LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON ESTIMATES 2022-2023

Mr James Milligan MLA (Chair), Mr Andrew Braddock MLA (Deputy Chair), Dr Marisa Paterson MLA

ANSWER TO QUESTION ON NOTICE

Peter Cain MLA: To ask the Attorney-General

1. How much has the Solicitor-General spent defending EPSDD decisions in ACAT for the following FY's: 2021-22, 2020-21, 2019-20, 2019-18, 2018-17?

2. What is the average cost to defend an EPSDD decision in ACAT per FY for the following FY's: 2021-22, 2020-21, 2019-20, 2019-18, 2018-17?

3. How much has the ACT Government spent defending decisions in ACAT per FY for the following FY's: 2021-22, 2020-21, 2019-20, 2019-18, 2018-17?

a) Please provide a breakdown for the 2021-22 FY by agency.

4. What are the factors that the ACAT considers in deciding whether an application (or part thereof) is vexations or frivolous under section 32, *ACAT Act 2008*?

SHANE RATTENBURY MLA: The answer to the Member's question is as follows: –

1. The Solicitor-General performs the functions of Chief Solicitor and is responsible for the legal work undertaken by the ACT Government Solicitor, which includes the work the subject of the Member's question. As the Solicitor-General informed the Member at the hearing on 24 August 2022 the relevant legal services provided by the ACT Government Solicitor are delivered by resourcing met from appropriation for Output 1.2.

   Matters before the ACT Civil and Administrative Tribunal (ACAT) involving the Environment, Planning and Sustainable Development Directorate (EPSDD) can involve expenditure where Counsel or experts have been required. The expenses associated with a particular matter may traverse multiple financial years and accordingly the data below reflects the expenditure associated with counsel and expert activity incurred in the relevant financial year.

	2017-18	2018-19	2019-20	2020-21	2021-22
Counsel	$143,187.46	$185,511.39	$124,855.00	$163,246.06	$158,512.98
Experts	$6,080.00	$48,607.46	$12,955.00	$31,428.45	$4,486.25
Total	$149,267.46	$234,118.85	$137,810.00	$194,674.51	$162,999.23

2. The average by financial year of expenditure on counsel and experts in EPSDD matters before ACAT are as follows:

2017-18	2018-19	2019-20	2020-21	2021-22
$24,877.91	$21,283.53	$17,226.25	$21,630.50	$12,538.40

3. The range and volume of decisions that may be the subject of review by ACAT across may aspects of government activity is significant. To provide the Member with a breakdown of costs to defend ACT Government decisions in ACAT over the last five financial years and by Agency for 2021-22 would require the manual searching of the records for several hundred matters to identify the forum in which a decision is the subject of review. To do so is considered an unreasonable diversion of resources.

4. Published decisions are the key resource for identifying the factors the ACT Civil and Administrative Tribunal (ACAT, or the tribunal) considers in deciding whether to make orders under section 32 of the *ACT Civil and Administrative Tribunal Act 2008* (the ACAT Act).

   As a creature of statute, the tribunal may only do things, make decisions and exercise powers which a law specifically authorises it to do [1]. It follows that section 32 itself is the basis for any exercise of the tribunal's power to decide that an application is frivolous or vexatious.

   The tribunal's powers under that section "extend to either refusing to hear an application, dismissing an application, or making directions to a person not to make an application of the same kind."[2] Examples exist for each of these types of orders.

   I note that the tribunal may not make orders to declare a person a vexatious litigant. However, if the applicant has been dealt with by a court or another tribunal as frivolous or vexatious, this will be relevant to the orders which ACAT may make.[3]

   Examples exist both for orders being made under section 32 on the tribunal's own initiative, and in response to an application by a party (for example, a respondent's application for interim or other orders seeking a strike out of the substantive application).

   There are many published decisions where the tribunal sets out the factors which it considers in deciding whether an application (or part thereof) is vexatious or frivolous under section 32.

   I note that rule 17 of the *ACT Civil and Administrative Tribunal Procedures Rules 2020* sets out a process for the Registrar to reject a document if it appears on its face to be an abuse of process or frivolous or vexatious. The factors which inform a decision under section 32 of the ACAT Act will also be relevant for a decision under rule 17.

   A list of those factors, subsequently adopted and repeated in several tribunal decisions[4], is set out in *Gindy & Chief Minister & ACT Government and Ors* (Discrimination) [2011] ACAT 67 at [39]:

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[1] *Gindy & Chief Minister & ACT Government and Ors* (Discrimination) [2011] ACAT 67 (*Gindy*), at [13]

2 *Ezekiel-Hart v Council of the Law Society of the Australian Capital Territory* (Appeal) [2021] ACAT 116 (*Ezekiel-Hart*) at [50]

[3] Section 32(1)(d) ACAT Act

[4] For example, *Cheluvappa v University of Canberra* [2018] ACAT 108 (*Cheluvappa*) at [39], *TGD v Australian National University* [2019] ACAT 81 at [66], *Sirohi v Director-General, Justice and Community Safety*

". . .
(4) A proceeding to dismiss or strike out a complaint is similar to an application to the Supreme Court in civil proceedings for summary dismissal. Both are designed to prevent abuses of process. However, it is a serious matter for the Tribunal, in an interlocutory proceeding which will generally not involve the hearing of oral evidence, to deprive a litigant of the chance to have their complaint heard in the ordinary course.
(5) In an application, the respondent bears the onus of showing that the complainant's case ought not be allowed to proceed. In a [strike out] hearing where the Tribunal proceeds on its own initiative the Tribunal must be satisfied on all the material before it that the complaint should not be allowed to proceed.
(6) For a dismissal or strike out to succeed, a respondent must show, or the Tribunal when proceeding on its own initiative must be satisfied, that the complainant's case is obviously hopeless and untenable or that it could on no reasonable view justify relief. The Tribunal's power to dismiss or strike out a complaint should however be exercised with caution and consistently with the objectives of the Act.
(7) In dealing with a dismissal or strike out matter a clear distinction must be drawn between the complaint or claim itself and the evidence which is to be given in support of it. A complaint cannot be dismissed or struck out as lacking in substance merely because it does not in itself contain the evidence supporting the claims.
(8) A complaint can be dismissed or struck out if it is obviously unsustainable in law or in fact. This will include, but is not limited to, a case where a complaint can be said to disclose no reasonable cause of action, or where the respondent can show a defence sufficient to warrant the summary termination of the complaint.
(9) The Tribunal should not apply technical, artificial or mechanical rules in coming to a view about the case that a complainant wishes to advance.
. . ."

Although this list of factors arose in the context of discrimination claims, "the exercise of the power in relation to discrimination claims is no different from the exercise of the power in relation to civil and administrative matters."[5]

Other factors which emerge from tribunal decisions about section 32 orders include:

a) *Whether the application is frivolous and vexatious*
   There have been various standards stated in the case law as to what test applies when proceedings are alleged to be frivolous or vexatious[6]. In tribunal decisions, the words together are a legal term which has been used in the sense of:
   - the absence of a cause of action;
   - an application made for no good reason at all;

Directorate (Discrimination) [2019] ACAT 84 (*Sirohi*) at [48]. Each of these cases cite the summary in *Jamieson Mary v Australian Workers Union and Anor* [1999] VCAT 268 of the principles considered by the Victorian Court of Appeal in *The State Electricity Commission Board v Rabel* [1998] 1 VR 102

[5] *Gindy* at [24]

[6] *Gardner & Beaver v The ACT Planning and Land Authority* [2010] ACAT 64 (*Gardner*) at [31]

- an application made for a purpose designed to harass or annoy, or "being instituted with the intention of annoying the respondent"[7];
- a cause of action which has no reasonable prospects of success[8];
- an application which is foredoomed to fail[9]; and
- claims that are so obviously untenable or manifestly groundless as to be utterly hopeless.[10]

b) Whether the application is lacking in substance

In some cases this question has been considered as an element of "frivolous and vexatious", and in others as a distinct consideration[11]. It includes:

- whether the applicant has no arguable case;
- whether the application "lacks substance in respect of any element that is essential for the complainant to prove"[12]; and
- whether a substantive remedy is available: "lack of substance refers not only to the prospects of success of an appellant's claim but also the prospects of whether the tribunal could grant the relief sought by the complainant."[13]

c) Whether the application is an abuse of process

Examples in tribunal decisions include applications which were:

- an attempt to find an alternate path to a merits hearing, when earlier efforts to have an order set aside had failed[14]; and
- an attempt to relitigate issues previously determined, or to reagitate matters that have been the subject of previous proceedings.[15]

d) The caution to be exercised in deciding to make orders under section 32

As it is a serious matter to strike out a proceeding, a decision to do so is not taken lightly, and the power to dismiss an application on the grounds that it is frivolous or vexatious must be exercised with considerable caution[16].

e) Whether the respondent has discharged its onus

Where the respondent has made an application under section 32, the onus is on the respondent to satisfy the tribunal that the complainant's case is so lacking in substance that it should not be allowed to proceed[17]. The bar to satisfy such an application is high, as the applicant's case must be taken at its highest.[18]

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[7] *Fothergill v Canberra Workwear Pty Limited ACN 614 504 504* (Appeal) [2022] ACAT 39 at [28]

[8] *Gindy* at [18]-[19], quoted in *Cheluvappa* at [42] and in *Gardner*

[9] *Gardner* at [40]

[10] *Applicant OR202019 v Commissioner for Fair Trading; Applicant OR202023 v Road Transport Authority* (Appeal) [2021] ACAT 99 *(Applicant OR202019)* at [21]

[11] See discussion in *Sirohi* at [53]-[54]

[12] *Gindy* at [32]

[13] *Ezekiel-Hart* at [52], picking up *Sirohi* at [54]

[14] *Gaia Partners Pty Ltd ACN 627 832 455 v Jahanphanah* (Civil Dispute) [2022] ACAT 60 (*Gaia*) at [28]

[15] *Gaia*, and *Ezekiel-Hart*

[16] See *Applicant 201943 v The School* (Discrimination) [2021] ACAT 3, and *Gardner* at [30]

[17] *Andreopoulos v University of Canberra* [2020] ACAT 95 (*Andreopoulos*) at [93]-[94], quoted in *Complainant 252020 v The Australian Capital Territory as Represented by Environment, Planning and Sustainable Development Directorate* (Discrimination) [2021] ACAT 53 at [105]

[18] *Applicant OR202019* at [40]

f) Human rights issues

An application under section 32 engages consideration of the applicant's right to a fair hearing, although this right is not absolute.[19] The tribunal will also consider human rights more broadly, including the right to home and privacy.[20]

g) The purposes of section 32

In several decisions, reference is made to the intention behind section 32, which "pursues a legitimate aim of discouraging litigants from bringing claims that have no merit."[21]

h) The impact on tribunal resources

". . . court and tribunal resources are a relevant consideration for case management decisions, and the present Tribunal considers that such resources may be a relevant consideration in applying section 32 of the ACAT Act."[22]

i) The impact on the respondent

Along the same lines as the previous point, ACAT has recognised that "to proceed with the applicant's application would be an improper use of the tribunal's processes and put the respondent to trouble and expense in responding to claims that have no possible prospect of success."[23] Section 32 has a purpose in protecting "the other party from being required to compromise or being forced to bear the costs of a full hearing into an unmeritorious claim."[24] In a more recent decision, the tribunal considered that "any possibility of future benefit to the applicant by continuation [of proceedings] is vastly offset by the reality of prejudice to the respondent."[25]

j) The time at which the application is made and considered

Set aside applications are normally made before a respondent incurs the time, trouble and expense of preparing evidence for a final hearing, rather than at a point where all the evidence is before the tribunal and the tribunal is able to decide the complaint on its merits, at which point there may be no utility in deciding separately whether the complaint lacks substance in the sense necessary to justify an order under section 32.[26]

k) Similarly, whether there is any efficiency in determining an application under section 32

It is sometimes the case that in order to satisfy itself that an application is frivolous or vexatious, the tribunal must embark on an enquiry as to the merits of the case of such depth and degree as to render any perceived efficiency of the section 32 application

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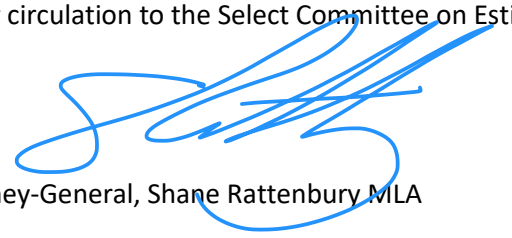
[19] *Cheluvappa*, adopting the reasoning of *Gindy* at [32]
[20] *Gardner*, see [41]-[69]
[21] *Gardner* at [57], quoted in *Gindy* at [32], and again with approval in several more recent decisions
[22] *Gardner* at [31]
[23] *Cheluvappa* at [103]
[24] *Gardner* at [57]
[25] *Gaia Partners* at [29]
[26] *Andreopoulos* at [93]-[94]

nugatory.[27] For these reasons, "applications under section 32 are best reserved for cases where the relevant facts are not disputed, the application of the law is clear, and there is little to no discretion available to the original decision-maker."[28]

Although each case will turn on its own facts, it is apparent from this summary that there are common factors which emerge from the significant number of decisions where the tribunal has decided whether or not to make orders under section 32 of the ACAT Act.

Approved for circulation to the Select Committee on Estimates 2022-2023

Signature:  Date: 14/9/22

By the Attorney-General, Shane Rattenbury MLA

[27] *Applicant 202019* at [41]
[28] *Applicant 202019* at [42]