred to at various points as ‘environmental legislation’.

There are other important pieces of legislation in the Northern Territory that regulate development and other matters, and impact on the environment.¹ Those pieces of legislation, regrettably, do not confer jurisdiction on the Tribunal. This severely limits the ability of NTCAT to deliver environmental justice in the Northern Territory.

In addition to confining the scope of this guide by limiting the legislation discussed, we have also limited the discussion (which is not of general application) to applications for review which can be made by third parties. For example, this means we do not discuss in detail the ability for a permit applicant under the Petroleum Act to seek review in the Tribunal of a condition that the Minister has decided to place on a permit.

1. For example, the Environmental Assessment Act, Mining Management Act and the Water Act

WHAT IS NTCAT?







WHAT IS NTCAT?

General

NTCAT was established under the Northern Territory Civil and Administrative Tribunal Act 2014 (NT) (the Act) on 6 October 2014. The objectives of NTCAT are set out under section 10 of the Act:

The Tribunal must:

- a. promote the best principles of public administration; and
- b. be accessible to the public by being easy to find and easy to access; and
- c. be responsive to parties, especially to people with special needs; and
- d. ensure that proceedings are processed and resolved as quickly as possible while achieving a just outcome, including by resolving disputes through high-quality processes and the use of mediation and alternative dispute resolution procedures when appropriate; and
- e. keep costs to parties involved in a proceeding to a minimum insofar as is just and appropriate; and
- f. use straightforward language and procedures; and
- g. act with as little formality and technicality as possible; and
- h. be flexible in the way in which it conducts its business and adjust its procedures to best fit the circumstances of a particular proceeding.

Despite the Northern Territory Law Reform Commission recommending the establishment of a single administrative tribunal in both 1991 and 2004, the Territory was slow to establish an independent civil and administrative tribunal. By the time the Territory established the NTCAT in 2014, Victoria had had its civil and administrative tribunal for 8 years.

Arguably the most important feature of NTCAT is its independence from government. NTCAT's independence is explicitly recognised in the Act at section 11:

1. The Tribunal is not subject to the direction or control of the Minister in exercising its jurisdiction.
2. A member is not subject to the direction or control of the Minister in the exercise of the member's powers or the performance of the member's functions.

Prior to the establishment of NTCAT, the very limited merits review options in the NT were conferred upon a wide range of decision-making bodies; from tribunals and committees to courts.² One of the main reasons underpinning the creation of NTCAT was, according to the Northern Territory Civil and Administrative Tribunal Bill 2014 second reading speech, to “provide a single, easy to find, easy to use, non-judicial body for a fair and

independent resolution of disputes relating to administrative decisions and will result in the abolition of many of the stand-alone bodies that currently exist”.³ The creation of NTCAT has removed much of the inefficiency and confusion that existed by virtue of the various independent bodies that existed prior to its establishment.

Under the Act, NTCAT may sit in any place in the NT and must facilitate access to its services across the NT.⁴

Original and Review Jurisdiction

NTCAT has both original jurisdiction and review jurisdiction. This means that NTCAT can either be the first decision maker on a particular question (original jurisdiction) or will review a decision made by a ‘primary decision maker’ (review jurisdiction), depending on what role it is given by the conferring legislation. The main focus of this report is NTCAT's review jurisdiction in relation to ‘environmental’ decisions.

2. Lands, Planning and Mining Tribunal, Information Commissioner

3. Northern Territory Civil and Administrative Tribunal Bill 2014 (NT), Second Reading Speech, Pp1.

4. See the Act, s9 – NTCAT sits primarily at the Met Building Level 1, 13-17 Scaturchio Street, Casuarina (Darwin) and Westpoint Building, 1 Stott Terrace, Alice Springs.

WHO MAKES UP THE TRIBUNAL?

The Act provides for the constituency of NTCAT. Specifically, the membership of NTCAT consists of the President, Deputy President and Ordinary Members.⁵ At the time of writing, NTCAT's President is Richard Bruxner. There is currently one other permanent Ordinary Member, Senior Member Andrew Macrides. Additional members will be appointed on an as-needed basis, allowing flexibility in the make-up of the Tribunal when dealing with specialised areas.⁶

The President and Deputy President

The Administrator of the NT appoints the President of NTCAT.⁷ The Act requires the President to either be a local court judge or be eligible to be a local court judge.⁸ The functions of the President are set out in section 14 of the Act. Those functions include being primarily responsible for the administration, effectiveness and efficiency of NTCAT, the development of codes of practice, the issuing of practice directions and the provision of leadership, direction and performance management of NTCAT's other members.

The Act requires that NTCAT have at least one Deputy President whose role is primarily to assist the President.

Ordinary members

The Administrator also appoints ordinary members of NTCAT. Under section 16 of the Act a person must not be appointed as an ordinary member of NTCAT unless:

- a. the person is a lawyer with at least 5 years' experience as a legal practitioner; or
- b. the person holds suitable qualifications, or has suitable knowledge or experience, relating to the jurisdiction of the Tribunal.

At the time of writing there are a number of sessional members of NTCAT, some of whom are legally qualified.

5. see the Act, s12

6. <http://www.ntcat.nt.gov.au/about.shtml>

7. The current President of NTCAT is Mr Richard Bruxner, the current Deputy President is John Birch.

8. See the Act, s13

WHO WILL HEAR AN APPLICATION AT NTCAT?

The President of NTCAT decides which members will form the Tribunal for all proceedings.⁹ No more than three members of NTCAT will hear any given proceeding. There are rules governing who can sit on the NTCAT for any particular proceeding, for example, the decision maker (under legislation) cannot sit as a Tribunal member for review of their previous decision.¹⁰

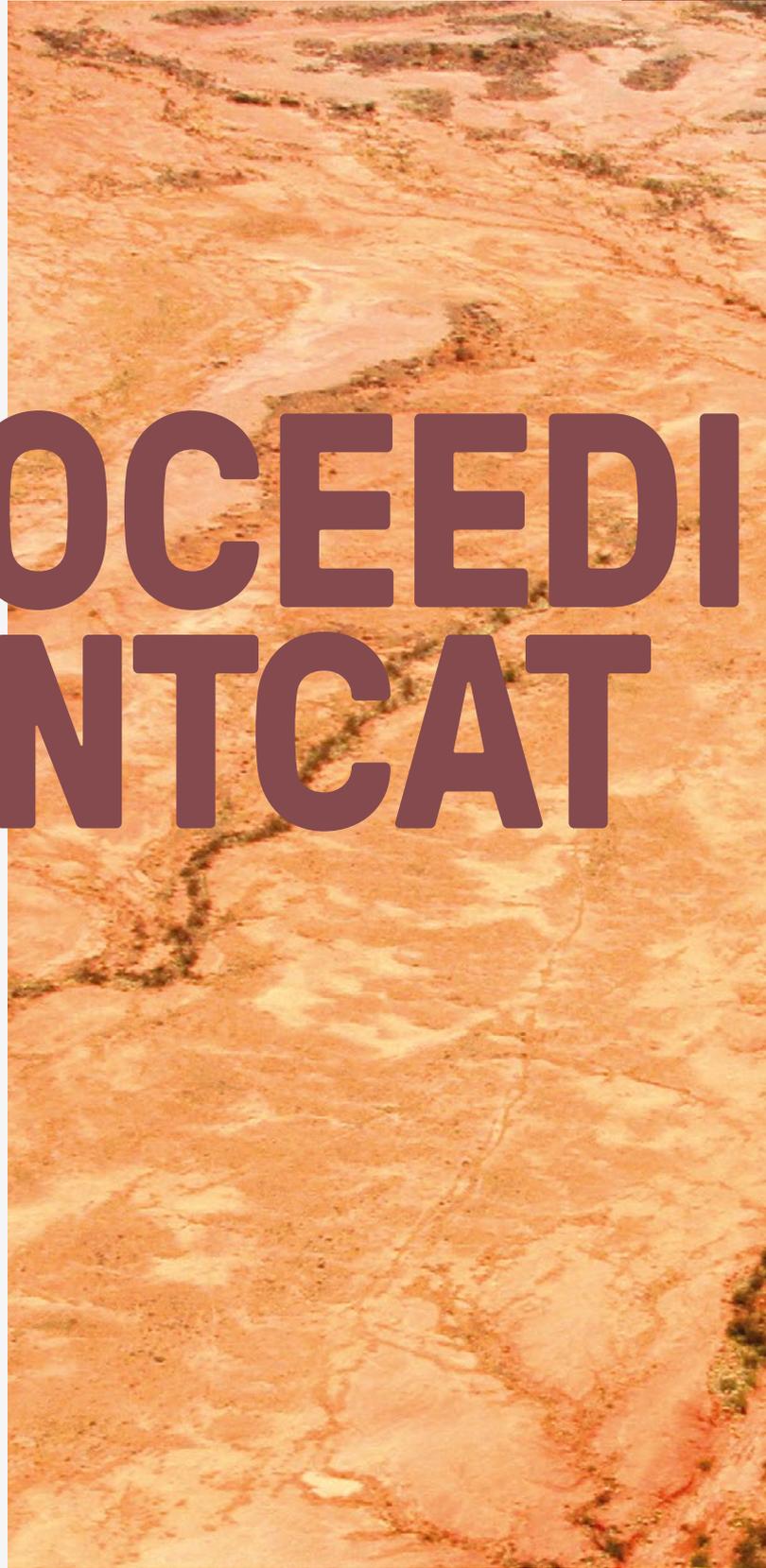
The “presiding” member of NTCAT in any given hearing will be the most senior member, unless the President nominates a different member. The order of seniority set out in the Act is the President, Deputy Presidents (in order of date of appointment) and ordinary members (in order of date of appointment).¹¹

9. See the Act, s 22

10. See the Act, s22(2)(a)

11. See the Act, s26

PROCEEDI AT NTCAT



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PROCEEDINGS AT NTCAT

What does NTCAT do when reviewing a decision?

NTCAT's objective is to produce the correct or preferable decision.¹² It seeks to achieve this result by rehearing a matter previously before the original decision maker. That is, NTCAT "stands in the shoes" of the original decision maker. NTCAT may also consider new evidence that was not before the original decision maker.

When reviewing a decision NTCAT is required to follow the procedures set out in the Act – as outlined below – and any additional factors required to be considered by conferring legislation.¹³

Following a rehearing, NTCAT has a number of options. It can:

- a. confirm the decision
- b. vary the decision
- c. set aside the decision and:
 - i. substitute its own decision; or
 - ii. send the matter back to the decision maker for reconsideration in accordance with any recommendations the Tribunal considers appropriate; or
 - iii. make a different decision if permitted by the relevant Act.

Some conferring legislation places additional restraints on what NTCAT can do.

Commencing proceedings

The procedure for NTCAT's review jurisdiction¹⁴ is set out in Division 3 of the Act. Proceedings are commenced when an application is accepted by the Registrar of NTCAT.¹⁵

The procedure for commencing an application in NTCAT's review jurisdiction will depend upon the conferring legislation.¹⁶ Generally, however, commencing a proceeding in NTCAT will require a person to file a Form 1 initiating application in accordance with rule 5 of the Northern Territory Civil and Administrative Tribunal Rules (the Rules).

Form 1 requires a person seeking a review of a decision (the Applicant) to provide NTCAT and the other party (the Respondent) with sufficient information to understand what the Applicant is seeking from NTCAT and why.

NTCAT provides an annotated example of a Form 1 Initiating Application.¹⁷

Once an Initiating Application has been filed with NTCAT, the Registrar will give the matter a proceeding number, date of acceptance and set out the next step in the proceeding (i.e. date for a directions hearing, compulsory conference or final hearing, depending on what is appropriate in any given case).

Once the Initiating Application is returned to the Applicant they must then serve a copy of the document (and any directions given by NTCAT) on all of the other parties to the proceeding. The other parties are then given the opportunity to respond by setting out what they say about the application and on what grounds, if any, the application is opposed.

Fees

Fees are payable to commence most proceedings in NTCAT. Details about the fees payable at any given time can be found at NTCAT's website.¹⁸

At the time of writing, the following fees are relevant to people seeking to use NTCAT in environmental matters:

- Application for an order from NTCAT that a decision maker provide a statement of reasons: No fee.
- Applications under the Petroleum Act, Pastoral Land Act, Information Act, Geothermal Energy Act, Land Acquisition Act, Local Government Act: \$350
- Applications under the Fisheries Act, Heritage Act, Planning Act: \$400
- Hearing fees – Day 1 (Free), Day 2-4 (\$134 per day), Day 5-9 (\$279 per day), days after Day 9 (\$341 per day).

12. See the Act, section 46

13. See for example, section 130 Planning Act (NT).

14. NTCAT has review jurisdiction where legislation makes a statutory decision the subject of merits review by NTCAT (also review of decisions made by NTCAT in its original jurisdiction).

15. See the Act, section 94(1)

16. For example, the commencement of a proceeding in NTCAT's review jurisdiction for a complaint under section 112A of the Information Act (NT) is commenced by referral by Information Commissioner rather than by a complainant filing an initiating application.

17. <http://www.ntcat.nt.gov.au/documents/PUBS/Form%201%20Initiating%20Application%20-%20Annotated%20Example.pdf>

18. <http://www.ntcat.nt.gov.au/fees.shtml>

Practice and Procedure at NTCAT

General

Practice and procedure in NTCAT is governed by the Act, the Rules and any practice directions.¹⁹ At the date of writing this guide, NTCAT does not have any practice directions relevant to NTCAT's jurisdiction under environmental legislation.

NTCAT is, by design, less formal than a court and has the power to determine its own proceedings.²⁰ Section 53 of the Act does provide NTCAT with guidance about how it must conduct proceedings, namely:

The Tribunal:

- a. must comply with the rules of natural justice; and
- b. may inform itself in any way it considers appropriate and is not bound by the rules of evidence; and
- c. must act with as little formality and technicality, and with as much speed as the requirements of this Act, a relevant Act and a proper consideration of the matter permit; and
- d. must ensure, so far as is practicable, that all relevant material is disclosed to the Tribunal to enable it to decide the proceeding with all relevant facts.

Representation in NTCAT

If a person wants to bring a proceeding in NTCAT, it is important to know that they can represent themselves (self-representation), be represented by a lawyer, or be assisted by a friend. A person can also seek the leave of the Tribunal to be represented by someone other than a legal practitioner, for example, representation by a town planner.²¹

Initial directions hearings

Rule 7(2) of the Rules sets out the procedure and purpose of initial directions hearings. Initial directions hearings usually requires the attendance of each party:

The purpose of the initial directions hearing is to enable the Tribunal to:

- a. Identify the areas of agreement and disagreement between the parties; and
- b. Identify the types of evidence the parties intend to rely on in the proceeding and make directions requiring the parties to provide that evidence to each other and to the Tribunal; and
- c. make any other directions the Tribunal considers conducive to a prompt and efficient resolution of the proceeding, including appropriate directions about alternative dispute resolution; and
- d. fix a date for any compulsory conferences under section 107 of the Act; and
- e. fix a date for the hearing of the proceeding.

Public or private hearings

Generally, proceedings of NTCAT will be open to the public.²² However, like courts, NTCAT has the power to make orders for a proceeding, or part of a proceeding to be heard in private.²³ NTCAT must not make orders of that kind unless it considers it necessary:

- a. in the interests of justice; or
- b. by reason of the confidential nature of the evidence to be given before the Tribunal; or
- c. in order to expedite the proceedings of the Tribunal; or
- d. for any other reason.

A statute that confers jurisdiction on NTCAT can also determine the nature of those proceedings. For example, hearings of complaints under the Information Act (NT) are presumed closed, unless otherwise ordered by NTCAT.²⁴

19. The power to issue practice directions is provided to the President of NTCAT under section 139 of the Act. The Rules prevail to the extent there is any inconsistency between them and a practice direction issued.

20. See the Act, section 52

21. See the Act, section 130

22. See the Act, section 60

23. See the Act, section 62

24. See the Information Act (NT), section 123

Costs

Costs generally

NTCAT was set up as a no or low cost jurisdiction and the general rule (unlike a court of record) is that parties will bear their own legal costs whether they win or lose.²⁵

Having said that, NTCAT does have the power to make an order for costs in certain circumstances set out in section 132 and 133 of the Act. Before making an order as to costs, NTCAT must consider (in all matters):

- a. the main objectives of the Tribunal that are relevant to simplifying proceedings and issues before the Tribunal and to keeping costs to parties in proceedings before the Tribunal to a minimum; and
- b. the need to ensure that proceedings are fair and that parties are not disadvantaged by proceedings that have little or no merit; and
- c. if the Tribunal has dismissed the proceeding – that fact; and
- d. the extent to which a failure by a party to comply with the Rules or a direction by the Tribunal has resulted in a waste of money or time; and
- e. whether the failure to make a costs order for the out-of-pocket expenses reasonably incurred by a successful party would substantially deprive that party of relief; and
- f. Any other matter specified by the Rules from time to time; and
- g. any other matter the Tribunal considers relevant.²⁶

In matters in NTCAT’s review jurisdiction, NTCAT must consider the following additional factors before making a costs order:

- a. whether the party genuinely attempted to enable and assist the decision maker to make the original decision on its merits; and
- b. whether the decision maker genuinely attempted to make the original decision on its merits.

Security for costs

Section 66 of the Act gives NTCAT the power to make an order requiring a party to provide security for the payment of costs. That is, the Tribunal can order that a party pay money to the Tribunal, which will be held in trust to satisfy any adverse costs should an order for costs be made.

25. See the Act, section 131

26. See the Act, section 132(2)(a)-(e)



Evidence in NTCAT

Evidence generally

To fulfil NTCAT’s objective to provide a forum with “as little formality and technicality as is possible”,²⁷ NTCAT is not bound by the rules of evidence, or any practice or procedures applicable to courts of record.²⁸ NTCAT may inform itself in any way it considers appropriate. This discretion allows NTCAT to take into account hearsay evidence, non-original and self-serving documents and submissions from groups or individuals who are not involved in the proceeding. In *Haberfield v Department of Veterans’ Affairs*²⁹ Sackville J stated (in relation to the Australian Administrative Appeals Tribunal or the AAT) “the AAT is not bound by rules of evidence. It is, however, obliged to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case”. In our opinion the same requirements are placed upon NTCAT.

Section 55 of the Act requires NTCAT to take all reasonable steps to ensure that:

- a. parties have had the opportunity in a proceeding to be heard or otherwise have their submissions received; and
- b. that all relevant material is disclosed to the Tribunal so as to enable it to decide all the relevant facts in issue in a proceeding.

Section 56 of the Act gives NTCAT broad powers to decide how it will hear evidence. The section allows NTCAT to limit the time available to parties to present a case and to decide what evidence must be presented in writing, and what evidence it will allow to be given orally.

Obviously, decisions made by NTCAT under section 56 must be made bearing in mind NTCAT’s obligations under section 55, to ensure all parties have an adequate opportunity to be heard and have their submissions received.

The effect of these sections is that NTCAT can tailor its procedures on a case-by-case basis. This is desirable, as NTCAT will deal with a vast range of matters where varying degrees of formality will be appropriate.

Unlike the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act), the Act does not explicitly state that NTCAT can require evidence to be given on oath or by affidavit.³⁰ However, the breadth of NTCAT’s discretion to control the conduct of proceedings before it, and other sections of the Act, make it implicit that the Tribunal can require evidence to be given on oath or by affidavit.

NTCAT Form 6 is an ‘unattested declaration form’ which may be used for witness statements provided in NTCAT proceedings.

The Act specifically provides for parties, representatives and other witnesses to participate in proceedings by telephone, video link up or any other manner of communication accepted by the Tribunal.³¹

Power to require a person to give evidence or produce evidence

Under section 89 of the Act, NTCAT has the power (on application of a party or of its own initiative) to issue a summons requiring a person to appear before the Tribunal to give evidence or produce evidentiary material. Rule 9 of the Rules sets out the process that must be followed in order to obtain a summons to give evidence or produce material.

A person wishing to obtain an evidence summons from NTCAT must complete Form 4 (Application for evidence summons) and Form 5 (evidence summons). Both forms must be filed with the Tribunal by an applicant seeking to have someone give evidence or to produce material. The summons should include sufficient details to enable the Tribunal and the recipient of the summons to understand what material is being sought. The Tribunal may refuse to issue a summons that is expressed too broadly.

An evidence summons issued by NTCAT (Form 5) is an Order of the Tribunal; therefore failure to comply with a summons may be an offence.

27. See the Act, section 53(3)(c)

28. See the Act, section 53(3)(b)

29. [2002] FCA 1579

30. See the Victorian Civil and Administrative Tribunal Act 1998 (Vic), section 102(3)

31. See the Act, section 69

Cross-examination of witnesses

Cross-examination of evidence is not explicitly contemplated by the Act. While the broad powers of NTCAT under the Act give NTCAT the discretion to allow cross examination of evidence, there are no provisions which explicitly require the Tribunal to allow a party reasonable opportunity to cross-examine witnesses.³²

Whether or not the Tribunal is required to allow cross-examination of evidence to accord with the principles of natural justice raises interesting questions in light of the 2009 Victorian Supreme Court case of *Leon Holdings Pty Ltd v O'Donnell*.³³ In this case, VCAT was found to have breached the VCAT Act by failing to allow a party a reasonable opportunity to cross-examine a witness.

Evidence taken on behalf of NTCAT outside the NT

Section 81 of the Act gives NTCAT the power to authorise a person to take evidence on the Tribunal's behalf. This includes the ability to authorise the taking of evidence outside of the Territory. The section gives NTCAT the power to give directions as to the manner by which evidence may be taken by a person authorised under section 81.

Expert evidence

There are no specific provisions in the Act which deal with the use of expert evidence, nor are there any relevant sections of the Rules or practice directions. Instead the Act appears to rely on NTCAT's broad powers to determine its own procedures.

The Act does make specific provision for the appointment of assessors to assist the Tribunal in the determination of matters before it.³⁴ An assessor may be asked by NTCAT to:³⁵

- a. give expert evidence in a proceeding;
- b. give advice about the matter that is the subject of a proceeding; or
- c. decide a question of fact arising in a proceeding.

If an assessor prepares a report for NTCAT, NTCAT must provide each party with a copy of the report and give each party an opportunity to respond to the report.

Privilege

Section 71 of the Act provides that the privilege against self incrimination (as set out in section 128 of the Evidence (National Uniform Legislation) Act) applies to witnesses in NTCAT.

The Act takes a markedly different approach to privilege when compared with VCAT. In VCAT's review jurisdiction, section 80(3) of the VCAT Act provides a broad waiver of privilege.

s80(3) *The Tribunal may give directions under this section requiring a party to produce a document or provide information in a proceeding for review of a decision despite anything to the contrary in section 106(1) or any rule of law relating to privilege or the public interest in relation to the production of documents.*

Section 105 of the VCAT Act provides that the rule against self-incrimination does not apply in VCAT.

Time limits

Time limits for commencing proceedings in NTCAT are not set out in the Act. Instead, the relevant time limit for commencing a proceeding will be set out in the conferring act.

For environmental legislation, the time limits in the following table apply:

Importantly, readers should note that NTCAT has the power to extend (or shorten) any timeframes specified in the Act or a related act as it considers appropriate.³⁶

32. This can be contrasted with section 102(1)(b) of the VCAT Act which specifically provides for the cross-examination of witnesses

33. [2009] VSC 430

34. See the Act, section 73

35. See the Act, section 74

36. See the Act, section 68

Environmental Legislation	Section/Reviewable Decision	Time Limit
Heritage Act (NT)	Section 91 – Application of an affected person for review of a reviewable decision.	28 days after having received a ‘review notice’ from the decision maker.
Information Act (NT)	Section 112A – Freedom of Information Application compliant	28 days after the applicant has been given a notification of the Information Commissioner’s prima facie decision and a mediation certificate.
Minerals Titles Act (NT)	Section 111 – Application for settlement of dispute about compensation.	Within 12 months from the date the claimant has given the other party a notice of claim – or such longer period as ordered by the Tribunal.
Pastoral Lands Act (NT)	Section 119 – Application for review by a pastoral lessee aggrieved by various decisions under the Act.	Within 28 days of being notified of the decision.
Petroleum Act (NT)	Section 57H, J & KA – consultation about impact avoidance for petroleum acts. Section 57P – compensation for native titleholders for acts above the high-water mark. Section 57V – compensation to owners or native titleholders for an act below the high-water mark. Section 81 & 82 – compensation to land owners and occupiers on which a petroleum title exists / compensation to owners and occupiers of land used for access.	30 days after 3-month consultation period. Claims must be lodged within 3 years, but can be extended by the Tribunal.
Planning Act (NT)	Sections 111, 113, 114, 115, 116 Various applications that can be made by development proponents. Section 112 – review if consent authority fails to determine application. Section 117 – Applications by third parties for review in respect of development applications and concurrent development applications.	30 days after 3-month consultation period. Claims must be lodged within 3 years, but can be extended by the Tribunal.

Reasons for decisions

It is possible to obtain the reasons given for a decision by the Tribunal. Under section 35(1) of the Act, a person who has a right under a relevant Act to have a decision reviewed by the Tribunal can request the decision maker to give them a written statement of the reasons for their decision.

All requests must be in writing. If the decision was made under section 34(2), the request must be within 28 days of the notice of the decision. Otherwise, the request must be within 28 days after the date of the decision.

The decision maker must comply with a request and provide reasons within 28 days of receiving the request.

The decision maker's written statement must include:

- a. the reasons for the decision
- b. any findings on material questions of fact that led to the decisions, including reference to the evidence or other material on which those findings were based.

The decision maker does not have to provide reasons if they include any protected matter. A protected matter is something that has been deemed to be contrary to the public interest.³⁷

Tribunal orders and enforcement of orders

In addition to the orders NTCAT must make following its review of a decision,³⁸ NTCAT has broad powers to make other orders in proceedings before it. Some of the potential orders that NTCAT can make in proceedings under environmental legislation are:

- Interlocutory orders (orders made during the proceeding for various matters);
- Orders required to preserve the subject matter of proceedings;³⁹
- Monetary orders (an order requiring the payment of money, including an order for costs).⁴⁰

Sections 84 and 85 of the Act set out how a person can seek to have an order of NTCAT enforced. In the case of monetary orders, a person can seek enforcement by application to a court of competent jurisdiction. An application must include the NTCAT order certified by the Registrar of NTCAT and an affidavit about the amount that is unpaid.⁴¹

In the case of non-monetary orders, a person can seek enforcement by filing a proceeding in the NT Local Court.

A person who fails to comply with an order of NTCAT (applied to non-monetary orders) commits an offence under section 84, which carries a maximum penalty of 100 penalty units (at the time of writing \$15,400) or 6 months imprisonment.⁴²

37. See the Act, section 37 and 38

38. See the Act, section 122

39. See the Act, section 125

40. See the Act, section 123

41. See the Act, section 125

42. See the Act, section 123

Alternative Dispute Resolution at NTCAT

NTCAT has broad powers to make orders requiring parties to engage in alternative dispute resolution actions prior to a hearing. NTCAT has two main alternative dispute resolution procedures:

1. Compulsory conferences; and
2. Mediations.

Compulsory conferences

Parties can be compelled by NTCAT to attend a compulsory conference.⁴³ Compulsory conferences serve to “identify and clarify the issues in the proceeding and promote the resolution of the matter by a settlement between the parties”.⁴⁴

Generally, compulsory conferences are without prejudice (that is, they do not affect the parties rights outside the conference and statements made or documents used in a compulsory conference are not able to be used in a hearing). Section 111 of the Act makes it clear that any evidence used in a compulsory conference is inadmissible in the proceeding, save for where the parties consent.

The Act has provisions for the conduct of a compulsory conference.⁴⁵ These allow the member presiding over the conference to:

1. Require a party to give particulars of the party’s matter;
2. Decide who can attend the conference, in addition to the parties;
3. Close the conference at any time;
4. Allow a party to withdraw from the proceedings.

NTCAT publishes a compulsory conferences information sheet which includes more details and can be accessed from the NTCAT website.⁴⁶

Mediation

Like compulsory conferences, NTCAT can require parties to a proceeding to attend mediation. The purpose of mediation is to promote the resolution of a matter. An order of this kind can be made with or without the consent of the parties. The Act requires the President to establish a list of people that are “approved mediators”.

Mediations are generally held in private, and are without prejudice. The way in which a mediation is conducted is determined by the mediator.

A member of NTCAT sitting as a mediator must accept any settlement reached at mediation. However, a member must not accept a settlement where it appears to be inconsistent with the conferring legislation and may decline to accept settlement if the settlement would prejudice a party not present at the mediation.⁴⁷

An NTCAT member who sat as the mediator in a proceeding is disqualified from sitting as the Tribunal in the proceeding, unless all parties consent to that member’s continued participation.⁴⁸

Any settlement reached at a mediation where an NTCAT member is not the mediator must not be inconsistent with the conferring legislation and may be rejected by the Tribunal if the settlement may prejudice a person not present at the mediation.⁴⁹

NTCAT must be advised of the outcome of all mediations by the mediator.

43. See the Act, section 107
44. See the Act, section 108
45. See the Act, section 110

46. <http://ntcat.nt.gov.au/documents/PUBS/NTCAT%20-%20Compulsory%20Conferences%20Information%20Sheet.pdf>

47. See the Act, section 122
48. See the Act, section 125
49. See the Act, section 123

ENVIRONMENTAL JURISDICTION OF NTCAT



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ENVIRONMENTAL JURISDICTION OF NTCAT

Mining

The Mineral Titles Act (MTA) provides NTCAT with original jurisdiction to hear certain matters under the MTA. Applications to NTCAT are made in line with the general provisions of the Act.⁵⁰

The relevant sections of the MTA providing NTCAT with jurisdiction are as follows:

- Under section 21 of the MTA, a person is prohibited from conducting preliminary exploration on relevant land⁵¹ unless they have first obtained the consent of the landowner (or the Minister in respect of reserved land). A landowner (or the Minister) may impose reasonable conditions on the entry and use of their land for the purpose of conducting preliminary exploration. However, a landowner must not unreasonably withhold consent. The Tribunal, on application of the person wishing to conduct the preliminary exploration, decides disputes about consent.
- Under section 78 of the MTA, the Minister can refer an application for a mineral title to the Tribunal for a hearing and recommendation about the application. The Minister is not bound to follow the Tribunal's recommendation.
- Under section 107 of the MTA a person with an interest in land is entitled to compensation from the holder of a mineral title for:
 - a. damage to the land, and any improvements on the land caused by activities conducted under the title; and
 - b. any loss suffered as a result of that damage (for example, loss suffered as a result of being deprived of the use of the land).
- Compensation for damage caused by exploration activities in a park, reserve or on pastoral land is limited to compensation for damage that occurred in excess of what was reasonably necessary to conduct the activities. The MTA provides for written agreements to be entered into in relation to compensation.
- The MTA establishes provisions for the resolution of a dispute about compensation and requires a claimant to give the other party a notice of claim. The MTA gives the Tribunal authority to appoint a mediator to assist in resolving a claim.
- Under section 111 of the MTA, where parties cannot reach agreement in relation to compensation, a person who may be entitled to be paid compensation can file an application with the Tribunal within 12 months after the claimant gives the other party a notice of claim in accordance with section 110 of the MTA.
- Under the MTA a person entitled to enter land outside the mineral title area must negotiate an access authority with the landowner. Regulation 76 of the Minerals Titles Regulations (MT Regulations), requires a title holder to obtain the consent of the land owner (which must not be unreasonably withheld). Under rule 76(4), a dispute about a refusal to grant an access authority may be decided by the Tribunal upon application by the title holder.
- Under the MT Regulations, a specified person (variously the landowner, licensee, occupier) can refuse a request to fossick on the relevant land by written notice giving reasons for the refusal. Again, a person must not unreasonably refuse a fossicking request and the Tribunal, upon application by the person making the fossicking request, may decide any dispute.
- Under Regulation 116 of the MT Regulations, a person may apply to the Tribunal for a decision about a dispute relating to preliminary exploration, a mineral title, a title area, a proposed title area or fossicking. The types of disputes that can be brought under regulation 116 are not exhaustively listed, but can include:

50. See the MTA, section 161

51. See the MTA, section 21(1) reserved land, private land, Aboriginal land, an Aboriginal community living area, a park or reserve.





- a. The area, dimensions and boundaries of land being surveyed for a proposed title area or title area;
- b. The entry onto land to conduct preliminary exploration or fossicking, to conduct authorised activities under a mineral title or to construct, maintain and use infrastructure under an access authority;
- c. The use of a landowner's water by a person who is conducting preliminary exploration or fossicking or by the holder of a mineral title;
- d. The entry onto a title area by a person other than the holder of the title;
- e. Contractual obligations relating to mineral titles;
- f. Mineral rights interests.

Under schedule 2 of the MT Regulations there are four kinds of decisions under the MTA, which are specified as reviewable decisions by NTCAT. None of those review rights are afforded to the community and exist for the benefit of the applicants for, or holders of, mineral titles.

Freedom of Information: Information Act (NT)

Under the Information Act (NT), NTCAT is provided with review jurisdiction to hear complaints. Complaints heard by NTCAT follow a relatively complex process of internal review and mediation, provided for under the Information Act.

For the purposes of this guide we have set out the process by which an application to access government information under freedom of information laws will end up at a hearing before NTCAT:

1. An application is made to access government information under section 18 of the Act. NT Departments have standard forms to apply for access to information. However, applications for this information do not require a specific form, only that they meet certain requirements, including that they are in writing.⁵²
2. An applicant unhappy with the decision on their application can request the public sector organisation (to whom the application was made) to undertake an internal review of the decision.⁵³

3. If, after the internal review, the applicant remains dissatisfied with the outcome, they have the option of making a complaint to the Information Commissioner under section 103 of the Act. A complaint must be in a form approved by the Commissioner.⁵⁴
4. After receiving a complaint, the Information Commissioner must decide whether to accept or reject the complaint. The Commissioner may reject a complaint upon satisfaction of one of a number of factors set out in section 106(3) or (4).⁵⁵
5. If the Information Commissioner accepts a complaint, they are then required to investigate the matter complained of and decide whether there is, on the face of things, sufficient evidence to substantiate the complaint.⁵⁶
6. Following a prima facie (on the face of things) decision in favour of the applicant, the Information Commissioner will hold mediation. Mediation is a pre-condition to a hearing at NTCAT.⁵⁷
7. A complainant may apply to the Commissioner to refer a complaint to the Tribunal if their complaint was dismissed or if the Information Commissioner decided that there was prima facie evidence to substantiate the complaint and the matter is not resolved by mediation.⁵⁸

52. Information Act, s 18
53. Information Act, s 38

54. The current form can be accessed at:
<https://infocomm.nt.gov.au/resources/forms>
55. Information Act, s 106 and 107

56. Information Act, s 110
57. Information Act, s 111
58. Information Act, s 18

Petroleum Act

Under the Petroleum Act, NTCAT is given jurisdiction to hear and make recommendations on native title objections that do not resolve following mediation. Objections can relate to the impact of the Petroleum Act on native title rights.

NTCAT is also given jurisdiction to determine disputes about compensation payable under the Petroleum Act for prescribed petroleum acts.⁶² The following disputes can be referred to the Tribunal:

- a. Compensation for the effect of a prescribed petroleum act on native title (acts above the high-water mark).^{63/64}
- b. Compensation for the effect of a prescribed petroleum act below the high-water mark payable to:^{65/66}
 - The owner or occupier of land for the loss and damage to that persons land because of the act; and
 - Any native title holder for the effect of the act on the holder's native title rights.
- c. Compensation to owners and occupiers of land for deprivation of use or enjoyment of the land, including improvements on the land and damage caused to the land or improvements on the land.
- d. Compensation to owners and occupiers of land used for rights of access in respect of loss or damage to the land, the effect of construction of roads or other work on the land.⁶⁷

62. Petroleum Act, s 57B – sets out the prescribed petroleum acts which include the grant, renewal or variation of an exploration permit, retention licence, production licence, access authority and variation of the area of a licence.

63. Petroleum Act, s 57P

64. Meaning prescribed petroleum act occurring on an onshore place on the landward side of the mean high-water mark of the sea.

65. Petroleum Act, s 57V

66. Meaning a prescribed petroleum act occurring on an onshore place on the seaward side of the high-water mark of the sea.

67. Petroleum Act, s 81

Planning

Appeals to NTCAT for review of decisions

Part 9 of the Planning Act (NT) confers jurisdiction on NTCAT to review certain decisions made under the Planning Act (NT). Those decisions are as follows:

- section 111: Appeal against a refusal to issue a development permit;
- section 112: Appeal if consent authority does not determine the application;
- section 113: Appeal against refusal to extend period of development permit;
- section 114: Appeal against determination of development application;
- section 115: Appeal against refusal to refund or remit contribution;
- section 116: Appeal against refusal to vary condition of development permit;
- section 117: Appeals by third parties in respect of development applications.

On the face of it, the Planning Act appears to provide a broad range appeals to NTCAT. For people making applications for development, it does. However, rights for community groups to appeal development decisions are severely restricted.

Section 117 – Third party appeals

The right for a community group, or third party, to challenge a development decision is provided under section 117.

Under section 117 of the Planning Act, a person or local authority who made a submission in relation to a development application can appeal to NTCAT against a decision to consent to the development (as proposed or as altered) or to impose conditions on the proposed development or proposed altered development.

Importantly third party (or community) appeal rights are “subject to the Regulations”. Regulation 14 sets out the circumstances where no right of appeal exists for third parties. The operation of Regulation 14 significantly restricts community opportunity to appeal decisions made under the Planning Act.

Because of the operation of Regulation 14, it is not open to community groups to appeal to NTCAT decisions about:

- Subdivision or consolidation of land;⁶⁸
- Single or multiple dwellings not exceeding 2 storeys above ground level;⁶⁹
- Setbacks for a single dwelling;⁷⁰
- Any other type of development on land in a residential zone if it complies with all the planning control provisions relating to the development;⁷¹

- Any other type of development on land that is not in a residential zone, or for which no zone is specified, unless the land is:
 - Adjacent to land in a residential zone; or
 - Is directly opposite land in a residential zone and is on the other side of a road with a reserve of 18 m or less.

Importantly, the Rural Living Zone (RL) is not defined as a residential zone under the Regulations. The consequence of this is that members of the community residing in the RL are denied the third party review rights afforded under section 117 of the Planning Act to other community members living in residential zones.

The effect of the Regulations is that third party appeals under the Planning Act are severely curtailed. By way of example, almost all developments (including native vegetation clearing) occurring outside of a residential zone are not able to be the subject of an appeal by a community group.

When NTCAT does have a power of review it is required to consider the matters in section 30P(2) (for concurrent applications) or section 51 (for development permit applications).

68. Regulation 14(2)

69. Regulation 14(3)(a)

70. Regulation 14(3)(b)

71. Regulation 14(3)(c)

NTCAT's powers when reviewing decisions made under the Planning Act

Section 130(4) of the Planning Act provides for NTCAT to have slightly different powers for reviews under the Planning Act than it would have using its usual powers set out in section 50 of the Act.

Section 130(4) of the Planning Act provides that NTCAT must, in writing, determine an application for a review of a determination of a consent authority by taking one of the following actions:

- a. confirming the determination of the consent authority;
- b. in respect of an application under sections 114⁷² or 117⁷³ only – revoking the determination set out in the notice served under sections 30X, 30Y, 53A or 53B, substituting the determination of the Tribunal and ordering the consent authority to issue a development permit subject to any conditions the Tribunal thinks fit;
- c. ordering the consent authority to issue or vary a development permit subject to any conditions the Tribunal thinks fit.

The options available to NTCAT under section 130(4) of the Planning Act are similar to the options available to it under section 50 of the Act and the Planning Act provisions seem complex and unnecessary.

More problematically, section 130(7) appears to fetter the jurisdiction of the Tribunal on review.

This sections provides that the Tribunal can only take action under subsections 130 (4)(b) or (c). – these are actions other than confirming the decision of the consent authority - if they are satisfied that either:

- a. the consent authority manifestly failed to take into account a matter referred to in sections 30P(2) or 51 of the Planning Act (as applicable); or
- b. the determination of the consent authority would result in a planning outcome manifestly contrary to a provision of a planning scheme.

The effect of this is that the Planning Act imposes a higher bar for the Tribunal on review than it would otherwise be subject to under its standard review jurisdiction powers. In simple terms, in Planning review appeals NTCAT doesn't just have to make the correct or preferable decision - it can only do so if satisfied that the consent authority obviously failed to take into account a required factor or that the decision of the consent authority is obviously contrary to the provision of the planning scheme.

72. Applicant review of a decision to alter a concurrent application or development application or to impose a condition on a concurrent application or development application

73. Third party review of concurrent application or development application



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