



THE LAW SOCIETY
OF NEW SOUTH WALES

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13 October 2009

The Hon. John Hatzistergos, MLC
Attorney General for NSW
Level 33, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General,

Re: Awarding of Costs in the Administrative Decisions Tribunal (ADT) Revenue Division

Thank you for your letter of 17 August 2009 in reply to the submission of the Litigation Law and Practice Committee seeking an amendment to Section 88 of the *Administrative Decisions Tribunal Act 1997* to grant the Tribunal wider powers than are currently available under Section 88 to award applicants their costs in the Revenue Division.

Your letter states that on the available statistics it cannot be said that section 88(1A) is ineffective in its intended purpose of giving the Tribunal flexibility in awarding costs.

In a recent decision, however, the Tribunal has pointed out that because of the inflexibility of section 88, the Tribunal was prevented taking into account relevant pre-litigation conduct for the purposes of awarding costs. The new section only allows the Tribunal to have regard to matters directly associated with proceedings. In *Australian Aqua Air Pty Ltd v the Chief Commissioner of State Revenue* [2009] NSW ADT 239, the application by the taxpayer for costs was dismissed and the following extract from the decision illuminates the inflexibility of the section in preventing the Tribunal from awarding costs in this particular matter.

"19. There is, therefore, this anomaly in the new s88 which only allows the Tribunal to take into account factors and matters arising from the proceeding in a particular matter without any regard to the pre-litigation conduct of a party. But if the Tribunal concludes in a particular case on the basis that it is fair to award costs, the Tribunal can under the new s88 also award pre-litigation costs incurred by a party. But this new approach clearly discriminates against a party that makes an application to the Tribunal to redress a decision made by an incompetent administrator, costing the applicant large legal expenses through that process, before the benefit of a fair hearing at the Tribunal. The pre-litigation conduct of the incompetent administrator will not be a relevant matter to be taken into account in awarding costs.

20. In this matter, the respondent has been a model litigant before the Tribunal and sought to have the decision reviewed in order to prevent any unnecessary litigation. The adjournments were by consent and the time taken by the respondent to have the matter resolved can only be described as reasonable in the context of the proceedings at the Tribunal.

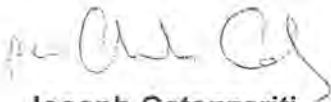
21. Because I have reached the conclusion that the pre-litigation conduct is not a relevant matter that the Tribunal can have regard to in awarding costs, I need not express any firm view as to the respondent's pre-litigation conduct in dealing with the matter....."

Judicial member Verick has identified that the new section 88 discriminates against a party that makes an application to the Tribunal to redress a decision made by an incompetent administrator, costing the applicant large legal expenses through that process.

In view of this decision and the practice of the Office of State Revenue of always having legal representation (often by Counsel) in proceedings before the Revenue Division, it appears that the tax payer will find it extremely difficult, at the least, to be eligible for the awarding of costs.

In view of the added benefit of this decision which clearly exposes the limitations of section 88, the Litigation Law and Practice Committee of the Law Society urges you to reconsider your decision and amend the section to give the Tribunal greater flexibility in awarding costs where justice requires it to do so.

Yours sincerely,



Joseph Catanzariti
President