



ACT
Government

Chief Minister, Treasury and
Economic Development

Freedom of Information Publication Coversheet

The following information is provided pursuant to section 28 of the *Freedom of Information Act 2016*.

FOI Reference: CMTEDDFOI 2020-137

Information to be published	Status
1. Access application	Published
2. Decision notice	Published
3. Documents and schedule	Published
4. Additional information identified	No
5. Fees	Waived
6. Processing time (in working days)	19
7. Decision made by Ombudsman	N/A
8. Additional information identified by Ombudsman	N/A
9. Decision made by ACAT	N/A
10. Additional information identified by ACAT	N/A

From: [REDACTED]
To: [CMTEDD FOI](#)
Subject: DT8/2019 - Policy And updates to framework
Date: Friday, 17 July 2020 12:53:12 PM

Hi all,

I am requesting all documentation and policy in relation to discrimination hearing DT8/2018 and the steps taken to mitigate any future discrimination.

“8. The Respondent’s decision to have regard to the Applicant’s criminal history in this case was based on what the Tribunal has determined in its 6 April 2020 decision was an erroneous understanding of the requirements of the Traders (Licensing) Regulation 2017 (Traders Licensing Regulation). There is no evidence to suggest that the Respondent’s error in its understanding of the requirements of the Traders Licensing Regulation was in anyway targeted at the Applicant or in relation to the Applicant’s particular circumstances. The Respondent applied its erroneous understanding of the requirements of the Traders Licensing Regulation in the honest belief that it was applying the requirements correctly. The Respondent has, since the Tribunal’s decision, taken steps to mitigate any future discrimination by implementing amended decision-making frameworks and providing guidance on consideration of public interest considerations to staff. The Tribunal should accept these as mitigating factors in making an order for compensation.
9”

I am requesting all documentation and guidance material provided to staff including drafts on:

- A. “Amended decision making framework”
- B. “Policy”

[REDACTED]

Sent from my iPhone



ACT
Government

Chief Minister, Treasury and
Economic Development

Our ref: CMTEDDFOI 2020-137

[REDACTED]

via email: [REDACTED]

Dear [REDACTED]

FREEDOM OF INFORMATION REQUEST

I refer to your application under section 30 of the *Freedom of Information Act 2016* (the Act), received by the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) on 17 July 2020 seeking access to all documentation and guidance material provided to staff in relation to discrimination hearing DT8/2018 and the steps taken to mitigate any future discrimination.

Authority

I am an Information Officer appointed by the Director-General of CMTEDD under section 18 of the Act to deal with access applications made under Part 5 of the Act.

Timeframes

In accordance with section 40 of the Act, CMTEDD is required to provide a decision on your access application by 14 August 2020.

Decision on access

Searches were completed for relevant documents and 12 documents have been identified that fall within the scope of your request.

I have decided to grant full access to 11 documents and fully exempt from release the remaining one document. The information not being released is contrary to the public interest to release under Schedule 1 of the Act.

I have included as Attachment A to this letter the schedule of relevant documents. This provides a description of each document that falls within the scope of your request and the access decision for each of those documents. The documents to be released to you are provided as Attachment B to this letter.

Additional Information

Documents 1 to 11 are draft documents which have not been cleared or endorsed. The finalisation of the documents has in part been delayed due to COVID-19. I am also advised by the A/g Senior Director of the Licensing & Registrations area that the team

was directed (verbally) to not process any applications using the public interest consideration unless first escalating it.

In accordance with section 54(2) of the Act a statement outlining the reasons for my decision is below.

Statement of Reasons

In reaching my access decision, I have taken the following into account:

- the Act; and
- the content of the document that falls within the scope of your request.

Exemption claimed

My reasons for deciding not to grant full access to the identified documents and components of these documents are as follows:

Cabinet Information (Schedule 1 of the Act)

Document 12 contains information that was prepared and brought into existence for consideration by Cabinet. The information in this document is deliberative in nature.

In reviewing the document, I note the requirements of schedule 1 section 1.6(2) of the Act which states that the exemption for Cabinet Information does not apply to 'purely factual information' unless the disclosure of the information would involve the disclosure of a deliberation or decision of Cabinet and the fact of the deliberation or decision has not been officially published. In the case of *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71, the Australian Information Commissioner stated that the term 'purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content in such a manner that it is impractical to separate it from the other content.

Having reviewed the document, I consider that the purely factual information within the document identified is an integral part of the deliberative content and as stated by the Commissioner, the analysis and views in the [document] would be robbed of its essential meaning without incorporation of this material. I am satisfied that disclosure of this purely factual information would involve the disclosure of a deliberation or decision of Cabinet.

Having considered the information contained in the documents, I am satisfied that disclosure of such information contained in documents Ref No. 12 would be contrary to public interest pursuant to Schedule 1 Section 1.6 of the Act. All other documents are released to you in full.

Charges

Pursuant to *Freedom of Information (Fees) Determination 2017 (No 2)* processing charges are applicable for this request because the total number of pages to be released to you exceeds the charging threshold of 50 pages. However, the charges have been waived in accordance with section 107 (2)(b) of the Act.

Online publishing – Disclosure Log

Under section 28 of the Act, CMTEDD maintains an online record of access applications called a disclosure log. Your original access application and my decision in response to your access application will be published in the CMTEDD disclosure log three days after the date of my decision. Your personal contact details will not be published.

You may view the CMTEDD disclosure log at <https://www.cmtedd.act.gov.au/functions/foi/disclosure-log-2020>.

Ombudsman Review

My decision on your access request is a reviewable decision as identified in Schedule 3 of the Act. You have the right to seek Ombudsman review of this outcome under section 73 of the Act within 20 working days from the day that my decision is published in CMTEDD disclosure log, or a longer period allowed by the Ombudsman.

We recommend using this form [Applying for an Ombudsman Review](#) to ensure you provide all of the required information. Alternatively, you may write to the Ombudsman at:

The ACT Ombudsman
GPO Box 442
CANBERRA ACT 2601

Via email: actfoi@ombudsman.gov.au

ACT Civil and Administrative Tribunal (ACAT) Review

Under section 84 of the Act, if a decision is made under section 82(1) on an Ombudsman review, you may apply to the ACAT for review of the Ombudsman decision. Further information may be obtained from the ACAT at:

ACT Civil and Administrative Tribunal
Level 4, 1 Moore St
GPO Box 370
Canberra City ACT 2601
Telephone: (02) 6207 1740
<http://www.acat.act.gov.au/>

Should you have any queries in relation to your request please contact me by telephone on 6207 7754 or email CMTEDDFOI@act.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Daniel Riley', written in a cursive style.

Daniel Riley
Information Officer
Information Access Team
Chief Minister, Treasury and Economic Development Directorate

13 August 2020



ACT
Government

Chief Minister, Treasury and
Economic Development

FREEDOM OF INFORMATION REQUEST SCHEDULE

WHAT ARE THE PARAMETERS OF THE REQUEST	Reference NO.
All documentation and policy in relation to discrimination hearing DT8/2018 and the steps taken to mitigate any future discrimination.	CMTEDDFOI2020-137

Ref No	Page number	Description	Date	Status	Reason for Exemption	Online Release Status	
1	1-36	Email to staff with attachment	10 Aug 2020	Full release	N/A	Yes	
2	37-38	DRAFT - CITL Decision Notification	Undated DRAFT document	Full release	N/A	Yes	
3	39-40	DRAFT - CITL Delegations	Undated DRAFT document	Full release	N/A	Yes	
4	41-42	DRAFT - CITL Legal Requests	Undated DRAFT document	Full release	N/A	Yes	
5	43-45	DRAFT - CITL Notifiable Instruments	Undated DRAFT document	Full release	N/A	Yes	
6	46-47	DRAFT - CITL RAC Briefs	Undated DRAFT document	Full release	N/A	Yes	
7	48	DRAFT - CITL Reviewable Decisions	Undated DRAFT document	Full release	N/A	Yes	
8	49	DRAFT - Decision making flowchart	Undated DRAFT document	Full release	N/A	Yes	
9	50-54	DRAFT - Escalating Decisions in Licensing & Registrations	Undated DRAFT document	Full release	N/A	Yes	
10	55-56	DRAFT - FOI 101	Undated DRAFT document	Full release	N/A	Yes	
11	57-60	DRAFT - Notice of decision - template	Undated DRAFT document	Full release	N/A	Yes	
12	-	Cabinet Submission	June 2020	Exempt	Schedule 1 1.16 Cabinet Information	No	
Total No of Docs							
12							

From: Blanch, Rachelle
Sent: Monday, 10 August 2020 11:31 AM
To: CITL; Kellie, Heather; Flint, Nicole; Crawford, Rebecca; Gamage, Gayani; McAlister, Dannielle; Sheather, Sarah
Cc: Cubin, Derise; Mangeruca, Giuseppe
Subject: Public Interest Test (CITL)
Attachments: COMPLAINANT-201908-v-COMMISSIONER-FOR-FAIR-TRADING-Discrimination-2020-ACAT-24.pdf

Importance: High

OFFICIAL

Good morning team,

As previously discussed, I would like to reiterate that before applying the public interest test that you first escalate the application and surrounding reasons to Heather and myself. From there, we will provide you advice as to whether it is appropriate to apply the public interest test in that instance.

I attach for your information the relevant ACAT decision and I encourage each of you to read. Further guidance will be provided in due course.

For clarity, the relevant sections of the legislation are listed below.

Section s18 (a)(i) *Traders Licensing Act 2016* –

In deciding whether an entity is a suitable entity to hold a licence, the commissioner—

(a) must consider the following:

- (i) suitability information about the entity, and each relevant person for the entity, prescribed by regulation;
- (ii) any information given to the commissioner under section 32 (Commissioner may request more information)

Section 7(1)(g) *Traders (Licensing) Regulations 2017* –

Suitability information

(1) Information about the following in relation to an entity is prescribed:

- (a) a contravention of a relevant law;
- (b) a conviction or a finding of guilt for an offence under a relevant law;
- (c) a conviction or finding of guilt for an offence involving fraud or dishonest conduct;
- (d) a contravention of a licence condition for a licence issued under a relevant law;
- (e) being refused a licence under a relevant law;
- (f) having a licence cancelled or revoked under a relevant law;
- (g) whether it is in the public interest to issue a licence to the entity

We will discuss this topic again at our next team meeting to ensure each staff member understands the application of the public interest test and the importance of seeking approval prior to applying this method during the assessment of an application.

Kind regards,

Rachelle Blanch
A/g Assistant Director – Community, Industry and Trader Licensing

A/g Assistant Director – Births, Deaths and Marriages
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Access Canberra | ACT Government
GPO Box 158, Canberra City ACT 2601 | www.act.gov.au/accessCBR



ACT CIVIL & ADMINISTRATIVE TRIBUNAL

COMPLAINANT 201908 v COMMISSIONER FOR FAIR TRADING (Discrimination) [2020] ACAT 24

DT 8/2019

Catchwords: **DISCRIMINATION** – irrelevant criminal record – applicant applied for licence under the Traders Licencing Act – whether the applicant’s criminal record is directly relevant to the circumstances – whether the applicant’s criminal convictions are relevant to the consideration of whether it is in the public interest to grant him a motor traders licence – whether a conviction which is relevant under the Traders Licensing Act can be irrelevant under the Discrimination Act – what is ‘in the public interest’ – does the issue of protecting consumers extend to ensuring that they deal with persons of good character more generally

Legislation cited: *Australian Human Rights Commission Act 1986*
Crimes Act 1900 ss 26, 116
Discrimination Act 1991 s 8
Sale of Motor Vehicles Act 1997
Security Industry Act 2003
Spent Convictions Act 2000
Traders (Licensing) Act 2016
Working with Vulnerable People (Background Checking) Act 2011

**Subordinate
Legislation cited:** *Traders (Licensing) Regulation 2017*
Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2018 (No 1)

Cases cited: *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FLR 446
Complainant 201823 v Insurance Australia Group Ltd Trading as NRMA [2019] ACAT 64
Kovac v Australian Croatian Club Limited [2014] ACAT 41
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Pereira v Commissioner of Police NT Anti-Discrimination Commission (15 August 2012)

Sobey v Commercial and Private Agents Board (1979) 22 SASR 70

The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379

List of

Texts/Papers cited: Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law*, 3rd ed (Federation Press, 2018)

Tribunal: Senior Member H. Robinson

Date of Orders: 6 April 2020

Date of Reasons for Decision: 6 April 2020

BETWEEN:

COMPLAINANT 201908
Applicant

AND:

COMMISSIONER FOR FAIR TRADING
Respondent

TRIBUNAL: Senior Member H Robinson

DATE: 6 April 2020

ORDER

The Tribunal orders that:

1. The matter is listed on 22 April 2020 at 10:00am for a directions hearing and the hearing of the applicant's application for interim or other orders dated 3 April 2020.
2. This hearing will be conducted by telephone.

.....
Senior Member H Robinson

REASONS FOR DECISION

1. The issue before the Tribunal is whether the actions of the respondent in refusing to grant to the applicant a motor vehicle sales licence (**motor sales licence**) under the *Traders (Licensing) Act 2016* (**Traders Licensing Act**) constituted “unlawful discrimination” contrary to section 8 of the *Discrimination Act 1991* (**Discrimination Act**). A secondary question is whether the grant or refusal of a licence constitutes an authorisation or qualification for the purpose of entry by the applicant into a profession, trade or occupation for the purposes of section 16 of the Discrimination Act.

What is this matter about?

2. The applicant claims that the Commissioner engaged in unlawful discrimination by treating him unfavourably because he had convictions for two offences that are:
 - (a) Irrelevant, having regard information the Commissioner is required to consider under the *Traders (Licensing) Regulation 2017* (**Licensing Regulations**) when considering whether to grant a licence; and
 - (b) in any case, not directly relevant to consideration of whether he should be granted a motor sales licence.
3. The respondent denies this and submits that the application should be dismissed for the following reasons:
 - (a) The convictions in question and the circumstances of those convictions were directly relevant to the situation, being the grant of the motor sales licence.
 - (b) The decision not to grant the applicant a licence did not constitute unfavourable treatment in the broader context of the legislative scheme.
 - (c) The grant or refusal of a licence does not constitute an authorisation or qualification for the purpose of entry by an applicant into a profession, trade or occupation.

Relevant facts

4. In early October 2018, the applicant applied to the Commissioner for a motor sales licence. As part of that process, the Commissioner conducted a police record check of the applicant. The police check listed two convictions in 2017 for:
 - (a) destroy/damage property not exceeding \$5,000 (**property damage conviction**); and
 - (b) common assault.
5. The convictions arose from two separate incidents.
6. The property damage conviction resulted from an incident in April 2016 in which the applicant engaged in an altercation with the driver of another vehicle. There is some dispute over the circumstances, but there is no dispute that the applicant threw a lump hammer at the other party's car, which was being driven the time. The lump hammer became embedded in the windscreen. The applicant was convicted of destroying/damaging property, contrary to section 116(3) of the *Crimes Act 1900* (**Crimes Act**).
7. The conviction for common assault resulted from an incident in July 2016 in which the applicant again engaged in an altercation with another driver, during which he spat in the other driver's face. He was convicted of common assault, contrary to section 26 of Crimes Act and was placed on a good behaviour order, which expired on 15 April 2019.
8. The Commissioner had knowledge of the two convictions but not the full details of the offences. On 8 November 2018, an assistant manager in the Directorate that provides oversight of the administrative functions of the Commissioner emailed the applicant noting she was in the process of preparing a brief for decision on the application. She stated that she had not received detailed information in relation to the convictions, writing:

You have provided the statement of facts for the 2 offences ... but no further documentation such as your personal statement explaining any extenuating circumstances surrounding the offences and steps you have taken since to prevent such incidents from occurring again. Personal and work reference can also be submitted.

If you do not want to proceed with your application please let me know and I will have it withdrawn. Otherwise can you please advise whether or not you are providing additional information.

9. On 8 November 2018, the applicant replied and sent the Commissioner a document labelled “Personal Reference Statement”. He had previously provided the same document in relation to an earlier application that had been withdrawn. In this document he wrote that:

I consider myself a direct and transparent person, for this reason, I'd like to decline the invitation to seek additional personal character references from friends and co-workers, any of these hand-picked associates can no doubt paint a colourful picture of me. Instead I'd prefer to represent a clear background on myself and the events in question.

10. In summary, the applicant made the following points about the broad circumstances of the offences:

- (a) He had sustained a permanent injury to his lower back in 2016.
- (b) He was unaware of the long-term effects of his injury at the time of the incidents.
- (c) He was juggling a lot of commitments, including project managing the construction of a new house and was under a lot of stress and financial pressure.
- (d) This resulted in a deterioration of his physical health and, in turn, his mental health.

11. The applicant then proceeded to make a number of general statements about his situation and to offer his personal reflections, of which the following are representative:

Metaphorically speaking, the overloaded ship had set sail and had now entered a storm en route to its destination and as I reflect on the events and how I handled them my only option at the time was to hang on to what I could as I embarked through this storm.

The injury I sustained on my back has slowed my life down considerably and made me reflect on my life. I am no longer the invincible young brave man I used to be ... But the hardest battle for me has been to not allow the negative notions of the subsequent criminal records imposed on me affect me mentally. I have been a

law-abiding citizen ... Now I am labelled a criminal and have this stigma attached for the rest of my life.

[After recovering somewhat from my injury] I then set my sights on addressing some of the underlying issues that I needed to address, to help me become more calm and patient in all activities. I wish the road incidents never occurred, it was plainly triggered by the cocktail of negative events.

... I was also blinded by ego and pride ... I can now accept that I have learnt a lot about myself as a result, most important lesson I have taken on board is that people and events are powerless without your reaction.

I have addressed my issues, focussed on rebuilding myself and not fixating on the stigma of the criminal records against my name as a means of failure.

12. On 13 December 2018, there was a meeting of the Directorate’s “Regulatory Advisory Committee” (**RAC**). This body is comprised of senior officers within the Directorate and provides oversight of the functions of the Commissioner, including making recommendations about granting licences under the Traders Licensing Act.
13. A briefing paper had been prepared for the RAC by officers within the Directorate. The briefing paper recommended that the license be refused because “[t]he convictions are fairly recent and do not demonstrate the behavior expected from people holding a Traders Licence”. It would appear from the documentation that the RAC agreed with this recommendation. Following this meeting, a draft statement of reasons was prepared by an officer of the Directorate. The draft statement was provided to another more senior officer and was endorsed by the Executive Branch Manager of Licensing and Registrations at Access Canberra by email dated 21 December 2018.
14. Meanwhile, a letter was prepared notifying the applicant of the RAC’s decision (**decision letter**). The decision letter was dated 18 December 2018 and signed by a delegate of the Commissioner (**the delegate**). The letter states that:

Section 18(a) of the Act states that the Commissioner must consider suitability information about an applicant in deciding whether or not the applicant is suitable to hold a licence. This includes whether it is in the public interest to issue the licence...

[I]t was decided given the recent nature of your offences and that you

are still under a good behaviour bond, not to issue you the licence...

You are entitled to apply for a reasons statement ... in relation to the decision...

Section 49 of the Act entitles your application to be reviewed. This is a reviewable decision and you are entitled to have [it] reviewed by the ACT Civil and Administrative Tribunal. ACAT may review the decision and consider other factors that I may not have been aware of when making the above decision...

15. The statement of reasons was later provided to the applicant. The delegate appears to have been absent at the time it was finalised, and it is unclear whether he ultimately endorsed it. However, the statement appears to have reflected the position taken to the RAC by officers within the delegate's area, and he stated his agreement with it while giving evidence at the hearing. Accordingly, I am satisfied that the statement of reasons represents the reasons for the decision.
16. Those reasons for the decision, as per the statement of reasons, can be summarised as follows:
 - (a) The decision making had regard to the matters required to be considered under the Trader Licensing Act, including whether it was in the public interest to issue the licence (the relevant provisions are set out below).
 - (b) That the applicant had two convictions, and those convictions and their underlying facts were considered serious, especially as the property damage conviction "could have resulted in injury and death".
 - (c) The applicant was at the relevant time subject to a good behaviour order that had not expired.
 - (d) The applicant had not provided any written statements or evidence to indicate that he had taken any steps to "mitigate the risk of offending again".
 - (e) Based on the original application, criminal history checks and the statements of facts for each offence, a decision was made that it was not in the public interest to issue the licence.
17. The applicant contends, and I accept that, that whatever the other reasons for the

decision, a reason for the decision to deny the applicant a licence was the fact of his convictions, how recent they were, and that he was subject to a good behaviour bond as a consequence of them.

The Discrimination Act

18. The *Discrimination Act 1991 (Discrimination Act)* protects people from being discriminated against because of a “protected attribute”. The various ‘protected attributes’ are set out in section 7 of the Discrimination Act.
19. Discrimination can take two forms: direct and indirect. The applicant claims direct discrimination. Under section 8(2) of the Discrimination Act, direct discrimination occurs if a:

person treats, or proposes to treat, another person unfavourably because the other person has 1 or more protected attributes.

20. In *Prezzi and Discrimination Commissioner* [1996] ACTAAT 132 (*Prezzi*) the Tribunal summarised the test for ‘unfavourable treatment’ as follows:

[Unlike equivalent legislation in some other jurisdictions], *the Discrimination Act... does not invite a comparison between the way in which a person who has a particular attribute is treated compared with a person without that attribute or who has a different attribute. All that is required is an examination of the treatment accorded the person or the conditions upon which the aggrieved person is or is proposed to be dealt with. If the consequence for the aggrieved person of the treatment is unfavourable to that person, or if the conditions imposed or proposed would disadvantage that person there is discrimination where the treatment is given or the condition is imposed because of the relevant attribute possessed by the aggrieved person.*¹

21. And in *Complainant 201823 v Insurance Australia Group Ltd Trading as NRMA* [2019] ACAT 64 as follows:

In other words, it does not ask: “were you treated less favourably than others?” It asks: “were you treated unfavourably?” This is an objective test. It calls for an examination of the treatment accorded to the complainant. If the consequence of the treatment is unfavourable to that person there is ‘unfavourable treatment’ and the question then turns to the reason for that unfavourable treatment, and whether it is

¹ *Prezzi, Patricia Anne and Discrimination Commissioner* [1996] ACTAAT 132 at [22]

*because of the attributes they possess.*²

22. The applicant claims that he was treated unfavorably because he had the ‘protected attribute’ of an ‘irrelevant criminal record’, as per section 7(1) of the Discrimination Act.
23. The term ‘irrelevant criminal record’ is defined in the Dictionary to the Discrimination Act as follows:

***irrelevant criminal record**, in relation to a person, means a record relating to an offence, or an alleged offence, if—*

- (a) *the person has been charged with the offence but—*
 - (i) *a proceeding for the alleged offence is not finalised; or*
 - (ii) *the charge has lapsed, been withdrawn or discharged, or struck out; or*
- (b) *the person has been acquitted of the alleged offence; or*
- (c) *the person has had a conviction for the alleged offence quashed or set aside; or*
- (d) *the person has been served with an infringement notice for the alleged offence; or*
- (e) *the person has a conviction for the offence, but the circumstances of the offence are not directly relevant to the situation in which discrimination arises; or*
- (f) *the person has a spent conviction or an extinguished conviction, within the meaning of the **Spent Convictions Act 2000**, for the offence.*

24. The applicant argues that his criminal record is an irrelevant record by operation of subparagraph (e) of the definition because the circumstances of his two offences are not *directly* relevant to consideration of whether he should hold a motor traders licence.

Preliminary observations

25. Under the Discrimination Act, the applicant must establish that he possesses a protected attribute within the meaning of section 7 of the Discrimination Act. Therefore the onus is on the applicant to establish that he has an irrelevant criminal record. This is a jurisdictional fact³, and this Tribunal only

² *Complainant 201823 v Insurance Australia Group Ltd Trading as NRMA* [2019] ACAT 64 at [7]

³ *Pereira v Commissioner of Police* NT Anti-Discrimination Commission (15 August 2012)

has jurisdiction to consider this matter if satisfied that the applicant does in fact have a protected attribute.

26. 'Irrelevant criminal record' is an unusual protected attribute when compared to the other protected attributes in section 7 of the Discrimination Act, because the attribute that is protected is *not* the possession of a criminal record per se, but rather the possession of a criminal record the circumstances of which are irrelevant to the situation in which it is or was considered. This is the only protected attribute that a person may or may not have depending on the surrounding facts and law.⁴
27. The question of whether the applicant has an irrelevant criminal record must therefore be considered first. To determine this, there are four questions that must be answered:
- (a) Does the applicant have a conviction for an offence/offences?
 - (b) What are the circumstances of the offence/s for which the applicant was convicted?
 - (c) What is the situation in which the alleged discrimination arises?
 - (d) Are the circumstances of the offence/s directly relevant to the situation?

Does the applicant have a conviction for an offence?

28. As set out at paragraph 4 above, the applicant has two criminal convictions, both of which were known to the respondent at all relevant times.

What are the circumstances of the offences for which the applicant was convicted?

29. My factual findings are set out above. Drawing from those factual findings, I am satisfied that the 'circumstances of the offences' include:
- (a) On both occasions the applicant engaged in what may broadly be

⁴ See above *Pereira v Commissioner of Police* NT Anti-Discrimination Commission (15 August 2012); Rees et al *Australian Anti-Discrimination and Equal Opportunity Law*, 3rd ed, (Federation Press, 2018) at [10.7.7].

described as ‘road rage’ altercations with a stranger.

- (b) One of the incidents, the property damage offence, could have resulted in injury or death, but did not.
 - (c) The applicant reacted aggressively and inappropriately to challenging behaviors by another person; but
 - (i) the two incidents occurred relatively closely together and in a time of some personal stress for the applicant; and
 - (ii) the applicant has no other convictions.
 - (d) The applicant was subject to a good behavior bond, which carried immediate consequences should he fail to be of good character until its term expires on 15 April 2019.
30. Having considered the applicant’s submission to the Commissioner, and heard the applicant’s evidence at the hearing, I am also satisfied that:
- (a) the applicant gave self-serving evidence about the circumstances of the offences to both the Commissioner and the Tribunal, providing disingenuous explanations designed to paint himself in the best light possible; but
 - (b) the applicant is aware that such conduct has serious ramifications and I am satisfied that, even if nothing else does, the threat of further penalty will reduce any risk that he will reoffend.

What is the situation in which the alleged discrimination arises?

- 31. The alleged discrimination arises in the context of the Commissioner making a decision whether or not to grant the applicant a motor traders licence under the Traders Licensing Act.
- 32. The applicant’s position is that the statutory framework for the Traders Licensing Act, which is set out further below, expressly establishes which convictions are relevant, with the implication that consideration of any convictions or similar matters outside the scope of this framework would amount to consideration of an irrelevant conviction. The applicant further submits that consideration of other, unspecified offences should not be permitted

where doing so would be contrary to the Discrimination Act. Finally, the applicant submits that the convictions are, in any case, not directly relevant.

33. The Commissioner argues that the Traders Licensing Act confers a broad discretion, including a requirement to consider ‘the public interest’, and this discretion is not narrowed by regulation. The Commissioner further submits that the applicant’s criminal convictions are relevant to consideration of whether it is in the public interest to grant him a motor traders licence.
34. On either argument, the starting point is section 23 of the Traders Licensing Act, which provides as follows:

23 Licence issue

- (1) *If an entity applies for a licence, the commissioner must, within the decision-making period:*
- (a) *issue the licence; or*
 - (b) *refuse to issue the licence.*
- (2) *The licence may authorise the entity to carry on business in:*
- (a) *more than 1 trader category; and*
 - (b) *more than 1 trader class.*
- (3) *The commissioner may issue the licence to the entity only if the commissioner is satisfied*
- (a) *about the identity of each relevant person for the entity; and*
 - (b) *that the entity*
 - (i) *is eligible to hold the licence; and*
 - (ii) *is a suitable entity to hold the licence.*

35. Section 23 effectively provides that the Commissioner may only issue a licence if satisfied that:

- (a) the applicant is “eligible”; and
- (b) the applicant is a “suitable entity”.

36. It is ‘suitability’ rather than ‘eligibility’ that is the contentious issue in this case. There is no suggestion that the applicant is not ‘eligible’.

37. Section 18 of the Traders Licensing Act sets out when an applicant is a ‘suitable

entity’:

18. Suitability of entity

In deciding whether an entity is a suitable entity to hold a licence, the commissioner

- (a) *must consider the following:*
 - (i) *suitability information about the entity, and each relevant person for the entity, prescribed by regulation;*
 - (ii) *any information given to the commissioner under section 32 (Commissioner may request more information); and*
- (b) *may consider whether the premises where the entity intends to carry out the licensed activity are -*
 - (i) *suitable premises for carrying out the licensed activity; and*
 - (ii) *premises that the entity is entitled to use.*

38. In other words, in considering whether an applicant is a suitable entity, the Commissioner must have regard to two types of information:

- (a) prescribed “suitability information”; and
- (b) any information given in response to a request issued under section 32 of the Act.

39. The Explanatory Statement to the Traders (Licensing) 2016 Bill (**Amendment Bill**) explains that the purpose of sections 18 and 23 of the Traders Licensing Act is to set out a broad framework, pursuant to which detailed regulations could be made⁵:

Prescription by regulation is necessary in this Bill because of the number of different industries that the Bill applies to and will apply to in future. Flexibility, adaptability and customisation are necessary to ensure that the licensing of each industry can be sufficiently regulated, with regard given to balancing administrative efficiency with the public interest and other factors relevant for the specific industry. This is the second of the two areas that require this intervention.

40. Further to this, the ‘suitability information’ is prescribed in more detail in the

⁵ See Traders (Licensing) Bill 2016, Explanatory Statement of June 2016 at page 11

Traders (Licensing) Regulation 2017 (the Regulation) as follows:

7. Suitability Information-Act, s 18 (a)(i)

(1) *Information about the following in relation to an entity is prescribed:*

- (a) *a contravention of a relevant law;*
- (b) *a conviction or a finding of guilt for an offence under a relevant law;*
- (c) *a conviction or finding of guilt for an offence involving fraud or dishonest conduct;*
- (d) *a contravention of a licence condition for a licence issued under a relevant law;*
- (e) *being refused a licence under a relevant law;*
- (f) *having a licence cancelled or revoked under a relevant law;*
- (g) *whether it is in the public interest to issue a licence to the entity,*

...

relevant law, for an entity, means

- (a) *the Act; and*
- (b) *the operational Act/or the entity's trader category; and*
- (c) *a corresponding law for the entity.*

41. The note⁶ to section 7(1) states that a 'conviction' does not include a spent or extinguished conviction under the *Spent Convictions Act 2000*. The note does not mention 'irrelevant criminal records' or the Discrimination Act and there is no guidance in either the Discrimination Act or the Trader Licensing Act or Regulations as to how these provisions are intended to interact.
42. I am satisfied that none of matters in sections 7(1)(a) to (f) of the Regulations apply to the applicant. To the extent that the respondent's consideration of the applicant's application is limited to the considerations under the Regulations, then the applicant's criminal convictions may only be relevant to whether it is 'in the public interest' to issue a licence to the applicant under

⁶ The note is not part of the Act but can be used for interpretation.

7(1)(g). This is, in any case, the basis upon which the Commissioner says the applicant's application was refused, and the only basis upon which the Commissioner has contended that the convictions are directly relevant to the decision.

Are the convictions irrelevant because they are not included in the class of specified in the regulation?

43. The question here is: Are the convictions irrelevant because they are not included in the class of offences in the regulation, or can they fall within the 'public interest' aspect of the suitability test in regulation 7?
44. The starting point is to consider what 'the public interest' means.
45. The public interest test has its origins in administrative law and administrative decision making. It is well established that the test imports a wide discretion, albeit one that is confined by its context. As was observed by the Full Court of the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, 400-401 at [42]:

*It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined/actual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is 'neither arbitrary nor completely unlimited' but is **"unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view"** (emphasis added)*

46. Drawing upon this, the question becomes: what is the 'scope and purpose' of the Traders Licensing Act, and what public interest considerations fall within a decision made under it?
47. Unfortunately, the Traders Licensing Act does not include an objects clause. However, its purpose is self-evidentially to establish a regulatory framework for engagement in certain industries or occupations. Logically, the legislature must have recognised that there are risks associated with trading in these industries that need to be regulated, and that licensing is an appropriate means to do this. As such, the Traders Licensing Act is broadly

analogous to other Acts that regulate occupations, albeit that the underlying concerns may be different.

48. In *Commissioner for Fair Trading & Quinton* [2011] ACAT 10 at [50] the Tribunal considered the public interest test in the context of the *Security Industry Act 2003 (SI Act)*, which governs the licensing of security guards. The SI Act at that time listed a broad range of “relevant offences”, including any offence under the *Crimes Act 1900* and the *Criminal Code 2002* and any offence under any corresponding Act. The Tribunal observed that:

The test that granting the licence has to be in the public interest is a high one. The fact that the Tribunal must in terms of our legislation take into account criminal convictions (although not traffic convictions) is a vital part of this equation. The law on this subject is quite clear (see, Walters J’s observations in Sobey v Commercial and Private Agents’ Board) which sets out the principles which regulatory bodies that granted licences have to take into account:

With this in mind, Parliament has constituted a Board which, in the exercise of its discretion to grant or refuse licences, has a duty to the community to be careful not to accredit any person as a licensee under the Act, unless he is worthy of public confidence and can satisfactorily establish his right to that credential.

49. *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70 concerned the regulation of process servers and commercial sub-agents. Such persons, the Court noted, are:

[H]eld out as ... authorized to take some part in the administration of justice...and by reason of knowledge, skill, capacity, good fame and character can be safely accredited to the public.

50. The functions that a motor salesperson licensed to perform are somewhat different, and largely centered around the purchase and sale of motor vehicles and the conduct of a commercial business – activities that involve interaction with consumers who are purchasing a vehicle. Undoubtedly, in terms of making the business a profitable one, this requires a range of skills, but the Traders Licensing Act and Regulations do not appear to prescribe any education, experience or learning. Rather, in broad terms, there appears to be an emphasis on criminal convictions and regulatory compliance (although this is not stated in the Act).

51. The current licensing scheme was introduced to the Traders Licensing Act by way of the Traders (Licensing) Bill 2016 (**Amendment Bill**). The Explanatory Statement to the Amendment Bill provides, relevantly, that one of the goals of the new licensing framework was the introduction of a public interest test:

The Single Licensing Framework facilitated by the Bill aims to provide the community with a single coordinated point of regulation and enforcement delivered through the range of licensing, registration, education and compliance activities undertaken by Access Canberra for the four industries. In addition, the following measures are provided by the Bill to protect consumers and ensure licensing continues to remain in the public interest:

- *introducing a public interest test in deciding certain elements of application;*⁷

52. There is no substantive explanation of what kinds of matters would be considered under this test, but the human rights consideration in the Explanatory Statement sets out the purposes of the register of licences as follows:

*The keeping of a register of licences works to allow consumers to search and consider the legitimacy of the trader they are purchasing goods and services from. This works specifically to protect consumer interests in **verifying that a provider is appropriately licensed, where fair trading and trades practices protections can be relied upon, as well as where criminal activity is legally guarded against**. Consumer protections serve many functions in a democratic society some of which include supporting a sustainable economy, ensuring sufficient quality of goods and services to prevent unacceptable risks of physical and/or economic harm to consumers. This is considered a sufficiently important objective (emphasis added).*⁸

53. It would appear from this that consumer protection, the prevention of criminal activity and economic considerations are the key purposes of the licensing scheme. Preventing an “unacceptable risk of physical ... harm” is also stated as a relevant consideration, although no detail is given as to what kind of harm is envisaged. The sale of only safe, reliable motor vehicle is one way in which the Act may promote the physical safety of consumers, but the protection of consumers from potentially aggressive conduct may arguably

⁷ Traders (Licensing) Bill 2016, Explanatory Statement page 2

⁸ *ibid* page 3

be another.

54. Further, in relation to the suitability requirements, the Explanatory Statement to the Bill provides that character may be a consideration for licensing purposes:

*The Bill introduces the concept of suitability in determining whether it would be appropriate to issue a licence to a particular entity. Suitability requirements are likely to vary depending on the particular industry trader category or trader classes (if any) applied for and **may include such matters as the character of the entity, the suitability of the premises where the licensed activity is to be carried out and whether the entity is entitled to use such premises.***⁹

55. Unfortunately, the term ‘character’ has several potential meanings, and is not immediately apparent whether the term is used here in terms of the personality or reputation of the entity, or the legal nature of the entity (eg. whether it is an individual or corporation). As such, this statement in the explanatory statement does not evidence a clear intention to introduce a ‘character’ test.
56. Prior to the Amendment Act, the licensing of motor vehicle dealers was governed by Part 2 of the *Sale of Motor Vehicles Act 1997*. This Act was significantly amended, and the licensing scheme reformed, by the *Sale of Motor Vehicles (Amendment) Bill 1995*. In introducing this Bill the then Attorney-General said:

For most consumers the purchase of a motor vehicle represents the most significant financial commitment they will make apart from the purchase of a home. It is essential, therefore, that consumers be properly protected when purchasing a vehicle and that the market operate efficiently and fairly.

The Sale of Motor Vehicles Act was introduced in 1977 to encourage fair trading amongst persons engaged in the selling of motor vehicles in the Territory. The Act provides for a Registrar of Motor Vehicle Dealers who may license persons to carry on business as licensed dealers. Under the licensing regime dealers are required to keep records of second-hand vehicles at the point of sale, maintain trust accounts and keep records in respect of all vehicles sold on consignment and contribute to a motor vehicle dealers compensation fund for the purpose of compensating purchasers of vehicles in certain

⁹ *ibid* page 11

*circumstances.*¹⁰

57. It is evident from these comments that the main purpose of the regulation scheme is consumer protection, in the sense of protecting the financial investments that consumers make when purchasing a vehicle. Consistent with this, section 7(1) of the Regulations requires the Commissioner to consider information about convictions for fraud, dishonest conduct or breaches of licensing laws. But what consequences does this have for the consideration of other convictions? What about a conviction for reckless driving, or for murder? Does the issue of protecting consumers extend to ensuring that they are dealing with persons of good character more generally?
58. The Commissioner says that the criteria does allow such consideration, and that in this case, the applicant's convictions were relevant to the question of whether it is in the public interest that the applicant be given a licence. There is, the Commissioner says, a public interest in protecting consumers from "heightened risks...for erratic behaviour"¹¹, or perhaps even from aggression more generally.
59. For his part, the applicant argued in reply that if the Tribunal were to allow the consideration of criminal convictions under 'public interest', the discretion in Regulation 7(a)(g) would import to the Commissioner "a power rendering the Discrimination Act nugatory, which, as a matter of statutory constructions, should not be preferred."¹² I do not accept this argument. The purpose of section 7 of the Regulations is to set out what *must* be considered when considering whether a person is a suitable person. The opening paragraphs (a) to (f) contains a specified list of information that must be considered. But nothing in those sections limits 7(1)(g). Information, including information about convictions, might be relevant to more than one category, and convictions may be relevant to other, identified public interests.
60. However, that does not mean that I accept that the public interest allows

¹⁰ Hansard, 26 October, 1995

¹¹ Transcript of proceedings, 29 October 2019 page 117, lines 36, 38

¹² Applicant's submissions at [21b]

consideration of any criminal record that suggests a less than desirable character.

61. Having regard to the explanatory statement above, it appears that a broad ‘public interest test’ was intended as a way of ensuring a degree of flexibility and adaptability in considering whether an entity should be licensed. The ‘public interest’ includes both promoting consumer protection and protecting against criminal activity. Consequently, I am satisfied that the ‘public interest’ in the context of the Traders Licensing Act is the ‘public interest’ in supporting consumer protection, which embraces such concepts as a sustainable economy, ensuring sufficient quality of goods and services, and preventing unacceptable risks of physical and/or economic or other harm to consumers. Regulations 7(1)(a) to (c) identify offences that are clearly relevant to that test, but that does not mean that other offences may not be relevant to the consideration of whether it is in the public interest to issue a licence to an applicant.
62. In conclusion, I am satisfied that the legislative scheme permits, and indeed requires, the consideration of criminal convictions beyond those prescribed in section 7(1)(a) to (c), where the fact and circumstances of those convictions go to whether it is in the public interest to issue a licence to the applicant. The relevant areas of public interest are the physical and economic safety of consumers. This may include consideration of criminal convictions beyond those in the regulations.
63. What this leaves open is the question of how to reconcile the two Acts. I do not consider this an impossible task, although it does add a layer of complexity to administrative decision making, and reconciling the Acts requires a brief detour to consider the background to the Discrimination Act.

Can a conviction which is ‘relevant’ to the Traders Licensing Act be ‘irrelevant’ under the Discrimination Act?

64. The protected attribute of ‘irrelevant criminal record’ was inserted into the Discrimination Act by the Discrimination Amendment Bill 2016, following recommendations from the Review of the Discrimination Act by the ACT Law Reform Advisory Council (LAC). Prior to the amendment, the Discrimination Act protected against discrimination on the basis of a ‘spent

criminal conviction’, defined by reference to the *Spent Convictions Act 2000*. A ‘spent conviction’ is, broadly, one that is no longer part of a person’s criminal history. The Discrimination Act did not, at that time, prohibit discrimination against a person whose conviction was not spent, or was not capable of being spent, even if the conviction was for an irrelevant offence.

65. The LRC favoured adopting the approach taken in the *Tasmanian Anti-Discrimination Act 1998* and the *Northern Territory Anti-Discrimination Act 1992* of protecting against consideration of ‘irrelevant criminal record’. However, the LRC also considered the special circumstances of the *Working With Vulnerable People (Background Checking) Act 2011 (WWVP Act)*. Ultimately, the LRC recommended as follows:

Recommendation 10

The Discrimination Act should be amended:

- i. *to replace the existing protected attribute of ‘spent criminal conviction’ and its definition with the protected attribute of ‘irrelevant criminal record’, defined in the same terms that both criminal history and non-conviction information are defined in the Working with Vulnerable People (Background Checking) Act 2011 (ACT)*
- ii. *so that the prohibition against discrimination on the basis of irrelevant criminal record is subject to the operation of the Working with Vulnerable People (Background Checking) Act 2011 (ACT).*

66. While it is clear that attention was given to expanding the ambit of the protected attribute, from ‘spent convictions’ to ‘irrelevant convictions’ and from ‘convictions’ to any record relating to arrest, interrogation and criminal proceedings, it is not clear if any attention was given to the criteria for determining what constitutes a relevant or irrelevant criminal record. The only consideration of this issue in the explanatory material appears in a discussion relating to possible exceptions to discrimination including in relation to the operation or effect of other Territory laws:

The LRAC’s recommended model does not create particular exceptions for different attributes or circumstances, but allows people to justify their conduct as a permissible limit on the right to non-discrimination. Consistently with this approach, an exception would not be made for working with children, but appropriate

drafting can ensure that discrimination protection for this attribute is subject to the provisions of the Working with Vulnerable People (Background Checking) Act 2011. ...

[T]he existing provisions of the Working with Vulnerable People (Background Checking) Act 2011 operate to ensure that both criminal history and non-conviction information are taken into account when registering a person to work with vulnerable people. The continued operation of that regime would provide an important and necessary exception to the prohibition against discrimination on the basis of irrelevant criminal record. If other circumstances require discrimination then conduct can be justified, and an exemption can be sought¹³

67. The WWVP Act was clearly intended to be a special case, justified by the special vulnerability of the persons that legislation protects. But what happens in other cases?
68. Where I understand the problem to arise is in the space between what is a ‘relevant consideration’ in the context of administrative decision making, and a ‘directly relevant’ consideration under the Discrimination Act.
69. As a principle of administrative law, decision makers are required to take ‘relevant’ considerations into account.¹⁴ There are considerations that a decision-maker *must* consider, having regard to the express terms of the legislation or the subject matter, scope and purpose of the empowering law.¹⁵ Section 30 of the Discrimination Act provides that nothing in the Act makes unlawful anything done necessarily for the purpose of complying with a requirement of a Territory law, so a decision maker who is obliged to take something into account must generally do so, regardless of the Discrimination Act.
70. However, where the relevant legislation allows a broad discretion, the situation is more complicated. In such cases, it is generally for the decision maker to decide what is relevant.¹⁶ As set out above, the public interest test in the Traders

¹³ ACT Law Reform Advisory Council, Review of the Discrimination Act 1991, Final Report ACTLRAC 3

¹⁴ Eg. a failure to take into account a ‘relevant consideration’ may be a ground for administrative review under the *Administrative Decisions (Judicial Review) Act 1989*, see section 5(2)(b).

¹⁵ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 36

¹⁶ *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FLR 446, 577 at [525]

Licensing Act does suggest a broad discretion, at least in relation to matters that go to the public interest in consumer protection. But matters taken into consideration still have to be *relevant*, and in order to be relevant, there must be a reasonable and credible basis for the concern. In the context of this case, for a conviction to be relevant under the Traders Licensing Act, there must be a reasonable and credible basis for concern that the applicant's criminal record may compromise consumer welfare. Tenuous or an inferred connections which one strains to draw are not sufficient.

71. There is nothing in the Discrimination Act that conflicts with this. Instead what the Discrimination Act does is apply another test. In addition to be relevant to the decision, information about a conviction must be *directly* relevant in order to be permissible under the Discrimination Act. In effect, this appears to narrow the field of permissible considerations from those that are relevant, to those that are *directly* relevant.

Is the applicant's criminal record *directly relevant* to the circumstances?

72. The next question is whether the applicant's criminal convictions are *not directly relevant* to the circumstances in which they are considered. This is a question of mixed fact and law, but the factual element is a question of jurisdictional fact – if the applicant does not have the protected attribute, the Tribunal cannot adjudicate this matter. The applicant bears the onus of proof.
73. As noted above, the test for the existence of a protected attribute that depends on the context is different to the other tests for a protected attribute under discrimination law. Hence, in *Pereira v Commissioner of Police*¹⁷, Commissioner Rice observed in relation to the similarly worded Northern Territory Act:

...to refer to the attribute as an 'irrelevant' criminal record is unhelpful drafting, as it incorporates into the definition an evaluation of the circumstantial status of the record ...it is the occurrence of those circumstances which renders the record 'irrelevant'.

74. The question in *Pereira* was whether the relied upon criminal record actually

¹⁷ *Pereira v Commissioner of Police* NT Anti-Discrimination Commission (15 August 2012)

existed – that is, it was the existence of the record that was in doubt. There is no doubt in the present case that a criminal record exists, the only question is whether or not the record itself was ‘directly relevant’. I have been unable to find any previous case that has considered what test to apply in the present circumstances.

75. There is definition of ‘relevance’ in the Discrimination Act, and therefore the ordinary meaning of the word should be considered. The Macquarie Dictionary defines ‘relevant’ to mean:

bearing upon or connected with the matter in hand; to the purpose; pertinent

and ‘irrelevant’ to mean:

not relevant; not applicable or pertinent.

76. Meanwhile ‘directly’ is defined to mean:

Adverb- 1.. in a direct line, way, or manner; straight.

2. without delay; immediately.

3. presently; soon absolutely; exactly; precisely.

Conjunction- 5. as soon as: directly he arrived, he mentioned the subject.

77. The question, therefore, is whether the circumstances of the offences for which the applicant was convicted absolutely or precisely bear upon the question of whether it is in the public interest that the applicant be licensed as a motor vehicle trader. This is an objective test – the circumstances in which the decision is made are relevant to this question, but belief of the decision-maker is not.
78. As a starting point, the Australian Human Rights Commission has issued guidelines on the operation of a prohibition on the consideration of criminal records found in the Australian *Human Rights Commission Act 1986* (Cth)¹⁸. The Commonwealth legislation has a different structure to that in force in the Territory, as it includes a prohibition on discrimination in employment, but also a defense that the conviction is relevant to the ‘inherent

¹⁸ AHRC, *On the Record*, See <https://www.humanrights.gov.au/our-work/human-rights-record-contents>

requirements' of the position. Still, notwithstanding the differences, the guidelines do provide some guidance. They provide relevantly as follows¹⁹:

The type of information which an employer may need to consider when assessing the relevance of a person's criminal record includes:

- *the seriousness of the conviction or offence and its relevance to the job in question whether in relation to the offence there was a finding of guilt but without conviction, which indicates a less serious view of the offence by the courts*
- *the age of the applicant when the offences occurred*
- *the length of time since the offence occurred*
- *whether the applicant has a pattern of offences*
- *the circumstances in which the offence took place, for example if it was an offence that took place in a work, domestic or personal context*
- *whether the applicant's circumstances have changed since the offence was committed (for example, past drug use)*
- *whether the offence has been decriminalised by Parliament or it was an offence overseas but not in Australia*
- *the attitude of the job applicant to their previous offending behaviour*
- *references from people who know about the offending history.*

79. These considerations are not dissimilar to the decision matrix established under the *Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2018* (No 1). Both set out what may broadly be described as 'common sense' principles about what one can infer about risk on the basis of a criminal record or criminal conviction.

80. I consider the following to be relevant to these considerations:

- (a) The convictions were serious, although certainly not among the most serious.
- (b) The applicant was driving at the time of the offences, and it is foreseeable that the applicant may need to drive vehicles as part of the role of a vehicle salesman.
- (c) The offences occurred in the context of dealing with difficult people, and the applicant may need to deal with difficult people as a vehicle

¹⁹ Chapter 5, recruitment: <https://www.humanrights.gov.au/our-work/human-rights-record-recruitment-chapter-5>

salesman.

- (d) The incidents did not occur in the context of a sales pitch or customer relations activities or other activity directly relevant to the role of a salesman.
 - (e) The applicant's offences occurred when he was an adult.
 - (f) The offences occurred less than two years before he applied for the licence.
 - (g) The applicant was still subject to a good behaviour bond at the time he made the application for a licence.
 - (h) The two incidents occurred within four months of each other, but such conduct has not been repeated and there has been no pattern of inappropriate or criminal activity.
 - (i) The applicant has not provided satisfactory objective evidence as to what has changed in the period since he committed the offences. Instead, he provided a subjective statement, and declined to provide character references.
81. The Commissioner has submitted that I should draw further inferences from the circumstances of the offences, including:
- (a) The convictions disclose a propensity for emotional dysregulation and acts of violence to persons and property which is directly relevant to the conduct of a licence holder and the safety of consumers and others in the motor vehicle trade.
 - (b) The convictions disclose propensities the possession of which by a licence holder will undermine public confidence in the integrity of the motor vehicle trade.
 - (c) The Commissioner was correct to be concerned about the need for further explanation.
82. The respondent offered no expert evidence to support the first or second contention, and I am presumably meant to draw the conclusion that the

applicant has such a propensity from the fact of the convictions. I cannot do so. At the highest, I can draw the conclusion that the applicant may have a relatively ‘short fuse’ when under stress, and that he may be particularly vulnerable when that stress arises from a traffic or road incident. Possibly, there is a greater risk of an altercation with a dissatisfied customer. However, I must also view the two incidents in the context of these being but two incidents over the course of a lifetime, neither of which involved an interaction with a customer, client or colleague.

83. Still, even if I accept that the applicant has a propensity to emotional dysregulation when under stress, I do not necessarily accept that this is directly relevant to the question of whether he should be excluded from a career in sales, or in the motor industry. The applicant must engage with society, he needs to work and hold down a job, he needs to interact with society at large when going about his daily business. In order to find these convictions *directly* relevant to consideration of whether the applicant should be permitted to work this area, I need to consider whether there is something about the role and functions of a motor vehicle salesman that could present a risk to the physical or economic harm to a customer, and whether there is something about the applicant’s convictions that may enhance that risk. In other words, is there anything about being a motor vehicle salesman that would increase the general risk to the public that the applicant poses because of his past conduct?
84. The delegate’s response to this question, put to him by his counsel, was that the regulation of the profession of a motor vehicle salesman was a matter of public safety:

MR HANCOCK: Why is it important that you think about public safety?—

DELEGATE: Because safety is - safety is everybody’s responsibility and particularly when you’re in a position where you are a decision-maker granting a licence. The way that Access Canberra assesses safety is that they balance, I guess, the risk and public safety versus the likelihood of an event happening, and what experience has shown us as a regulator is that when people have taken steps to change their behaviour and have engaged in the help of professionals or support groups or other mechanisms that exist, that the propensity for the behaviour is mitigated and that the

person can continue on in normal life. Now, in terms of safety in this context, we didn't see sufficient evidence that the granting of the licence would be necessarily safe for total strangers to be interacting.

85. And later:

MR HANCOCK: What did you understand to be - that statement to mean, that, 'The convictions do not demonstrate the behaviour expected from a licence holder.'?---Well, I think that that statement refers to the fact that, the nature of the convictions, the violent and unpredictable nature of the predictions and the fact that they occurred relatively recently, makes the motor trader's licence inappropriate.

By whom - if you understood that sentence, by whom is the expectation; whose expectation is this?---The public. So if you're going to - if you are interacting with any trader that has got a licence, you don't expect the person to have a propensity for violence or unpredictable behaviour in fairly fluid situations, which is what I would call moving in and out of traffic.

Why is that an important thing? Why is it here an important thing, this expectation of the public?---Well, it's here because if we don't take that into account then we're not being a responsible regulator.

A responsibility to?---The care of duty that we have to the general public.

86. I accept the delegate's argument that there is a public interest in ensuring that consumers who purchase motor vehicles are protected from unnecessary risks. While I consider these risks to be primarily financial, I accept that there may also be public interest in protecting consumers from persons who present a genuine physical or emotional risk to them. However, I am not satisfied that the mere fact that the applicant has the convictions gives rise to a reasonable basis for reaching the conclusion that the convictions mean he has a propensity for violence or that he presents a greater risk to consumers. I am satisfied that there is no *direct* link between the circumstances of the offences and a risk to the public interest in consumer protection or public safety.

87. Consequently, I am satisfied that the respondent has taken into consideration an irrelevant criminal record. This means that applicant has the protected attribute of 'irrelevant criminal record' for the purposes of section 7(1) of the Discrimination Act.

Was the applicant treated unfavourably because of his protected attribute?

88. Pursuant to section 8(2), the respondent will have discriminated against the applicant if it:

- (a) treated the applicant *unfavourably*;
- (b) *because* the applicant had a protected attribute.

89. The respondent declined to grant the applicant a licence. Plainly, this was an unfavourable action.

90. The respondent suggested that because the applicant had an alternative means of review available through administrative review, and he did not avail himself of that review opportunity, there has been no ‘unfavourable treatment’ by the respondent. I do not accept this argument. The applicant has remedies under both statutory frameworks and was entitled to choose which he commenced proceedings under.

91. The next question is whether that treatment was because of an irrelevant criminal record. Presidential Member Spender set out the test for causation in the case of *Kovac v Australian Croatian Club Limited* [2014] ACAT 41 as:

*Whether the applicant’s [protected attribute] is, either alone or in combination with other reasons, a real, genuine and not insubstantial reason for the unfavourable treatment... so in determining whether the respondent [in that case] has treated the applicant unfavourably... the Tribunal will take into account all reasons for doing the act other than those that are not real or genuine or are insubstantial.*²⁰

92. The question before the Tribunal is whether the unfavourable treatment was ‘because’ of a protected attribute. It does not need to be exclusively or solely because of that protected attribute.

93. The delegate gave evidence about reason for the decision. Unfortunately, his evidence was unreliable. He said he recalled, and gave an account of, his active participation in a key meeting of the RAC which he later admitted he did not attend at all. However, as set out above, I accept the documentary

²⁰ At [90]

evidence that is before the Tribunal as to the reasons for the decision, including the statement of reasons adopted by the delegate. That statement of reasons is clear that the applicant's criminal convictions were a substantial, if not the substantial, reasons for the decision.

94. Accordingly, I am satisfied that the applicant was treated unfavourably because of his irrelevant criminal record.

Qualifying bodies

95. The remaining question is whether the Commissioner is a 'qualifying body' pursuant to section 16 of the Discrimination Act. This provides:

16 Qualifying bodies

It is unlawful for an authority or body that is empowered to confer, renew, extend, revoke or withdraw an authorisation or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation to discriminate against a person—

- (a) by failing to confer, renew or extend the authorisation or qualification; or*
- (b) in the terms or conditions on which it is prepared to confer, renew or extend the authorisation or qualification; or*
- (c) by revoking or withdrawing the authorisation or qualification or varying the terms or conditions on which it is held; or*
- (d) by subjecting the person to any other detriment.*

Note The Legislation Act, dict, pt 1 defines **fail** to include refuse.

96. The Discrimination Act is to be interpreted in a beneficial and not in a narrow way. Section 4AA of the Act expressly provides that the Act must be interpreted in a way that is beneficial to a person who has a protected attribute.
97. The respondent is empowered to confer licences under the Trades Licensing Act. The applicant argues that the licence is an 'authorisation' to engage in the occupation of a motor trader. There is no definition of 'authorisation' in the Act, so regard should be had to the ordinary meaning of the term. An 'authorisation' is defined in the Macquarie Dictionary as:

noun the act of authorising; permission from or establishment by an authority.

98. In order to work in the occupation of motor vehicle trader, the applicant must be licensed. To trade without a licence would be an offence under section 45 of the Traders Licensing Act. Section 45(1) - (2) of the Licensing Act provides that:

- (1) *A person commits an offence if the person—*
 (a) *carries out a licensed activity; and*
 (b) *is not licensed to carry out the licensed activity.*

Maximum penalty: 50 penalty units.

- (2) *A person commits an offence if the person—*
 (a) *carries out a licensed activity at premises; and*
 (b) *does not hold a licence authorising the person to carry out the licensed activity at the premises.*

Maximum penalty: 50 penalty units.

99. In other words, it is an offence to carry on a licenced activity without a licence. A licence is an authorisation to do something that is otherwise prohibited.²¹ This provision leaves little doubt that a licence is an authorisation.

100. In terms of whether the applicant is engaged in an ‘occupation’, the ordinary meaning of that term is: “noun 1. one’s habitual employment; business, trade, or calling.”

101. I am satisfied that the applicant wishes to engage in the business of trading in motor vehicles as his habitual employment. In any case, and given section 4AA of the Discrimination Act makes it clear that the legislation should be interpreted beneficially, no purpose is served by taking an unduly or technical interpretation of the term ‘occupation’. I do not need to consider whether the applicant may also be engaging in a trade.

Outcome

102. The intention of the amendments to the Discrimination Act are clear: a person’s criminal conviction should not ‘hound’ them for their whole life, keep them out of employment, or cause them to be subject to discrimination or disconnected

²¹ *Federal Commissioner of Taxation v United Aircraft Corp* (1934) 68 CLR 525, 533
 “A licence provides an excuse for an act which would otherwise be unlawful...”

from employment, other aspects of public life, or the chance to earn money.²²

103. The Traders Licensing Act requires consideration of whether the granting of a licence is in the public interest. That Act establishes a statutory framework under which there is a range of relevant considerations. However, the Discrimination Act provides that where one of those considerations is a criminal conviction, it may only be considered if the offence is *directly* relevant to the situation in which it is being considered.
104. In this case, the question was whether the applicant’s convictions were directly relevant to the question of whether the applicant should be licensed to perform the role and functions of a motor vehicle trader. I am satisfied that neither conviction meets this test. Consequently, by taking those convictions into consideration, the Commissioner has discriminated against the applicant on the basis of an irrelevant criminal record.
105. Obviously, the need to consider whether a conviction is not just relevant, but directly relevant, places a greater regulatory burden on decision makers. I note that under section 30 of the Discrimination Act, the Discrimination Act does not make unlawful anything done necessarily for the purpose of complying with a Territory law. It is open legislature to refine the statutory scheme to make it clear that what criminal offences may be considered.
106. The matter is relisted on for submissions on remedy.

.....
Senior Member H Robinson

²² Australian Capital Territory, Debate Discrimination Amendment Bill 2016, Legislative Assembly for the ACT, 4 August 2016, 2351 (Shane Rattenbury)

HEARING DETAILS

FILE NUMBER:	DT 8/2019
PARTIES, APPLICANT:	Complainant 201908
PARTIES, RESPONDENT:	Commissioner for Fair Trading
COUNSEL APPEARING, APPLICANT	Mr J Macken
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	Bradley Allen Love
SOLICITORS FOR RESPONDENT	ACT Government Solicitor
TRIBUNAL MEMBERS:	Senior Member Robinson
DATES OF HEARING:	28 October 2019



What is a Notice of Decision?

A Notice of Decision (the *Notice*) is the formal advice provided by Access Canberra to an applicant to refuse an application.

This provides the applicant with Access Canberra's decision and the reasons for the decision, as well as the process for the applicant to appeal the decision.

For CITL, examples of decisions that require a formal Notice of Decision might include:

- A refusal to issue security licence subclass C;
- A refusal to incorporate an association; or
- A decision not to issue a motor vehicle repairer licence.

What about for applications we have granted?

If the application has been granted, then a Notice of Decision is not required. Instead, a letter or licence is issued with Access Canberra's decision and the requirements of the legislation attached to that licence/incorporation etc.

What information is provided?

The Notice must include:

- Who has made the decision (the delegate);
- The Statutory Officer responsible for the legislation;
- The section of the Act under which the decision has been made; and
- The refusal.

For example:

I, Alex McPherson, Delegate of the Commissioner for Fair Trading (the **Commissioner**), pursuant to section 25(1)(b) of the *Security Industry Act 2003* (the **Act**), hereby issue the security employee licence applied for with subclasses 1A (general guarding) and 1E (monitoring centre operator) only. Subclass 1C (crowd control) is refused.

The signature and title details of the delegate must be included, and the name, title and contact details of the contact officer. This is so the applicant has someone to follow up with if they have questions.

Part 1 of the Notice steps out the reasons for the decision. This should be laid out in simple steps so that the decision can be understood. Here at Access Canberra we live and breathe the legislation and regulatory decision-making framework – for most people, it can seem like a different language.

It is important that someone who has not been involved in making the decision can understand why a certain decision has been made.

Part 2 provides information about options for review by the ACT Civil and Administrative Tribunal (ACAT).

Why do we need to send this?

This formal Notice serves several important functions.

- It provides our answer to the applicant.
- It sets out their potential avenues for review.
- It finalises the application process.

Who signs off on this?

The Notice is signed by the Delegate as set out in the delegations relevant to that Act.

As a general rule of thumb, the more complex the decision that was made, the higher up the delegation lies.

Only Senior Directors and above can sign off on a decision that is different from a recommendation made by RAC.

Never send a Notice from a delegate who has not have the chance to review and approve the Notice.

As with all other formal correspondence, the Notice should be sent in PDF format so as to restrict the opportunity to make changes to it once it has left Access Canberra.

Where do I save this?

The last step of this process is to save the Notice with the application.



General overview

A delegation is where one entity entrusts a function to another person. Across the ACTPS, this usually means that the Director-General or Minister has been given a function under legislation, and they delegate down that function to people in the directorate to carry out that function.

A statutory office appointment is a specific position created by an Act which has certain powers or functions attached to the position, such as regulating compliance; issuing licences or registrations or providing advice to the Minister on the day to day operation of the Act. A person appointed to one of these statutory office positions is called a statutory office holder.

For CITL, the relevant delegations are linked to the statutory offices of:

- Registrar-General (which is the person in the position of Deputy Director-General, Access Canberra)
- Commissioner for Fair Trading (which is the person in the position of Chief Operating Officer, Access Canberra)
- Controlled Sports Registrar (which is the person in the position of Executive Branch Manager, Licensing & Registrations)

Fun fact

A person may be the acting DDG, COO or EBM, but the Statutory Office is not an acting role. So the Acting Deputy Director-General is still the Registrar-General, not the Acting Registrar-General.

How delegations are made

The Legislation Act 2001 provides the framework for how a delegation is made.

- Unless the relevant Act provides otherwise, the power to delegate cannot be delegated.
- A delegation must be in writing.
- The appointer may delegate by – (a) naming the person to whom the delegation is made; or (b) nominating the occupant of a position (however described) (e.g. position number, title or classification), at a particular time or from time to time.

CITL delegations

Where do I find my delegations?

The Access Canberra Government Business and Coordination (GBC) team manages all Access Canberra operational delegations and appointments. The team drafts delegation and appointment instruments and arrange for them to be signed. All instruments are stored in Objective and entered into the [Access Canberra Delegations and Appointment Register](#).

There are over 10,000 individual delegations and appointments for Access Canberra staff. If in doubt about your delegations, you can check with the GBC team at AccessCanberraGBC@act.gov.au or check the current instrument in [Objective](#).

What do I need to escalate?

As a general rule of thumb, the more serious a decision is, the high the level at which a decision must be made.

Each delegation instrument sets out the detail of delegations for each act by Section. This means that just because someone hold delegation under section 25 (1); they may not hold delegation under section 25 (2). When in doubt, refer to the delegation instrument or flag the question with the team leader or assistant manager. Remember – just because something “has always been done this way”, does not mean that it is the best way.

How do I refer to myself?

When you are exercising the delegations granted under a statutory authority, you do not use your Access Canberra title. Instead, you are the *Delegate of the Commissioner for Fair Trading*, the *Delegate of the Registrar-General* or the *Delegate of the Controlled Sports Registrar*.



When do we need legal advice?

There are several reasons why we might need to get legal advice. It might be the first time a section of legislation is being enacted (such as with the implementation of the *Controlled Sports Act 2019*). A strict reading of the legislation may appear unfair or excessive when mitigating circumstances are taken into account. Or it may be a yellow brick road of legislative clauses referring to other items of legislation (such as the *Crimes Act 1900*, the *Public Sector Management Act 1994* or the *Registrar-General Act 1993*).

Another time to call in legal assistance is if another party mentions they are being legally represented, or if we are contacted by a law firm on an applicant's behalf. (If this is the case, please make sure you bring your Assistant Director and Director up to speed as a matter of urgency, as there may be significant flow on effects.)

Recent CITL examples include:

- Queries around the transitional clause of the *Controlled Sports Act 2019* applying to promoters or not;
- Clarification under the *Security Industry Act 2003* about the 10 year mandatory disqualifying period applying to security licence applicants who committed offences as juveniles; and
- A member from an incorporated association engaging legal representation against the association's committee and a subsequent request made to Access Canberra.

How do we access legal advice?

In Access Canberra legal assistance is provided by the ACT Government Solicitor's Office. Requests are sent in via a [smart form](#), which will prompt a requirement for Senior Director approval.

Before formally requesting legal advice:

- Check in with the Assistant Manager and Assistant Director to see if similar advice has been requested in the past;
- Talk to the Director and Senior Director to see if the legal advice is required (as they will need to approve it in the portal, and giving them a heads up may increase your chances of the request being actioned promptly); and
- Consider what it is that you need advice on – is it an interpretation of the legislation, or is it a matter of policy?

What do I need to provide?

When requesting legal advice, you should include:

- the specific issue or concern;
- the relevant clause of the Act in question; and
- any material that you think affects the reading of the legislation; or

- an outline of the situation, and why the issue has been raised.

Who needs to approve me asking for legal advice?

All requests for advice submitted through the smartform must be approved by the Senior Director. No requests will be actioned without this approval.

What if the advice is needed urgently?

If advice is needed urgently, talk to your Assistant Director. In consultation with the Senior Director, they may need to contact the GSO solicitor embedded in Access Canberra directly.

How do we apply the legal advice?

Legal speak can seem like a language all of its own. Talk to your Assistant Manager or Assistant Director if you are unsure of the direction being given.

Once you have the legal advice, this forms part of the information you should put forward to the delegate when recommending a course of action or a particular decision outcome.



CITL Notifiable Instruments

General overview

A proposed new law passes through several stages before it becomes a law. Notification is the final stage of the process. Acts and certain legislative instruments must be formally notified and made publicly available for them to become legally effective. The Parliamentary Counsel's Office (PCO) is responsible for notifying the community of new laws by publishing on the legislation register a statement that the Act or instrument has been made and the text of the Act or instrument.

Notifications can be accessed on the [legislation register](#).

Notifiable instrument templates are found on the [PCO website](#).

Notification information for ACT government officers and notification officers

The authorising provision of an Act or instrument under the legislative instrument to be notified will usually tell what type of instrument it is and whether the instrument should be notified. The relevant laws for CITL are:

- *Justices of the Peace Act 1989*
- *Associations Incorporation Act 1991*

Instrument details

Notification number

The notification number is a unique number allocated to a legislative instrument by PCO before the instrument is notified on the register. The number for notifiable instruments will always commence with NI and the year, so NI2019-; NI2020- etc. This is all the information that is needed when putting up an instrument for signature.

Instrument title

The title of the instrument requires more information to be entered. Each instrument requires a unique title and is sequential within years. The name of the instrument comes from the title of the Act. So for CITL:

- Justices of the Peach Appointment 2019 (No 2)
- Associations Incorporation (Cancellation) Notice 2019 (No 1)

If an instrument is the first for the year, the name should include (No 1) at the end. If another instrument with exactly the same name is made in the same year, the instrument should be given an identifying number to make the name of the instrument unique.

Commencement

A legislative instrument commences:

- on the date specified in the instrument; or
- on the day after its notification day is no date if specified.

All instruments should include the phrase: "This instrument commences on the day after it is notified."

A legislative instrument is **not enforceable** if it is not notified on the legislation register. As soon as the instrument is signed (whether by the Minister or the Registrar-General) the Access Canberra Government Business & Coordination team (accesscanberraGBC@act.gov.au) should be sent the signed (PDF) and unsigned (word) versions with a request to lodge the instrument for notification via PCO.

Authorising law

Always include the name of the authorising law under which the instrument is made, as well as the authorising provision of the authorising law.

Eg. *Justices of the Peace Act 1989*, section 3 (1) (Appointments); *Associations Incorporation Act 1991*, s93(3) Cancellation of Incorporation

Maker of the instrument

This refers to the person who signs the instrument. For CITL this is either the Attorney-General for JP-related instruments, or the Registrar-General for Association-related instruments.

- The instrument needs the name and title, so David Pryce, Registrar-General.
- Under the name and title, include the date the instrument has been signed.

The Access Canberra Lifeline

For any questions about Notifiable instruments, the Access Canberra Business & Coordination (accesscanberraGBC@act.gov.au) team is the holder of all knowledge. The team members are always happy to answer any questions or look over any drafts.

The little things that make the difference

When listing peoples' names, the list should be alphabetical order by surname, with the surname in capitals:

Lucy ABLE

Greg COOK

John SMITH

Always check the font is as in the template. (Example below)

Arial 20pt, bold

Water Resources (Fees) Determination 2011 (No 2)

Arial 12pt, bold

Disallowable instrument DI2011—{number filled in by CLO}

Times new
roman, 12pt

made under the

Arial 10pt, bold

Water Resources Act 1998, s 107 (Determination of fees)

Arial 12pt, bold

1 Name of instrument

Times new
roman, 12pt

This instrument is the *Water Resources (Fees) Determination 2011 (No 2)*.

2 Commencement

This instrument commences on 1 July 2011.

3 Determination of fees

The fees set out in the schedule are determined.

4 Payment of fees

The determined fees are payable to the ACT Government by a person requesting the goods or services mentioned in schedule 1.

5 Revocation

This instrument revokes the *Water Resources (Fees) Determination 2011 (No 1)* DI2011-12.

Times new
roman, 12pt

Bill Wood
Minister for Urban Services
15 June 2011



Background

The Access Canberra Regulatory Advisory Committee (RAC) is the advisory committee for providing governance and oversight on key regulatory matters in Access Canberra.

RAC will, among other things, consider the following:

- Applications for a licence or registration which may be refused, or where there is a complex licence decision to be determined.

RAC is not a decision-making body. RAC considers all information available and provides a recommendation on the appropriate course of action. The final decision rests with the decision maker, i.e. the Delegate for the Commissioner for Fair Trading.

When to take a matter to RAC

A matter should be taken to RAC when guidance is required on a licensing or registration decision. So:

- If there is reasonable doubt as to the outcome, then it should be taken to RAC.
- If a mandatory disqualification applies, then this does not need to go to RAC – the information should instead be put to the Delegate.
- If there is the potential for imposing conditions on a licence, this should be taken to RAC.

If a previous RAC recommendation has not been implemented and additional information has been provided, or the circumstances have changed, it may be appropriate to bring the matter back to RAC.

Common CITL RAC submissions include cases where a criminal conviction casts doubt on an applicant's suitability to hold or maintain a licence. In these instances, it may be appropriate to recommend that a licence be granted with conditions; or that a sub-class be granted in place of a full licence. There may also be room for interpretation on the severity of a particular criminal offence.

If there is a concern that a particular decision might establish a precedent, escalate the decision to the Assistant Manager or Assistant Director for a second opinion.

Legal advice

Representatives from the Government Solicitors Office attend to assist the Committee but cannot provide in-depth advice during the meeting. If legal advice is required, this should be sought before submitting to RAC.

The process

If a licence application comes through that needs further investigation before a licence is issued, it should be raised with the CITL Assistant Manager for preparation of a RAC brief.

Once the brief has been prepared, it is reviewed by the Assistant Director and Director before being sent to the Senior Director for final determination.

Once cleared, the brief and supporting documents are sent by the Senior Director to the RAC Secretary at AccessCanberraRAC@act.gov.au. The Secretary will then invite the Senior Director and key staff to attend the meeting.

The meeting

The meeting is attended by two Executive Branch Managers, one Senior Director and Access Canberra's GSO Liaison. It is chaired by the Executive Branch Manager of either Customer Coordination or Licensing & Registrations.

During the meeting, outline the key facts of the case and the recommendation. Work on the assumption that the papers have been read in advance of the meeting, so significant detail is not needed. The Committee may have questions or request additional clarification.

Things the Committee will consider include:

- *Harm and detriment*: Is the recommendation going to cause or avoid harm or detriment?
- *The seriousness of the conduct*: Was the conduct reckless or deliberate? Was it ongoing or a single instance? Was it intentionally deceptive?
- *The risk created by the behaviour*: Is the risk aligned to the strategic intent and objectives of the legislation? Can the risk be mitigated in some way?

RAC can be a good opportunity to see how different perspectives can influence the way recommendations are made. If you're interested in having exposure to the way RAC works, have a chat with your Assistant Manager or Assistant Director in order to arrange a session to sit in on as an observer.

Recommendations

The reasons for a recommendation of the RAC will be documented by the Secretary who will file all relevant information in the appropriate Objective file.

It is the responsibility of the EBM, Senior Director and the relevant staff member who brought the matter before the Committee to implement the recommendation, including referral to the delegate for their consideration and sign-off if necessary.

If the Delegate chooses not to implement the recommendation of the Committee, then that is their right. If, however, the matter is contested through ACAT, the choice not to implement the recommendation may be a consideration in the administrative review. For this reason, *if the decision is made not to implement the recommendation, this decision must be made by the Senior Director.*



What makes a decision reviewable?

Each individual Act has a section on reviewable decisions. In table format, it sets out the section of the Act, the decision made according to that section, and who can request review of the decision. In working terms, most regulatory decisions made across Access Canberra can be reviewed.

For CITL the Acts that provide for reviewable decision by ACAT are:

- *Agents Act 2003*
- *Associations Incorporation Act 1991*
- *Controlled Sports Act 2019*
- *Charitable Collections Act 2003*
- *Security Industry Act 2003*
- *Traders (Licensing) Act 2016*

Who can review the decision?

Decisions are formally reviewed by the ACT Civil and Administrative Tribunal (*ACAT*). ACAT is an independent body that hears and determines a range in the ACT, including:

- Reviewable decision made by the ACT Government (as covered by the legislation above); and
- Disciplinary action for certain occupations. (While this doesn't directly affect CITL, we may then need it implement a decision if a licence needs to be suspended or cancelled as a part of the finding.)

How does a decision get reviewed?

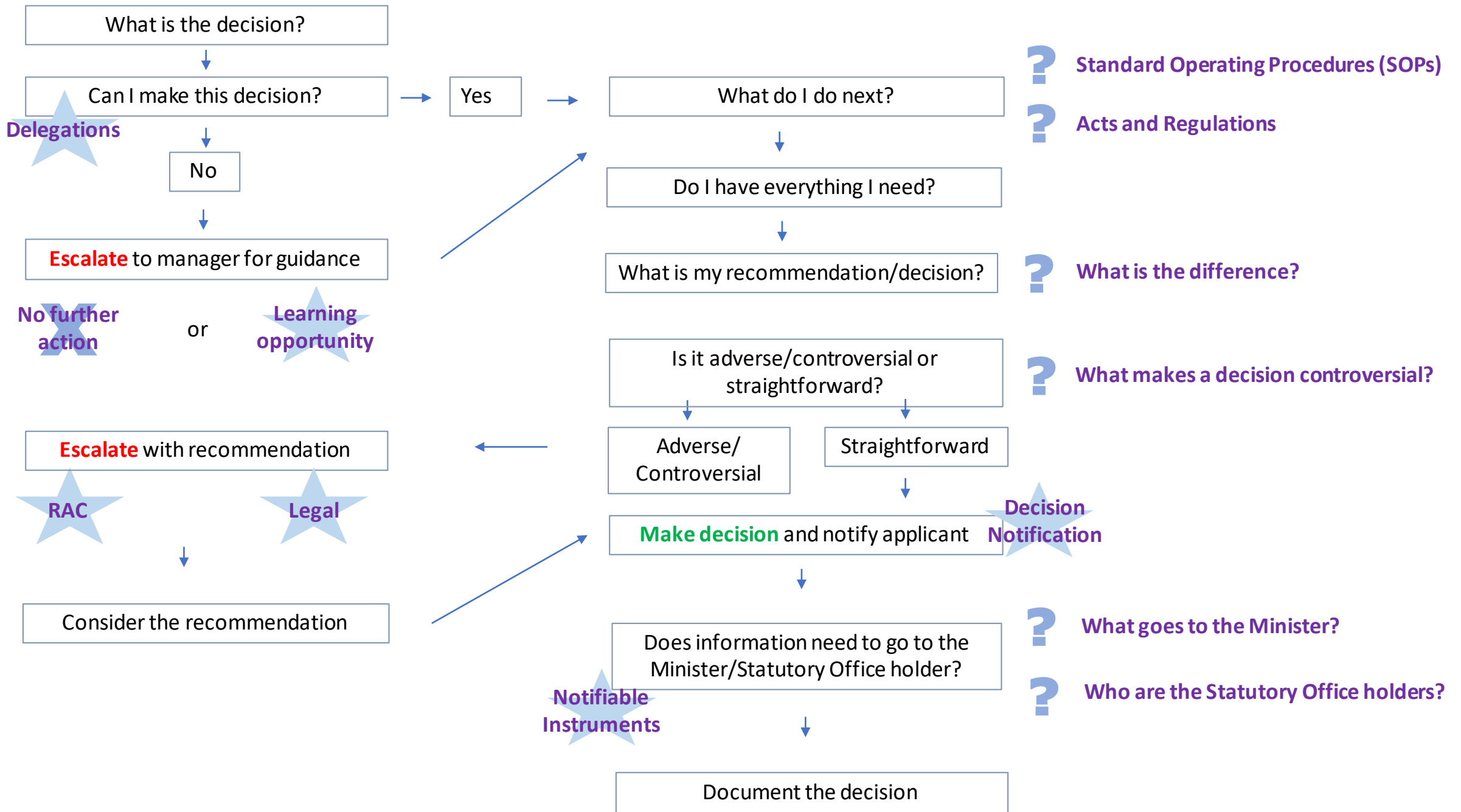
Essentially what happens is that ACAT steps into our shoes and makes the decision again. They take into account our authorising environment (including the legislation – eg. *Security Industry Act 2003* – and the role of any relevant Statutory Office holder – eg. The Commissioner for Fair Trading), the information we were provided with by the applicant and any other information or advice we had access to when making the decision.

What happens if the decision made by Access Canberra is overturned?

If ACAT comes to a decision that is different from the original Access Canberra decision, then it is as though the original Access Canberra decision was never made. If a licence/registration was refused by Access Canberra and ACAT determines that the licence/registration should not have been refused, then Access Canberra must issue the licence/registration.

Is an ACAT decision final?

Yes. Once ACAT makes their decision, it is final and must be implemented.



Escalating decisions in Licensing & Registrations – BDM and CITL

This document provides additional details in support of the Escalation Flowchart.

Every day 8,000 regulatory decisions are made across Access Canberra. We are trusted to make good decisions to keep our community safe. At the heart of this lies solid decision-making processes. Every decision we make has the potential to make a serious impact on the community we serve. Decisions can be made at many levels across the organisation. This framework is designed to provide some structure around when a decision should be escalated.

The principles behind good decision-making

There are a few principles that underpin good decision-making.

- **Good documentation and record keeping:** This applies not only in gathering the information required to make the decision, but also in recording the rationale behind why a particular decision was made, and by whom. It needs to be easy to find too, so once you've got all of the relevant information available, make sure it's stored in an appropriate location with an appropriate file name.
- **Consistency:** Decisions should be consistent with legislation and procedures, but also should not be significantly out of line from other similar decisions – unless there is a well-documented and agreed upon reason for doing so. Decisions like this will normally see involvement by your managers, or even escalation to RAC.
- **Fairness:** A decision maker should not be involved in a decision where a conflict of interest exists, even if the decision maker has the proper delegation or authority. All administrative decisions should be reviewable.
- **Timeliness:** Wherever possible, a decision should be made in a timely fashion. This also requires early identification of whether a decision should be escalated.

You've received a request that requires a decision. What next?

What is the decision?

What decision is required? Is it the granting/refusal of a licence? Is it a change of name? Is an entity requesting registration?

What is the impact of the decision, both upon the person/entity requesting it, and the broader community?

Can I make this decision?

Do you feel confident in moving forward? Is this similar to other decisions you make? Do you have the authority under the applicable Act to make this decision?

If not, **escalate this to your manager for guidance**. Your manager will then help you to work through the next steps, or there may be no further action required from you.



Refer to *CITL Delegations* for more details specific to CITL.

What do I do next?

What Procedures apply? What Act is referenced?

? **Standard Operating Procedures**

A Standard Operating Procedure (SOP) is a set of step-by-step instructions to provide guidance in carrying out routine operations. SOPs aim to achieve efficiency, a quality and consistency of outcomes.

SOPs should be written in consideration of the appropriate legislation, agency requirements, available systems and team makeup. They are used to train new team members, provide guidance on new processes, or to step through a complicated system.

? **Acts and Regulations**

The Act will always be your cornerstone. It informs the procedures and lays out the rights of the citizen/entity, as well as the responsibility of the regulator (Access Canberra) or statutory officer (Registrar-General; Commissioner for Fair Trading; Controlled Sports Registrar; or Attorney-General).

Acts provide clear criteria about what can or cannot be done under certain circumstances, as well as what can be required on the part of both the customer and Access Canberra. They are written in a specific kind of language, which can feel fairly strange at first. If you do not understand what something means, speak with your manager for help interpreting it.

Regulations may be referred to in an Act. These lay out more specific elements about what is required and are more frequently updated than Acts themselves. Both Acts and Regulations set out “the law”.

Acts and Regulations can be found on the [ACT Legislation Register](#).

Do I have everything I need?

What information is required according to the Act or Procedure? Do you have all the information you need?

Can the information be verified? Is there anything that seems “off” about the documents you have? Is there any contradictory information?

Almost all Acts cover instances in which we can request further information from an applicant so as to make an informed decision. If you do not have everything you need, go back to the applicant to get it.

What is my recommendation/decision?

? **What is the difference?**

A recommendation is your proposal of what you think should be done. This may be because you have not come across this particular topic before; or you may not have the delegation to sign off on it.

A decision is what you are able to sign off on yourself. It does not need further approval from your manager.

Is it adverse/controversial or straightforward?

If it is straightforward decision in the applicant's favour, *make the decision* and notify the applicant.

If it is not, if the outcome is not favourable, or if a contentious/adverse decision is required, then *escalate with your recommendation*.

? *What makes a decision controversial?*

Controversial decisions are those where it might not have been in line with similar situations before; where the outcome might be sensitive; or where a reading of the situation might have different interpretations. Adverse decisions are those where the outcome will not be what has been requested; essentially, where the answer is "no".

Does this need a formal sign off? Does this simply need advice? Does this need input from another area?

Is the application of the legislation unclear? Is legal advice required? Would a strict application of the law be deemed unfair or excessive?

★ Refer to *CITL Legal Requests* for more details specific to CITL.

Does the matter need to go to RAC for a regulatory recommendation?

★ Refer to *CITL RAC Briefs* for more details specific to CITL.

Consider the recommendation

Is the recommendation practical? Does it align with what can be put in place?

Do you agree? Do you have delegation?

If yes, *make the decision and notify the applicant*.

Only Senior Directors may approve a decision to go against a RAC recommendation. If this decision is made, you will need to have this instruction in writing and with the justification for doing so clearly recorded.

Make the decision and notify the applicant

Is there a strong link between the decision and the application? Could someone who has no knowledge of the matter follow why a particular decision has been reached?

Have you saved the decision and rationale? Have you communicated the outcome to the applicant?

Have you provided full information about the applicant's right to appeal?



Refer to *CITL Decision Notifications* for details specific to CITL.

Does information need to go to the Minister/Statutory Office holder?

Who needs this information? Is it a more senior member within Licensing & Registrations? Is it a Statutory Officer? Is it the Minister? This will dictate what kind of briefing is required, and what level of internal clearance is needed.

? *What goes to the Minister?*

Not all decisions can be made within Access Canberra. Some, like Justice of the Peace appointments, must be made by the relevant Minister. This should be reflected in individual SOPs and can be confirmed in the delegations of each Act.

At other times, information may need to be escalated to the Minister for their awareness of a decision which will impact their constituents or the services able to be provided by Access Canberra. If this is the case, the Senior Director or Executive Branch Manager will ask for a Ministerial briefing.

A Ministerial Brief is required for briefings to the Minister for Business & Regulatory Services or the Attorney General. Templates can be found on the [CMTEDD Intranet](#) and will step you through what is required. These should be saved in Objective and cleared by the Senior Director and Executive Branch Manager, before then being escalated to the Chief Operating Officer and the Minister's Office.



Is a Notifiable Instrument required as part of this information? If so, refer to *CITL Notifiable Instruments* for details specific to CITL.

? *Who are the Statutory Office holders?*

There are several Statutory Office holders within Access Canberra. Relevant to Licensing & Registrations are the:

- Registrar-General (the Deputy Director-General);
- Commissioner for Fair Trading (the Chief Operating Officer); and
- Controlled Sports Registrar (Executive Branch Manager, Licensing & Registrations).

There may be decisions that cannot be delegated to another member of Licensing & Registrations, or information may need to be provided around sensitive matters. The Senior Director will let you know if this is required.

Internal Minutes are required for briefings to Access Canberra executives or Statutory Office holders. Templates can be found on the [CMTEDD Intranet](#). These should be saved in Objective and cleared by the Senior Director and Executive Branch Manager.

Document the decision

If you have not kept a record of your decision, it may not be considered to have been made. Whether the decision is kept in a database or in Objective, it should be clearly laid out, with a title

that allows someone with no involvement to find it and understand why you made a particular decision. These documents should not be kept in personal drives or emails. The purpose is that someone could come into your area/role and follow what has been done.



Remember that these may be needed as an answer to a Freedom of Information (FOI) request (refer to *FOI 101*) or as a reviewable decision (refer to *CITL Reviewable Decisions*) through an avenue such as the ACT Civil and Administrative Tribunal (ACAT).

FOI 101

The Act

The Freedom of Information Act 2016 (the FOI Act) is designed to make information held by the Government more accessible. The intention is that formal access applications for information under the FOI Act should be a last resort, with a greater focus on the proactive disclosure of information.

The Public Interest

Information does not need to be published where it is contrary to the public interest information as defined in section 16 of the FOI Act. That is, information:

- which is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act, or
- the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17 of the FOI Act.

Government information

Government information is defined in section 14 of the FOI Act as information 'held' by an agency or Minister, excluding information related to a Minister's personal or political activities, or created or received by a Minister in the Minister's capacity as a member of the Legislative Assembly.

This includes information contained in a 'record' that is held by the agency or the agency is entitled to access.

Record is defined broadly to mean any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means, or a copy of such a record. Consequently, the FOI Act covers not just written documents, but a wide range of materials, including emails, electronic recordings, photographs, videos and post-it notes.

The applications

Increasingly, FOI legislation and formal FOI processes for accessing government information have become more well known and utilised in the ACT. As a result, the public often attempt government information through an access application in the first instance.

While this may be appropriate in some cases, in others, the information requested may have been able to be provided to the person more quickly and informally outside of the access application process. This poses several issues, the most obvious being the time and resources required to process an access application which may have been avoided if the request had been dealt with informally.

Publicly available information

The first consideration is whether the information is already publicly available.

- Publicly available information is routinely provided by agencies to the public every day, including by frontline staff providing copies of leaflets and handouts, information provided by call centre staff directly over the phone responding to general enquiries, and information published on an agency's website.

Where a person is informally requesting government information that is publicly available, they should be advised where to find the information and assisted if they are having difficulty finding the information.



Notice of decision

Under the *Name Act Year*
x Committee

REFERENCE NUMBER: XXXXX	DATE LODGED: xxxx
DATE OF DECISION: x	
ASSOCIATION NAME: x	
APPLICANT: x	

THE DECISION

I, x, Delegate of the x, pursuant to section x of the *Name Act Year* hereby **refuse** to xxx.

PART 1 sets out the reasons for the decision.

PART 2 contains administrative information relating to the decision.

DELEGATE

Signature

(Example) Giuseppe Mangeruca
Delegate of the Registrar-General
Senior Director, Licensing and Registrations Branch
Access Canberra

CONTACT OFFICER

(Example) Megan Corrigan
A/g Director, Community, Industry & Trader Licensing
Access Canberra
Phone: (02) 6207 7665
Email: megan.corrigan@act.gov.au

PART 1
REASONS FOR THE DECISION

1. Stepped out according to the decision rationale and linked back to the legislation.

PART 2

ADMINISTRATIVE INFORMATION

REVIEW BY THE ACT CIVIL AND ADMINISTRATIVE TRIBUNAL (ACAT)

The following notes are provided in accordance with section 7 of the *ACT Civil and Administrative Tribunal Regulation 2009*.

CONTACT DETAILS

<p><u>Location:</u> ACT Civil & Administrative Tribunal 4/1 Moore Street CANBERRA CITY ACT 2601</p>
<p><u>Contact details:</u> Website: www.acat.act.gov.au Email: tribunal@act.gov.au Telephone: (02) 6207 1740 Facsimile: (02) 6205 4855 Post: GPO Box 370, CANBERRA, ACT, 2601</p>

POWERS OF THE ACAT

The ACAT is an independent body. It can review on their merits a large number of decisions made by ACT Government ministers, officials and statutory authorities. The ACAT can agree with, change or reject the original decision, substitute its own decision or send the matter back to the decision maker for reconsideration in accordance with ACAT recommendations.

APPLICATIONS TO THE ACAT

To apply for a review, obtain an application form from the ACAT.

TIME LIMITS FOR APPLICATIONS

An application for review must ordinarily be lodged within 28 days of the date that you received this Notice of decision. The time limit can be extended in some circumstances. Check with the ACAT for more details.

FEES

Applications to the ACAT, including an application to be joined as a party to a proceeding, require payment of a fee. You can apply to have the fee waived on the grounds of hardship, subject to approval (refer to section 22T of the *ACT Civil and Administrative Tribunal Act 2008*).

PROCEDURES OF THE ACAT

The procedures of the ACAT are outlined on the ACAT's website. Contact the ACAT for alternative ways to access information about the ACAT's procedures

TRANSLATION AND INTERPRETER SERVICES

The ACT Government's translation and interpreter service runs 24 hours a day, every day of the week. Telephone 131 450.

ENGLISH	If you need interpreting help, telephone:
ARABIC	: إذا احتجت لمساعدة في الترجمة الشفوية ، إتصل برقم الهاتف :
CHINESE	如果你需要传译员的帮助，请打电话：
CROATIAN	Ako trebate pomoć tumača telefonirajte:
GREEK	Αν χρειάζεστε διερμηνέα τηλεφωνήσετε στο
ITALIAN	Se avete bisogno di un interprete, telefonate al numero:
MALTESE	Jekk għandek bżonn l-għajnuna t'interpretu, ċempel:
PERSIAN	: اگر به ترجمه شفاهی احتیاج دارید به این شماره تلفن کنید:
PORTUGUESE	Se você precisar da ajuda de um intérprete, telefone:
SERBIAN	Ако вам је потребна помоћ преводиоца телефонирајте:
SPANISH	Si necesita la asistencia de un intérprete, llame al:
TURKISH	Tercümana ihtiyacımız varsa lütfen telefon ediniz:
VIETNAMESE	Nếu bạn cần một người thông-ngôn hãy gọi điện-thoại:

TRANSLATING AND INTERPRETING SERVICE

131 450

Canberra and District - 24 hours a day, seven days a week