



ACT Department of Treasury

REPORT ON DELAYED OBJECTION DECISION: MR A

November 2006

Report by the Acting ACT Ombudsman, Dr Vivienne Thom, under
section 18 of the *Ombudsman Act 1989*

REPORT NO. **02|2006**

Reports by the Ombudsman

Under the *Ombudsman Act 1989* (ACT), the Australian Capital Territory Ombudsman investigates the administrative actions of Australian Capital Territory Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

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Contents

Part 1—Background	1
1.1 Complaint.....	1
1.2 Chronology	1
Part 2—Investigation	2
2.1 Imposition of penalty by ACT Revenue	2
2.2 Meetings with ACT Revenue and ACT Department of Treasury	2
Part 3—Issues	5
3.1 Delay.....	5
3.2 Decision by ACT Revenue and s 12 certificate	5
3.3 ACT Revenue communications policy	6
Part 4—Conclusion.....	7
4.1 Recommendations.....	7

PART 1—BACKGROUND

1.1 Complaint

On 16 March 2004, Mr A objected to the ACT Revenue decision to impose a 100% penalty for an improper claim of the First Home Owner Grant (FHOG). Mr A pursued the matter with ACT Revenue and the ACT Ombudsman on a number of occasions. ACT Revenue made a decision about the objection on 9 August 2006.

1.2 Chronology

Following is a chronology of relevant events.

- | | |
|-------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 27 September 2001 | Mr A lodged his application for the FHOG. |
| 5 March 2004 | ACT Revenue found that the FHOG was wrongly claimed and imposed on Mr A the 100% penalty (\$7000), plus interest (\$1222.86). |
| 16 March 2004 | Mr A objected to the penalty. |
| March 2004 | While his objection was pending, Mr A repaid the FHOG, the penalty amount and the interest, a total of \$15,222.86. |
| 9 July 2004 | Mr A contacted ACT Revenue and was given a reference number for his objection. |
| 13 January 2005 | Mr A wrote to ACT Revenue about the status of his objection. ACT Revenue failed to respond. |
| 10 February 2005 | Mr A wrote to ACT Revenue about the status of his objection. ACT Revenue failed to respond. |
| March 2005 | Mr A emailed ACT Revenue asking for an update on his objection. Mr A was advised by a return email from Mr V that ACT Revenue was sorry for the delay and would determine the objection within 30 days. No related documents appear on the ACT Revenue file. |
| 10 May 2005 | Mr A complained to the ACT Ombudsman about the delay. |
| 12 May 2005 | In response to ACT Ombudsman inquiries, ACT Revenue explained that their objections unit had one member who was unavailable for long periods in the previous 12 months. ACT Revenue agreed to contact Mr A directly to explain the matter, and on that basis the 10 May 2005 complaint was closed by the ACT Ombudsman. |
| 14 December 2005 | Mr A complained to the ACT Ombudsman about the further delay. |
| 13 February 2006 | Mr V stated: 'My current estimate [for deciding the objection] is between two and four months, depending on the litigation we handle and the difficulty of completing older objections.' |
| 31 March 2006 | The complaint was closed by this office on the basis that Mr A should recontact the ACT Ombudsman if he did not receive a decision by 30 June 2006. |
| 30 June 2006 | Having received no decision and no resolution of his concerns, Mr A again complained to the ACT Ombudsman. |

PART 2—INVESTIGATION

2.1 Imposition of penalty by ACT Revenue

Section 47 of the *First Home Owner Grant Act 2000* ('FHOG Act') provides the statutory basis on which the Commissioner for ACT Revenue imposed the 100% penalty. The relevant part of section 47 provides:

Section 47. Power to require repayment and impose penalty

- (1) The commissioner may, by written notice, require an applicant (or former applicant) for a first home owner grant to repay an amount paid on the application if—
 - (a) the amount was paid in error; or
 - (b) the commissioner reverses the decision under which the amount was paid for any other reason.
- (2) If, because of an applicant's dishonesty, an amount is paid by way of a first home owner grant, the commissioner may, by the notice in which repayment is required or a separate notice, impose a penalty of not more than the amount the applicant is required to repay ...

Section 25 of the FHOG Act permits the applicant to make a written objection if dissatisfied with any aspect of the Commissioner's initial decision. Section 29 requires the Commissioner to make a decision on the objection. The FHOG Act does not specify a period within which that decision must be made. Should the applicant be dissatisfied with the Commissioner's further decision on the objection, s 31 of the FHOG Act enables the applicant to appeal to the ACT Administrative Appeals Tribunal (ACT AAT). The FHOG Act does not contain a deemed refusal provision allowing an applicant to appeal to the ACT AAT in the absence of an actual decision being made within a specified time.

2.2 Meetings with ACT Revenue and ACT Department of Treasury

On 17 July 2006, Officer W and Officer X of the Ombudsman's ACT Team met with Mr Y, Commissioner for ACT Revenue, and Mr Z, Revenue Management Division in the ACT Department of Treasury. Mr Y and Mr Z provided the following advice.

- There were currently about 230 objections awaiting determination.
- Prior to the recent increase in resources in the objections unit, there were outstanding objections with ACT Revenue for as long as 10 years.
- Objections are determined in chronological order unless there is a group of objections which raise a common issue and/or can be more efficiently determined together.
- There were only three staff in the objections unit of ACT Revenue.
- Due to increased staffing, the unit determined 215 objections in the 2005-06 financial year.
- The objections unit was considering objections lodged in 2004.
- Objections are acknowledged when made, but the objections unit does not provide interim advice to objectors while objections are awaiting decision.

Mr Y and Mr Z also stated that the determination of objections is frequently complex and time consuming. The resources of the objections unit are also affected by the 5–10 litigation matters which arise in the area each year. In the case of Mr A's objection, research would need to be done and consideration given to whether the 100% penalty is justified, or a lesser penalty is appropriate.

Mr Y accepted that the giving of undertakings to Mr A, which were not met, is undesirable. At the time of the 13 February 2006 undertaking by Mr V, the policy of the objections unit was that such undertakings should not be given.

Section 12 of the *Ombudsman Act 1989* (Ombudsman Act) provides:

Section 12. Unreasonable delay in exercising power

- (1) Where—
 - (a) under an enactment, a person has a power to do an act or thing in the exercise of a discretion or otherwise;
 - (b) no enactment prescribes a period within which the person is required to do or refuse to do the act or thing;
 - (c) under an enactment, an application may be made to a prescribed tribunal for the review of decisions made in the exercise of that power; and
 - (d) a complaint has been made to the ombudsman concerning a failure to do the act or thing in the exercise of that power;

the ombudsman may, after investigating the complaint, if he or she is of the opinion that there has been unreasonable delay in deciding whether to do the act or thing, give to the complainant a certificate certifying that, in the opinion of the ombudsman, there has been unreasonable delay in deciding whether to do the act or thing.

- (2) Where the ombudsman gives a certificate under subsection (1), the person required or permitted to exercise the power shall, for the purpose of enabling an application to be made under the enactment referred to in subsection (1)(c) to the prescribed tribunal concerned, be taken to have made, on the day on which the certificate is given, a decision in the exercise of that power not to do the act or thing ...

Officer W of the ACT Team explained the operation of s 12 of the Ombudsman Act to the Commissioner for ACT Revenue, Mr Y. Mr Y responded that he did not believe that the Ombudsman should issue a section 12(1) certificate in this case. Mr Y added that the Commissioner's substantive decision on the objection, when given, would in his view provide a useful starting point for the independent review of the matter by the ACT AAT.

On 25 July 2006, Officer X of the ACT Team met with Mr V of the ACT Revenue objections unit. Mr V provided the following advice.

- There were about 100 objection matters awaiting determination.
- According to a printout of these matters, 10 arose before 2004, 15 arose in 2004, and the balance of 75–80 objections date from 2005 and 2006.

- Mr V stated that simpler objections, and those which were of a known pattern, were determined ahead of the older, more complex objections.
- Mr V stated he had recently finalised a 12 year old objection.

On 25 July 2006, Officer X inspected the ACT Revenue file on Mr A's objection. The file included the unanswered correspondence from Mr A referred to above.

As discussed in sections 1.1 and 3.2, ACT Revenue advised this office on 27 September 2006 that it had refused Mr A's objection on 9 August 2006.

PART 3—ISSUES

There are three relevant issues in this complaint. These are discussed below.

3.1 Delay

Was the delay in this matter unreasonable?

The time between Mr A objecting to the penalty and the decision of 9 August 2006 was nearly two and a half years. During this period, ACT Revenue had on several occasions given undertakings separately to Mr A and to the ACT Ombudsman that there would be a decision by an earlier date.

The ACT Department of Treasury maintained that the delay in this matter was not unreasonable. They referred to the existing backlog of objection matters and to the requirements of related AAT litigation. They also noted that Mr A's objection was the first of its particular type to be considered by the objections area.

However, it remains the case that a delay of two and a half years is not consistent with good public administration. In a great many other contexts, administrative practice and statutory requirements are based on the view that delays much shorter than this are not acceptable.

In my view, the delay was not made more reasonable by the existence of other similarly delayed cases, or the need, as in many jurisdictions, to handle an AAT caseload. Further, for reasons expressed immediately below, it would appear that the complexity of Mr A's objection contributed only marginally to the delay that occurred.

3.2 Decision by ACT Revenue and s 12 certificate

Should ACT Revenue have given a decision on Mr A's objection on an urgent basis, or should the ACT Ombudsman have issued a certificate to Mr A under s 12(1) of the Ombudsman Act?

ACT Revenue gave its decision on Mr A's objection on 9 August 2006. To that extent, this issue is now resolved. There is no purpose to be served now by the issuance of a certificate to Mr A under section 12(1) of the Ombudsman Act. I continue to be of the view, however, as previously expressed in my draft report, that such a certificate would have been appropriate in the absence of a substantive decision on the matter.

When staff of my office met with Mr Y and Mr Z on 17 July 2006, no indication was given that the decision on Mr A's objection would be expedited. At that time, the view was expressed by ACT Revenue that the objection would be determined in due course and according to existing priorities. Further, when staff of my office met with Mr V on 25 July 2006, there was no indication that there was an immediately pending decision on Mr A's objection. That decision was given only a fortnight later on 9 August 2006. My office was not notified of the decision until 27 September 2006.

In my view, it is regrettable that some seven weeks passed before notice of the decision was given to this office. Amongst other matters, such notification would have simplified the preparation of my draft section 18 report which was provided to the ACT Department of Treasury on 6 September 2006.

The sequence of events in this matter suggests that the ACT Revenue decision on Mr A's objection was drafted and finalised sometime between 25 July and 9 August 2006. It would seem therefore, that the two and a half year delay involved was not due to the complexity of the case.

3.3 ACT Revenue communications policy

Is the policy of ACT Revenue in respect of its communications with objectors adequate and reasonable?

During the history of Mr A's objection, the policy of ACT Revenue was to acknowledge objections, but not to provide interim advice to objectors while their matters were pending. Some objectors did make contact with ACT Revenue, and these people were usually provided with a response. In practical terms, however, an objector often did not receive any communication from ACT Revenue during the months and years before an objection was determined. In Mr A's case, he did not receive any interim advice, and ACT Revenue did not answer at least two of his letters.

From the point of view of good administrative practice, and the legitimate expectations of people dealing with government, the previous communication policies of ACT Revenue are not adequate or reasonable. Generally, it would appear appropriate that objectors be given interim advice on the progress of their matter on at least a semi-annual basis, and that all correspondence and emails from objectors be responded to promptly.

ACT Revenue has agreed to implement a new policy in this area under which those persons with outstanding objections will be advised of the status of their matter every six months. ACT Revenue has also agreed to reply to all correspondence of substance from objectors. I agree that, with these changes, the policy of ACT Revenue on communications with objectors would be adequate. I would note that, in terms of replies to objectors, the notion of 'correspondence of substance' should not be employed to unduly restrict the necessary practice of responding to objectors in the great majority of instances.

ACT Revenue has acknowledged that there were deficiencies in its communication with Mr A. As noted above, there were two instances in which ACT Revenue did not respond to Mr A's letters. I consider that ACT Revenue should therefore apologise to Mr A in writing for its deficiencies in this area.

PART 4—CONCLUSION

After considering all of the issues, I have reached the following conclusions.

1. The delay that occurred in this matter was unreasonable, and constitutes an instance of administrative deficiency.
2. In view of the 9 August 2006 decision on the objection, it is no longer necessary that I consider issuing a certificate under section 12(1) of the Ombudsman Act enabling Mr A to lodge an appeal to the ACT AAT.
3. The proposed new policy on communication with objectors is adequate and, if implemented appropriately, should prevent further problems arising in this area. Given the deficiencies acknowledged in Mr A's case however, ACT Revenue should provide a written apology to Mr A.

4.1 Recommendations

Accordingly, I recommend that:

- a. ACT Revenue implements the proposed changes to its communication policy and reports to my office on the details of that implementation.
- b. ACT Revenue apologise in writing to Mr A for its deficiencies in communication in his case, including the failure to answer his letters.

Dr Vivienne Thom
Acting ACT Ombudsman