

Mr. Bill Stefaniak, MLA
Chairman
Standing Committee on Legal Affairs
ACT Legislative Assembly

Dear Mr. Stefaniak,

ACTPLA CLEARANCE OF BLOCK 3 SECTION 158 KAMBAH, LESSEE JOHN FLEISCHINGER (AT 02/ 110,
21 October 2002)

The ACTPLA order received by John Fleischinger was: "... to clean up a leasehold by removing the accumulation of miscellaneous items and debris from the land and to continue to keep the land clean to the satisfaction of the Territory..." The order was affirmed at the AAT hearing but the lessee was given an extension of time until 25 November 2002 to clean up.

The following information documents ACTPLA breaches of its own order and the AAT Consent Decision which they executed on 2,3, and 4 December 2002. The following facts are well established through the Authority's own documentation, yet ACTPLA, and/or its political representatives, have failed to acknowledge, apologise or propose any compensation to John Fleischinger for these breaches.

breach number 1

ACTPLA failed to give the lessee until the 25 November 2002 to clean up the lease. Mr. Neil Savery, CEO ACTPLA, stated: "The condition of the property was assessed closer to the clean up than you allege, with an inspection having taken place on the 15 November 2002" (Savery 25 August 2005) By failing to note the condition of the property on the 25 November, ACTPLA Compliance inspectors were unaware of the fact that the lessee had conducted an extensive clean up. Had they inspected on this date they may have decided that "the satisfaction of the territory" had been achieved. This constitutes a breach of the AAT decision.

breach number 2

On 13 November 2002, subsequent to the AAT Consent Decision of 21 October 2002, Mr. Carl Thompson, ACTPLA Compliance officer, wrote to the lessee: "Furthermore, a number of unapproved structures are still erected on the block, which from file reports, indicate you were requested some years ago to have either removed or rectified to be approved. As this had not been carried out and the structures are substandard and unsightly, these and the contents should also be removed as **part of this order and the consent agreement**" which amounted to a retrospective, additional requirement, not included in the ACTPLA order or the AAT consent decision. Furthermore, there was no current ACTPLA demolition order in place that the Authority could rely on as a legal justification for demolition.

The lessee believed that his garden sheds complied with the various regulations. ACTPLA demolished the sheds and the contents were removed from the site, thus contravening of its own order, and the lessee's right to retain his garden sheds.

breach number 3

During the clean up, inspectors cleared the lessee's back terrace, which was an approved structure. The lessee informed the inspectors of this and that they had no legal right to enter the area or to remove anything from it. The inspectors claimed that it was an unapproved structure, apparently being unable to read the plans correctly. They threatened to recall the police if the lessee impeded them and they cleared the area, which comprised 32 square meters of enclosed terrace, attached to the house.

The lessee complained to ACTPLA about this. Mr. Neil Savery, the CEO, confirmed that: "the removal of items from the front terrace was beyond the scope of the Order. I confirm that the terrace was an approved structure and, therefore, not included within the scope of the Order... The officers involved, dispute your list of items allegedly taken from the terrace and assert that any material of items that they did remove from the terrace were in a state of disrepair and of no apparent value." (Savery 25 August 2005)

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the law

The Land Act 1991, Section 255 states: "Offences — orders... A Territory authority shall not, without reasonable excuse, contravene an order." The foregoing excuses offered by ACTPLA are unreasonable and unlawful, specifically the removal of goods and chattels from within the lessee's approved residence.

the complaints to government

In representing the lessee, I have made a variety of complaints to the ACT Government. The responses have either been indifference or a denial of the facts. Now government representatives have given up trying to answer my letters, which cover contentious issues and canvas difficult questions.

I complained to the ACT Attorney General about the ACTPLA breach of the AAT Decision and Mr. Stanhope's reply was that: "As a statutory Authority, ACTPLA is bound to comply with every court and tribunal order. I am satisfied that ACTPLA's actions in this instance were not in breach of the Order of the Administrative Appeals Tribunal" (Stanhope 27.09.05). I asked the Attorney General to account for the discrepancy between ACTPLA's statement and his. To date no reply has been received.

In responding to my complaint to the Auditor General, Rod Nicholas (letter 22 December 2005) stated that he considered that the Attorney General, ACTPLA and the Ombudsman had dealt with the lessee's complaints "adequately". He claimed that "a person (or persons) independent of the initial review has undertaken the re-examination, and you have been provided written responses concerning their conclusions," which was about as specific as he was apparently was prepared to be.

Both the Ombudsman and ACTPLA did conduct a "re-examination" and predictably they reiterated their earlier conclusions, which were arrived at without examining my evidence, on both occasions. However ACTPLA's internal enquiry and the Ombudsman's investigation demonstrated an unconditional acceptance of the sweeping claims made by the Planning Authority in its defence of against the issues raised in my complaint.

ACTPLA could hardly claim to be independent as they obviously have a vested interest in protecting its officers and the Authority against criticism. The Ombudsman's independence was compromised, the evidence for which was demonstrated by its flawed, unprofessional investigation that selectively examined marginal issues and ignored the substance of the complaint. Furthermore, this independence was further compromised by denying the complainant any right of reply.

I similarly complained to the AAT. It replied that "The powers of the Tribunal do not extend to the provision of a remedy for action taken otherwise in accordance with a decision made by it. The Tribunal is, therefore, unable to further assist you in resolving your complaint." (Kerri Perriman 6.10.05)

the present situation

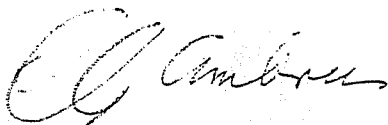
The Land Act 1991, Section 255, and the Regulations do not specify how an ACT Authority's breach of a court order could be redressed. Enquiries with the ACT Department of Justice reveal that there is no administrative process in place to compensate for this deficit in the law.

The response of government authorities has been to either close down my complaints or recommend that the lessee take it to court. Representatives now refuse to answer my letters and give as an excuse that it is in the hands of the Government Solicitor and that I should address any letters there. However, this is not justified as there has been no legal representations applications made on behalf of the lessee. It is not appropriate that the government attempt to use the courts or the Government Solicitor to solve administrative problems generated by its incompetent officers. According to my experience, because of government inertia and/or its abuse of power, these systemic problems are allowed to fester, to the detriment of the ACT community and good government.

The Legislative Assembly needs to step in to ensure that an order by an ACT court or tribunal is respected and observed to the letter by the various ACT authorities. ACT citizens need to have confidence in the integrity of the court system and any threat to this needs to be dealt with at the highest level. John Fleischinger's case may be a one-off. But even this one case needs to be addressed, because what happened to him can happen to any ACT resident, if the heavy handed behaviour of government officials is not moderated and/or the systemic deficiencies which gave rise to such abuses are addressed.

Would your Committee enquire into this matter and address the problem by either recommending appropriate changes in the Land Act 1991 and Regulations and/or The Administrative Appeals Tribunal Act? Or alternatively, can your Committee recommend changes to government practices and policies that would create an administrative process whereby these matters can be addressed within the bureaucracy.

yours faithfully



Caroline Ambrus for John Fleischinger 27.03.06