



# ACAT Unit Titles Stakeholder Meeting

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5PM TO 6.30PM ON WEDNESDAY 15 AUGUST 2018

# Agenda

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- Overview of the nature of the ACAT's work
- Authorities to represent
- How a matter travels through the ACAT
  - The first directions hearing
  - Preliminary conferences
  - Mediations
  - Preparation for hearing (including evidence)
  - Filing documents
  - Witness statements
  - Chronologies
  - Filing and serving documents
  - Hearings
  - Submissions
  - Decisions
- Questions



# Overview of the nature of the ACAT's work

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# Unit Titles Jurisdiction - Statistics

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How many unit titles applications are made in a financial year?

2013-14	2014-15	2015-16	2016-17	2017-18
27	52	43	25	33

This does not include debt recovery proceedings relating to unpaid unit titles levies.

# What types of applications are made?

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A range of unit title applications are made at the ACAT, including:

- Disputes about keeping an animal (s.126(1) of the *Unit Titles (Management) Act* 2011 (UTM Act));
- Disputes about liability for the repair of property – typically a request for an order under s.129(1)(c) of the UTM Act;
- An order repealing or amending a resolution of a general meeting or executive committee based on a merits review of the resolution by the ACAT (s. 129(1)(f)); and
- An order giving effect to an unsuccessful motion for a resolution of a general meeting (either as originally proposed or as amended by the ACAT) if the ACAT is satisfied after a merits review of the motion that opposition to the motion was unreasonable (s. 129(1)(g)).

There are also civil dispute applications seeking the recovery of unit titles levies.

# Ruling Tribunal and expenses

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- In August 2017, an ACAT Ruling Tribunal handed down a decision on a question of law referred to it from within the ACAT under Section 77 of the *ACT Civil and Administrative Tribunal Act 2008* (ACAT Act).
- The question of law related to whether legal and other costs incurred by an owners corporation in pursuing the recovery of unpaid unit titles levies can be recovered in proceedings before the ACAT as 'expenses' under section 31 of the UTM Act.
- It concerned some 162 applications. There are 117 matters outstanding, which will be determined over the coming months.

# Authorities to Represent

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# Reminders

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- The Authority to Act for a Corporation form is available at: [http://acat.act.gov.au/applications\\_and\\_forms](http://acat.act.gov.au/applications_and_forms).
- If representing an individual (eg. a unit holder), the Power of Attorney form is available at: [http://acat.act.gov.au/applications\\_and\\_forms](http://acat.act.gov.au/applications_and_forms).
- In relation to the Power of Attorney form:
  - Witnesses must witness the form being signed – they are witnessing the execution (making) of the document.
  - The person who is appointed as attorney cannot also be a witness to its execution.
  - An authority cannot be given to business names or branch names or entities that have no legal existence (XYZ Strata Management Manuka).
  - The date the document is executed should be entered and be correct.
- An attorney or representative exercising power in accordance with these documents may:
  - Appear on behalf of a party
  - Engage in negotiations, including the capacity to resolve or conclude proceedings
  - A representative must have knowledge of the matter to participate and discuss settlement or resolution. The representative must also be able to contact a party during a conference or hearing to obtain instructions.



# How a matter travels through the ACAT

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# The first directions hearing

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- Nearly all unit titles matters will be listed for an initial directions hearing.
- This is usually on a Wednesday morning. It is often a busy list.
- The purpose of the directions hearing is to:
  - Identify the parties and, if necessary, make directions for the service and joinder of additional parties;
  - Consider whether the matter should be referred to alternative dispute resolution, for example:
    - Preliminary conference; *or*
    - Mediation
  - Make directions for preparing the matter for hearing.
- You should be prepared to discuss your case in broad terms at the directions hearing, but it is unlikely the Member will make any substantive decisions. Your witnesses do not need to be present.
- There is a *Guide to Parties – Directions Hearings* available at:  
[http://acat.act.gov.au/about\\_acat/guide-to-parties-directions-hearings](http://acat.act.gov.au/about_acat/guide-to-parties-directions-hearings).

# Preliminary conferences

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- A preliminary conference is a form of alternative dispute resolution.
- Preliminary conferences involve the parties and a Member, Registrar or Delegate acting as ‘convenor’.
- The purpose of a preliminary conference is to enable the parties to discuss possible resolution of the dispute.
- The convenor cannot impose a resolution, but can make binding orders if the parties reach an agreement.
- The convenor is usually a lawyer.
- The convenor cannot give legal advice, but can assist the parties to identify and work through legal issues and necessary evidence, and can do ‘reality checking’.
- Directions may be made at the conclusion of the preliminary conference if there is no agreed resolution.
- A *Guide to Parties – Conferences* is available at: [http://acat.act.gov.au/about\\_acat/guide-to-parties-conferences](http://acat.act.gov.au/about_acat/guide-to-parties-conferences).

# Mediation

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- Mediation is another form of alternative dispute resolution.
- Mediations involve the parties and a Member, Registrar or Delegate acting as ‘mediator’.
- The purpose of a mediation is to enable the parties to discuss possible resolution of the dispute.
- Again, the Mediator cannot impose a resolution, but can make binding orders if the parties reach an agreement.
- The mediator is always an accredited mediator, but is not necessarily a lawyer.
- The mediator cannot give advice, but helps the parties to work through the issues and may do ‘reality checking’.
- A mediator will usually not make directions, but may refer the matter to another member to make directions on the day.
- We will often refer matters that involve relationship and communication issues to mediation rather than a preliminary conference.
- A Guide to Parties – Mediation is available at: [http://acat.act.gov.au/about\\_acat/information-sheets](http://acat.act.gov.au/about_acat/information-sheets).

# Mediation and preliminary conferences

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- What occurred in a conference or mediation is *not admissible* in a proceeding before the Tribunal: s.34(3) of ACAT Act.
- It should not be included in any documents filed with the ACAT for hearing, for example, witness statements or submissions.
- People who are not parties may be given leave to attend the mediation at the discretion of the Mediator, but they will usually be required to give an undertaking as to confidentiality.
- It is essential that the people or representatives who attend the mediation or preliminary conference have full instructions and the authority to settle the matter.

# Preparation for hearing

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- The ACAT's procedures must be “... **as simple, quick, inexpensive and informal as is consistent with achieving justice**” (s.7(a) ACAT Act).
- The ACAT's principal obligation is to ensure that both parties are given natural justice – that is, they must have an opportunity to properly respond to the case against them.
- The ACAT requires all parties to file with the ACAT and give to the other parties all the evidence they want to rely upon at hearing *prior to the hearing*.
- If a party does not comply with this requirement:
  - the Member may decline to consider the evidence at hearing; or
  - The hearing may be adjourned to allow the other party time to prepare a response.
- Where a hearing is adjourned because of unreasonable obstruction or delay, the ACAT may award costs to the other party: s.48(2) ACAT Act.

# But what is “evidence”?

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- In most matters, the ACAT will have to make findings of facts in issue – i.e. findings as to what happened and when etc.
- Evidence is the data or information, in the form of witness statements or testimony, documents or other objects, offered to the ACAT to prove the facts at issue.
- Evidence includes:
  - Statements from witnesses about what they saw, heard, touched, felt or perceived or otherwise experienced;
  - Statements or reports from expert witnesses as to their opinion on certain facts;
  - Photographs, receipts, plans, diagrams and other documents.
- When considering what evidence to file, ask: “what facts do I need to make out my case, and what evidence do I need to show the ACAT to prove those facts?”

# The 'rules' of evidence

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- The ACAT may inform itself in any way it considers appropriate in the circumstances (section 26 of the ACAT Act) and is not bound by the “Rules of Evidence” – i.e. the common law rules of evidence or the *Evidence Act 2011* that relate to hearsay, opinion, business records and documentary evidence etc.
- However, many of these rules are common sense and they may affect the *weight* the ACAT gives any particular piece of evidence.
- For example, the rules of hearsay do not apply. But evidence to the effect of: “The lady who lives at number 12 told me that she saw Bob putting trash in the recycling hopper” is going to be given minimal weight to prove that Bob put trash in the recycling hopper because the lady who lives at number 12 is not present to give the evidence and cannot be cross examined on the truth or the detail of the statement (although it might be more weighty if used to establish that the witness spoke with the lady at number 12).

# When filing evidence...

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- It is useful to paginate and/or tab your documents.
- This is essential if:
  - Your documents are voluminous; or
  - A witness is likely to be appearing by telephone.

# When filing photographs...

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- Photographs filed with the ACAT should be:
  - In hardcopy – we cannot read USBs or other digital media;
  - In colour – this is particularly relevant to damage claims;
  - Sufficiently large to see the details;
  - Marked with the date and time that the photograph was taken; and
  - Numbered for easy reference.
- If the photographs do not print well, you may bring a device to the hearing to display them.

# Witness Statements

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- A witness statement should clearly set out the evidence that a witness is prepared to give at the ACAT.
- If the witness is giving evidence about what happened, this is best done in a chronological, narrative form.
- An example of a witness statement can be found here: [http://acat.act.gov.au/applications\\_and\\_forms](http://acat.act.gov.au/applications_and_forms).
- The example witness statement has useful advice on content.
- A witness statement should clearly state the witness's name, and it should be signed and dated.
- A witness should be available to give evidence at the hearing.
- A witness who gives evidence at a hearing may be required to give evidence under oath or affirmation. They should be advised of this when making a witness statement.

# Witnesses in the “unreasonable reason” cases...

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- For example:
  - The ACAT may make an order giving effect to an unsuccessful motion for a resolution of a general meeting (either as originally proposed or as amended by the ACAT) if the ACAT is satisfied after a merits review of the motion that opposition to the motion was unreasonable: s.129(1)(g) UTM Act;
  - The owners corporation’s consent must not be unreasonably withheld to the keeping of a pet: s.32(2).
- The ACAT will usually allow objectors an opportunity to be joined as third parties to these matters.
- The corporation or the objectors should put on evidence as to the *reason* for the decision under review. This will usually be in the form of witness statements from the objectors.
- The test of ‘reasonableness’ is objective.
- Occasionally, an owners corporation or objectors will put on *no evidence* as to the reasons for the refusal. Be aware that the ACAT will rarely be able to infer a reason, and in at least one case it was decided that objection to a proposal, without any basis, is unreasonable: *Floro v The Owners – Unit Plan No 630* [2017] ACAT 4.

# Expert witnesses

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- Expert witnesses give opinion evidence eg. “the drainage is inadequate having regard to the impermeable surface”
- A party who proposes to call expert evidence at a hearing must:
  - Give each other party and the ACAT a written statement or report from that witness;
  - The report should state the witness’s expertise; and
  - The witness should be aware that:
    - They are required to be impartial;
    - Their primary duty is to assist the ACAT; and
    - They are not a party’s advocate.
  - There is an ACAT Expert Witness Code of Conduct – this provides guidance to any a person who is asked to prepare a statement for the Tribunal: see *ACT Civil and Administrative Tribunal (Expert Witness Code of Conduct) Procedural Directions 2009 (No 1)* (<http://www.legislation.act.gov.au/ni/2009-642/current/pdf/2009-642.pdf>)

# The chronology

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- The ACAT will often make directions requiring the parties to file a chronology.
- This is a ‘timeline’ of key events – what happened and when.
- It is often useful and timesaving to cross reference the chronology and your documents – doing this is often good preparation for hearing.
- Example of a chronology:

Date	Event	Details	Cross-reference to other tribunal documents
10 January 2016	General Meeting	A resolution passed in relation to .....	Page 11 of the minutes of the meeting

# Filing and serving...

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- Documents need to be *filed* with the ACAT and *served* on the other parties.
- Addresses for service are usually found on the application, response, or the Notice of Representation filed by a legal representative.
- If in doubt, the address for service can be clarified at the directions hearing.
- The ACAT will generally serve listing notices and other communications by email. You should give the ACAT a regularly monitored email address.

# Communicating with the Registry

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- Registry staff can provide procedural information but they cannot provide legal advice.
- You must copy the other party into any correspondence with the ACAT. The Registry does not need to be copied into all correspondence between the parties but if you ask the Registry a question, you need to copy in the other parties. This is to ensure transparency and fairness.
- You should always be polite to Registry staff.
- Where parties are consistently rude, the ACAT may ask that all communication be in writing.
- Excessively rude or offensive emails may not be answered.

# Dismissing claims prior to hearing...

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- We are commonly asked: “why are matters not reviewed for legitimacy prior to being accepted by ACAT?”
- It is rare that the ACAT can strike out matters on its own initiative prior to hearing.
- What can you do if you are a respondent to a case you view as hopeless?
- **Do not** write emails to the Registry complaining that the matter is a waste of time
- Instead, file an application for interim or other orders setting out the basis upon which you say the proceedings, or part of them, should be dismissed (eg. no jurisdiction, wrong respondent, vexatious). The application is available on the ACAT website.
- The interim application will be listed as soon as possible.

# At the hearing...

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- You should refer to the ACAT Member by their name (e.g. Mr or Ms Surname) or their title (Member, Senior Member, Presidential Member).
- The name and title of the Member will be on a name plate in front of the Member.
- The party making the application is 'the applicant', the party responding is 'the respondent', and any other party is usually the 'party joined'.
- You usually refer to the other individual parties or their lawyer as Mr or Ms Surname.
- You may refer to the owners corporation as 'the corporation' or 'the respondent' or even "the other party".
- You should always be polite to the tribunal Member, other staff and the other parties.

# At the hearing...

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- This is your chance to convince the ACAT to make an order in your favour.
- The ACAT is only interested in the facts relevant to the matter before it – do not waste time on irrelevant matters.
- The ACAT may decide its own procedure and is flexible.
- Generally the applicant goes first, then the respondent, then any parties joined, but this may vary, particularly if a party joined supports the applicant's case.
- The party may ask each party to present its entire case consecutively, or may prefer to proceed "issue by issue".
- Each party may be asked to make an opening statement. This is an outline of your case. Keep this short and to the point.

# At the hearing...

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## The evidence phase:

- Where the applicant goes first, the applicant should:
  - Make sure the ACAT and the other party has all their documents;
  - Give their evidence; and
  - Call any witnesses and 'lead' evidence from them.
- After the applicant or one of their witnesses has given their evidence, the ACAT Member will ask the respondent if they want to ask the applicant any questions. This is called 'cross-examination'.
- The same process then applies to the respondent.
- Be polite when asking questions. If nothing else, it saves time.
- The ACAT is only interested in relevant questions. Think about the evidence you need to get or test and ask the questions accordingly.
- If you are going to suggest to the Member that a witness is unreliable or not telling the truth, you need to put that to the witness: for example *"that is not what happened at the meeting is it?"*

# At the hearing...

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## The submissions phase:

- At the conclusion of the hearing, each party will be given an opportunity to:
  - Draw together their evidence and outline the findings the parties say the ACAT should make on that evidence;
  - Summarise the law and make any submissions about what the ACAT should find is the legal position, having regard to those facts.
- Legal practitioners should bring relevant case law to the attention of the Member and the other parties.
- Parties may be given an opportunity to make written submissions – this can be discussed with the Member.

# Written submissions

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Written submissions may be filed and given to the parties:

- Prior to the hearing, in which case they set out the case the party intends to advance at the hearing; or
- Following the conclusion of the hearing, in which case they draw together the evidence and set out the case the party wishes to make following the conclusion of the hearing.

Ideally, written submissions should set out:

- The (alleged) facts;
- The evidence in support of those facts;
- The law; and
- The way the law is applied to the facts.

Written submissions should be paginated and signed by the party or legal representative who is making them.

# The decision

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It is the usual (but not universal) practice in unit titles matters for the Member to reserve and deliver a written decision at a later date.

Be aware that:

- a written decision is usually published on the ACAT website and on most legal databases (Austlii, Barnett Jade and Westlaw);
- the written decision will have the names of the parties and may also contain the names of witnesses;
- the written decision may contain personal information about a party and/or findings of credit;
- decisions may be “googled” – and google may suggest a decision when searching for a party’s name.

# Section 31 – Debt Recovery

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These are civil claims – they are given an “XD” file number.

They are subject to the ACAT’s civil jurisdiction limit - \$25,000, unless a higher amount is agreed by all parties.

The excess may be waived to bring the matter within the ACAT’s jurisdiction.

These matters proceed through the ACAT’s civil procedure processes– which includes the availability of default judgment.

# Section 31 – Debt Recovery

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## Default judgment

Many levy matters go through to default judgment.

However, the ACAT only has jurisdiction to award 'legal and enforcement' expenses where they are:

- (a) reasonable in quantum; and
- (b) reasonably incurred.

This applies to default judgments. As a guide:

- (a) Applications that are below the scale costs in schedule 3 of the *Court Procedures Rules* will usually be eligible for default judgment, with judgment being entered administratively;
- (b) Applications that are marginally outside the schedule *may* be reviewed by a registrar or member in chambers and entered administratively if they appear reasonable;
- (c) Other claims will usually be listed for an assessment (default judgment may be entered for an unspecified amount).

# Section 31 – Debt Recovery

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## **Contested debt recovery matters:**

- Where the existence of the debt is contested, the matter will be set down for a preliminary conference, and if resolution is not reached the matter will be referred to hearing;
- Where only the amount of the debt is contested, the matter may be set down for a preliminary conference or for assessment.

## **Assessments:**

- Are usually listed on Wednesday afternoons;
- Parties commonly appear by telephone, but leave must still be sought on each occasion; and
- The ACAT will require an up-to-date schedule of the debt and expenses claimed.



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# Questions

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