



# ENVIRONMENTAL DEFENDER'S OFFICE (ACT)

## Introduction to environment and planning law and the legal system

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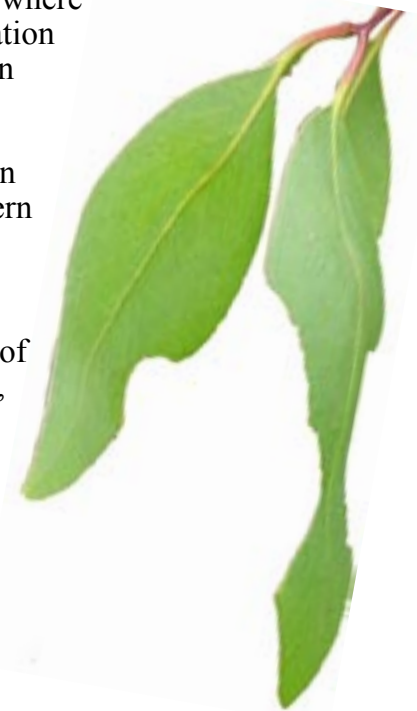
*Environment and planning law in the Australian Capital Territory sits within the context of the Australian legal system, which is based on a federal system of Government, the separation of powers doctrine, responsibilities and powers set out in the Constitution, and the rights of State / Territory Governments to make legislation, as well as certain rights individuals have to challenge legal decisions.*

### Australian legal system

The Australian legal system is based on a federal system of government where power is shared between a central government, which has powers in relation to the whole country and regional governments having powers in relation to their respective regions. The Australian federal system consists of the Commonwealth government, which has power over specific matters, six state governments and two territory governments, with powers in relation to all other matters. Local councils also exist in the states and the Northern Territory.

### Separation of powers

A central feature of the Australian system of government is the doctrine of separation of powers. Under this doctrine, the three arms of government, the legislature (Parliament), the executive (government ministers and their departments) and the judiciary (courts), are independent of each other and exercise separate functions. In general, it is the legislature's function to make laws, the executive's function to administer and enforce laws, and the courts' function to interpret laws. However, the doctrine of separation of powers only applies to a limited extent in Australia. For example, Parliaments often delegate powers to the executive to make laws.



### Commonwealth Constitution

The ultimate source of law in Australia is the Commonwealth Constitution. It sets out the powers of the Commonwealth and the states and the roles and structure of these arms of government. Since the Commonwealth Constitution was introduced in 1901, the Commonwealth Parliament has passed laws giving powers of self-government to both the Northern Territory and the ACT.

### Legislation

The main source of Australian law is legislation, also known as statutes or Acts. The Commonwealth Parliament, state parliaments and territory legislative assemblies create legislation by passing Acts that have been brought before them. Due to a lack of time and resources, parliaments often delegate powers to the executive to make delegated legislation, also known as rules, regulations, ordinances and by-laws. This is known as delegated legislation. State parliaments

also delegate powers to local councils, for example, to make detailed rules about matters such as the criteria that must be satisfied to obtain planning approval.

## Common law

The other main source of law in Australia is common law or alternatively known as case law. It is created by decisions of members of the judiciary, who interpret legislation and, in areas where there is no legislation in force, develop common law principles. Although many subject matters are regulated primarily by legislation, there are some areas of the law, such as nuisance and negligence, in which case law is still the main source of legal rules. Legislation takes precedence over case law, so it is generally open to parliament to change case law principles that it considers inappropriate.

## Power to make laws

The Commonwealth Parliament has power to make laws only in relation to those subject matters that are outlined in the Commonwealth Constitution. In contrast, state parliaments and territory legislative assemblies can generally make laws about all subject matters, including those over which the Commonwealth Parliament has power. If there is a conflict or inconsistency between a Commonwealth law and a state or territory law, the Commonwealth law will prevail. The Commonwealth may also pass a law specifically to over-rule a territory law where it relates to a subject matter for which the Commonwealth has power to make laws under the Constitution.

The Commonwealth Parliament does not have a specific power to protect and conserve the environment under the Commonwealth Constitution. However, the Commonwealth is able to use some of its broad powers to make important environmental laws. In the Tasmanian Dams case [*Commonwealth v Tasmania* (1983) 158 CLR 1], for example, the High Court held that the Commonwealth Parliament could use its 'external affairs' power to make laws implementing an international treaty, in that case the World Heritage Convention. Therefore, it upheld the validity of the Commonwealth's *World Heritage Properties Conservation Act 1988* (Cth) which prevented Tasmania's Gordon and Franklin Rivers from being dammed and drowned. Nevertheless, state parliaments and territory legislative assemblies create most environmental laws.

In some cases local councils have powers to make rules about matters that impact on the environment, such as development applications and waste management, and to enforce existing environmental laws. As there are no local councils in the ACT, the ACT government deals with these matters.

## Developing legislation

When a proposed law is introduced into parliament, it is known as a Bill. Members of parliament then debate the Bill. Some Bills are also considered in detail by parliamentary or legislative assembly committees, which may provide the public with an opportunity to make submissions about the Bill in question. These committees make recommendations to parliament about whether the Bill should be passed and whether any amendments are required. In the Commonwealth Parliament and all state parliaments, except Queensland, both the lower and upper houses of the parliament must pass a Bill before it becomes an Act. For a Bill to become a valid law in Queensland and the territories, which only have one house, Bills need only be passed by that one house. An Act comes into force as a law on the commencement date that is set out in that Act.

## Delegated legislation

Acts often include provisions that give power to the executive to make delegated, or subordinate, legislation. Although the executive creates delegated legislation, parliament often retains control over whether it can come into effect. Regulations generally have to be tabled in the relevant parliament or legislative assembly. If no member challenges the regulations within a certain number of sitting days, it then becomes law.

The *Legislation Act 2001* (ACT) provides twelve sitting days (six sitting days to present a motion of disallowance and six sitting days to deal with the motion) for the Legislative Assembly to disallow or amend the delegated legislation after it is tabled, after which time it will become enforceable, if it is not disallowed [s.65]. This Act contains many other important provisions about the making and notifying of rules and regulations.

## ACT legislation register

In the ACT, all Acts must be included on the ACT legislation register. The register was established under the *Legislation Act 2001* and it provides ready access to current, authorised versions of all Acts and subordinate legislation in force in the ACT. All new legislation since 2001 is placed on the register, with older legislation gradually being incorporated.

In addition, a range of instruments made under legislation, including disallowable instruments, notifiable instruments and commencement notices, are published on the register.

## Interpreting legislation and delegated legislation

If the meaning of legislation or a section of legislation is unclear, the following tools can be used for the purposes of interpretation. The Commonwealth and state parliaments and territory legislative assemblies have all passed Acts which set out the basic rules for interpreting legislation. The *ACT Legislation Act 2001* contains a dictionary setting out the meaning of words and expressions that are commonly used in ACT laws. The Act, for example, states that a penalty unit means \$110 for an individual and \$550 for a corporation [s.133(2)]. This definition applies whenever the term 'penalty unit' is used in ACT legislation, except where otherwise stated in an Act.

Many Acts contain a definitions or interpretation section, often towards the beginning of the legislation, or as a dictionary at the end of the Act. If a term is used anywhere in that Act, its meaning as set out in the definitions section may be substituted for that term. Sometimes a definition may be contained in a particular section or Part if it is relevant only to that section or Part.

Many Acts contain a section defining the Act's objects or purposes. This section can sometimes assist in interpreting the meaning of a particular part or section of the Act that seems unclear. When a Bill is introduced into parliament it is accompanied by an explanatory memorandum. This document and second reading speeches of ministers in parliament about the Bill may clarify the meaning of legislation.



## Administration of legislation

Once an Act has been passed and is an enforceable law, it is administered by a Minister and her or his department. The Government of the time will formulate Administrative Orders, which will outline which Ministers and departments have responsibility for various legislation. The administrative orders are available on the ACT Legislation Register.

## Courts and case law

The Australian judicial system consists of a hierarchy of courts. In the ACT, the lowest court is the Magistrates Court, followed by the Supreme Court of the ACT, then the ACT Court of Appeal, with the High Court of Australia being the highest court of appeal. If a case in the Magistrates Court is unsuccessful, it can generally be appealed to the Supreme Court, and then to higher courts (subject to rules about what can be appealed). Lower courts are bound by decisions of higher courts, which are known as 'precedents'.

Broadly speaking, there are two main types of cases that come before the different courts, criminal cases and civil cases.

## Criminal law

In a criminal case, it is the government (referred to as the Crown) that usually brings an action to prosecute a criminal offence. The two parties involved in these cases are known as the prosecution and the defendant. The penalty for a person convicted of a criminal offence will generally be a fine or imprisonment. Due to the serious consequences of convicting a person of a crime, the prosecution is required to prove its case beyond reasonable doubt. The *Environment Protection Act 1997* (ACT) contains many examples of criminal offences. For example, it is an offence for a person to knowingly or recklessly cause serious environmental harm, with a penalty of

2,000 penalty units (a \$220,000 fine for individuals, \$1,100,000 fine for corporations), five years imprisonment or both [s.137].

## Civil law

Civil law involves disputes between two or more parties. The party bringing the action is referred to as the plaintiff or applicant and the party being sued is referred to as the defendant or respondent. The parties can include individual persons, organisations, corporations, and governments. Depending on the type of dispute, the successful party may obtain an award of damages (money), or an order such as an injunction, which requires the other party to do, or stop doing, something. An injunction can be a useful remedy in environmental cases because it can prevent environmental damage being done, or ensure that action is taken to remedy a problem. In order to succeed in a civil action, a party must convince the court that its case has been proven on the balance of probabilities.



## Nuisance and negligence

Two areas of civil law that may be relevant to environmental protection are nuisance and negligence. Both these areas of the law are known as 'torts' (civil wrongs) and are mainly governed by the common law (case law), rather than by legislation.

The law of nuisance broadly concerns the protection of a person's land from damage or from activities that interfere with the enjoyment of that land. Nuisance can involve, for example, water escaping from a dam, pollutants escaping from a mining operation, fumes escaping from an industrial process, or noxious weeds spreading from one property to another. However, nuisance is of limited use in protecting the environment because it only protects an individual's interest in land and many of these situations are now dealt with more comprehensively by legislation dealing with pollution and other environmental harms.

In an action for negligence, it is necessary to show that the defendant owed you a duty of care, that he or she breached that duty, and that you suffered damage as a result. It is possible that the law of negligence could apply in some situations where there has been environmental damage. In some circumstances, governments can also be sued for breach of their statutory duties. It should be noted that a disadvantage of bringing a legal action for negligence or nuisance is that, as with most court action, it will often be complex and, therefore, expensive.

## Administrative law

Administrative law is a key part of environmental law. This branch of civil law deals with both the quality and lawfulness of decisions made by ministers, departments and government authorities. Individuals and community groups seeking to protect the environment may be able to use this branch of law to challenge government decisions affecting the environment. The two formal legal avenues of review of government decisions are:

- review by the ACT Civil and Administrative Tribunal (ACAT); and
- judicial review by a court.

Other options include making complaints to the Ombudsman or the ACT Commissioner for Sustainability and the Environment or seeking internal review by the decision-maker.

## Merits review

For decisions made by ministers and other government officials in the ACT, review by the ACT Civil and Administrative Tribunal (ACAT) may be available. A decision is only reviewable by ACAT if the relevant legislation states that the decision is subject to merits review.

In reviewing a decision, the ACAT deals with the merits of the decision, that is, it stands in the shoes of the original decision-maker and decides whether the decision is a good one or not. It can

support the existing decision, attach conditions to it, make an entirely new decision, or send the matter back to the original decision-maker with directions on how to reconsider that decision. The procedures in the ACAT are relatively informal. This is a very important avenue of review in environmental cases in the ACT.

For some types of decisions, review of the merits of the decision is also available in the Commonwealth Administrative Appeals Tribunal (AAT).

## Judicial review

Judicial review generally involves a challenge to the lawfulness, rather than the merits, of a decision and is heard by a court. In the ACT, these cases are heard initially in the Supreme Court. They are much more complex and expensive than cases in the ACAT. For decisions made by Commonwealth officials, judicial review is usually available in the Federal Magistrates Court, Federal Court and High Court.

## Key environment and planning laws for the ACT

The most important Commonwealth and ACT environment and planning laws that apply in the ACT are:

- *Australian Capital Territory (Planning and Land Management) Act 1988 (Cth)*
- *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*
- *Planning and Development Act 2007 (ACT)*
- *Nature Conservation Act 1980 (ACT)*
- *Commissioner for Environment Act 1993 (ACT)*
- *Environment Protection Act 1997 (ACT)*
- *Heritage Protection Act 2004 (ACT)*
- *Tree Protection Act 2005 (ACT)*
- *Pest Plants and Animals Act 2005 (ACT)*
- *Water Resources Act 2007 (ACT)*.

## EDO (ACT)

*The Environmental Defender's Office is a non-profit community legal centre based in Canberra, advising on environmental and planning law with an aim of increasing public awareness of environmental laws and remedies.*

*We advise on questions of Commonwealth and Australian Capital Territory law.*

*We offer a free telephone advice service on environmental law questions. Appointments with our solicitor are also available.*

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### **Disclaimer**

*The law described in this Fact Sheet is current at 31 March 2010.*

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