



ENVIRONMENTAL DEFENDERS OFFICE (ACT)

Pollution control law

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The Environment Protection Act 1997 is the Australian Capital Territory's main legislation for managing pollution. It requires that certain activities be licensed and subject to environmental standards. In addition it places a general environmental duty on all individuals and businesses in the community to take steps to prevent or minimise pollution that their activities may cause. The Act and its regulations are enforced by the Environment Protection Authority. Pollution is also governed by the common law.

The Environment Protection Act 1997

The Environment Protection Act 1997 (the Act) creates the Environment Protection Authority (EPA) which is a statutory position held by a public servant. Currently the position is held by the Director of Environment Protection within the Department of the Environment, Climate Change, Energy and Water [s.11]. The EPA administers the Act and any other functions conferred on it by other legislation having regard to the objects of the Act [s.12].

The EPA regulates pollution through the use of environmental authorisations, environmental protection agreements, accredited codes of practice, environmental improvement plans, environment protection orders and prosecutions.

What are the objects of the Act?

The objects of the Act [s.2] include:

- prevention of environmental degradation and adverse risks to human health and the health of ecosystems by promoting pollution prevention;
- requirements for people engaging in polluting activities to make progressive environmental improvements;
- regulating, reducing or eliminating the discharge of pollutants and hazardous substances into the air, land or water consistent with maintaining environmental quality;
- promoting the principles of ecologically sustainable development;
- establishing a process for investigating and where appropriate remediating land where contamination is causing a significant risk of harm to human health or serious environmental harm.



What is pollution?

To pollute is defined as causing or failing to prevent the discharge, emission, depositing, disturbance or escape of a pollutant. A pollutant is a substance which may cause environmental harm when discharged, emitted, deposited or disturbed. This includes:

- a gas, liquid or solid;
- dust, fumes, odour or smoke;
- an organism, whether dead or alive, including a virus or a prion;
- energy, including heat, noise, radioactivity, light, or other electromagnetic radiation; or
- anything prescribed or any combination of the above elements [s.3, dictionary].

A pollutant is taken to cause environmental harm if the pollutant 'exceeds the prescribed measure' or is a 'prescribed pollutant' [s.45].

Some activities are specifically not regulated by the Act, including trains, aircraft, certain motor vehicles or pollution resulting solely from the appearance or use of a structure [s.8].

What is the general environmental duty of care?

The Act encourages responsibility for the environment by imposing, a general environmental duty on the whole community, to take all practicable and reasonable steps to prevent or minimise environmental harm or environmental nuisance resulting from their activities [s.22]. However, failure to comply with this general environmental duty is not in itself an offence, and does not necessarily constitute grounds for action under the Act [s.22(3)].

What is an environmental authorisation?

It is an offence to undertake certain polluting activities without an authorisation [Part 8].

Activities requiring authorisation

There are three situations where environmental authorisations are required:

- The conduct of Class A activities, which are activities involving the greatest environmental risk. These are listed in Schedule 1 of the Act and include, but are not limited to:
 - o transport of hazardous waste within the territory and between states and territories;
 - o operation of commercial landfill facilities;
 - o operation of agricultural facilities;
 - o motor racing events;
 - o commercial use of chemical products, registered under the Commonwealth's Agricultural and Veterinary Chemical Code [AgVet], for pest control or turf management;
 - o manufacture, sale, storage, supply, transport, use, servicing, disposal of, or dealing with an ozone depleting substance [for example, the servicing of car air conditioning systems];
 - o cutting, storing, seasoning, sale and supply of firewood;
 - o operation of sewage treatment plants.
- The conduct of Class B activities, where an environmental protection agreement is not in place. Class B activities have less potential for causing significant environmental harm than Class A activities and include:
 - o commercial collection of waste;
 - o wastewater recycling activities; or
 - o growing, harvesting and management of forestry products.
- In addition the EPA may require an environmental authorisation on the grounds that the person conducting the activity:
 - o has, is, or is likely to contravene the Act; or
 - o the contravention has caused, or is likely to cause, serious or material environmental harm.

What types of authorisations are there?

There are three kinds of authorisation:

- a **standard** authorisation for an unlimited period, but usually for three years, subject to annual review [s.46(a)];
- an **accredited** authorisation given to operators who can demonstrate that they are applying an environmental improvement initiative [s.46(b)]. There are certain incentives as an accredited authorisation is issued with lower fees [s.53(3)] and a three year review period of the authorisation, rather than annually [s.58]; and
- a **special** authorisation where the activity is being conducted for research and development, including a trial of experimental equipment, granted for a specified period not longer than three years [s.46(c)].

Authorisations most commonly authorise a named person to conduct the activity in a specified location, subject to any specific conditions. They require the payment of a fee, which can vary substantially from several hundred to tens of thousands of dollars, depending on the activity and the level of pollutants released to the environment. These fees are set out in *Environment Protection (Fees) Determination 2009 (No 1)* [F 2009/332].

polluter pays principle. The fees include a component, which is applied as a rate per kilogram of pollutant, that the authorisation holder releases into the environment. Pollutant loading has been applied in the ACT for sewerage treatment works, incinerators and petroleum storage facilities.

Are conditions placed on authorisations?

Conditions can be attached to an authorisation to ensure compliance with the Act [s.51].

Conditions may require that an applicant:

- commission an environmental audit on a specified matter;
- prepare a draft environmental improvement plan;
- provide a financial assurance of a specified kind and amount to the EPA;
- give specified information regarding the environmental impact of the activity at any specified time during the period of the authorisation;
- conduct environmental monitoring or testing;
- comply with a specified provision of an industry standard or code of practice, being a provision that relates to minimising environmental harm.

Is the public consulted on authorisations?

The EPA is required to place a notice of an application for an authorisation in the Legislation Register and the *Canberra Times*, inviting submissions on the application within fifteen days [s.48]. However, the Minister can make a declaration that public consultation is not required for a particular prescribed activity where there is no impact, or minimal impact on the environment. This declaration is a disallowable instrument and therefore must be notified, presented and may be disallowed by the Legislative Assembly. A notice of the grant of an authorisation must also be published in the Legislation Register and the *Canberra Times*.

Can authorisations be varied?

The EPA can vary environmental authorisations [s.60]. Such a variation does not have to be publicly notified, although it is a disallowable instrument.

What happens if an authorisation is breached?

There are many possible consequences for breaching an authorisation. Depending on the nature and scope of the breach, there could be criminal or civil penalties imposed on the individuals or businesses, or a suspension or cancellation of the authorisation. The EPA may, by notice in writing, suspend or cancel an environmental authorisation where it has reasonable grounds for believing that the holder has contravened the authorisation, an environment protection order or a provision of the Act and the breach results in serious or material environmental harm [s.63].



Can I access information on authorisations?

Authorisations are public documents and may be viewed on request, at no cost. These may be viewed at the Environment Protection Authority Office, Macarthur House, 12 Wattle Street, Lyneham ACT.

What is an Environmental Protection Agreement?

Environmental Protection Agreements [Part 7] are developed between the EPA and people conducting less harmful Class B activities, listed in Schedule 1 to the Act. These agreements are formal written documents that have effect for a specific period of time. There is no fee payable for an agreement. An agreement does not relieve a party from any obligation or duty under the Act or any other law [s.40]. Such agreements are designed to broaden the obligations of the holder of an authorisation to include items such as complying with industry codes of practice.

Is the public consulted on Environmental Protection Agreements?

These agreements are notified in the Legislation Register and *Canberra Times* as having been

entered into but there is no public input by way of submissions. The Minister may declare that the notification requirements for agreements do not apply if the Minister is satisfied that the implementation of the agreement is not likely to cause any material environmental harm [s.41(5-6)]. Such a declaration is a disallowable instrument scrutinised by the Legislative Assembly and notified in the ACT legislation register. Members of the public can view agreements at the EPA.

What happens if an Environment Protection Agreement is breached?

If an environmental protection agreement is breached, the EPA has the capacity to suspend the agreement. The holder will then have to apply for a legally binding environmental authorisation, for which he or she must pay the appropriate fees. When a breach of the Act has occurred, prosecution may take place.

Accredited Codes of Practice

The Act provides for Accredited Codes of Practice which outline ways of achieving compliance with the general environmental duty [s31-33]. Some Codes have been accredited, such as the waste collection code of 1998, however the EPA tends to provide a range of less formal guidelines.

What is an Environmental Improvement Plan?

An Environmental Improvement Plan is a formal plan to rectify problems, minimise environmental impacts and achieve compliance with the Act [Div 9.1]. It can be put in place either to prevent or rectify harm. The EPA can require a plan if there is, or is likely to be, serious environmental harm caused by a contravention of the Act and the EPA considers that an improvement plan will help to rectify the situation [s.69]. These plans can be required as part of an environmental authorisation, or alternatively can be prepared on a voluntary basis. Environmental Improvement Plans can be viewed by the public at the EPA.

What is an Environmental Protection Order?

Where the EPA has reasonable grounds for believing that a person has contravened or is contravening an environmental authorisation or a provision of the Act, it may serve an environment protection order on the person [s.125]. The order is in writing, and identifies:

- the person on whom the order is served;
- the provision of the Act or authorisation contravened;
- the nature of the contravention;
- the day, time and place where the contravention happened.

The order may also be served on the occupier of contaminated land. In this case, the order will specify:

- the nature of the substances in, on or under the land;
- the grounds the EPA has for believing the land is contaminated;
- the action that must be taken, stopped or not commenced by the person;
- the maximum penalty on conviction for a failure to comply with an order.

Orders can specify particular requirements or things to be done or not done, including:

- stopping or not commencing a specified activity for a period of time or indefinitely;
- undertaking particular action to remedy the harm and, if appropriate, taking action to prevent or mitigate further harm;
- restoring the environment in a public place or for the public benefit;
- not conducting a particular activity except during specified times or subject to specified conditions;
- providing information to the EPA on the environmental impact of an activity being conducted.

What are Environment Protection Policies

The Act is supported by Environment Protection Policies (EPPs). They are non-binding guidelines on how the EPA will administer and interpret the Act [s.30]. Nine EPPs have been finalised, one general one and eight specific EPPs. These are:

- General (August 2007)
- Noise (November 1998)

- Motor sport noise (December 1998, revised October 2002)
- Wastewater reuse (July 1999)
- Air (3 November 1999)
- Water (November 1999, revised April 2008)
- Contaminated Sites (November 2000)
- Hazardous materials (December 2000)
- Outdoor Concert Noise (February 2001).

There are certain requirements for developing EPPs [Part 4]. First a draft is developed by the EPA. It is then made available for public comment for forty working days, after a notice has been published in the ACT legislation register and the *Canberra Times*. Comments received during this period are considered and the EPA may revise the draft EPP in accordance with the suggestions received [s.26]. Finally, the policy goes to the Minister for Environment for his or her consent.

Does the Act use economic measures?

The Act utilises a range of economic instruments, with the intent that financial benefits are associated with less polluting activities, some of these measures include:

- Load based licensing fees – [s.165]
- Bubble licenses – [s.35]
- Tradeable permits – [s.36].

Are there offences and penalties?

An authorised officer can serve an infringement notice on a person if the officer has reasonable grounds for believing that a person has committed a minor environmental offence [s.120 *Magistrates Court Act 1930*]. These minor offences are listed in Schedule 1 to the Magistrates Court (Environment Protection Infringement Notices) Regulation.

The infringement notice includes an on-the-spot fine. The maximum fine for breach of an environmental regulation is ten penalty units, which is currently \$1,100 for an individual or \$5,500 for a corporation. If the fine is not paid within twenty-eight days a final infringement notice is issued that adds an administrative charge to the fine. A person may also apply for a withdrawal of the notice. Prosecution for minor environmental offences can only occur if the person has not responded to the second and final notice and a period of fourteen days after the date of the notice has elapsed.

More serious offences are dealt with in Part 15 of the Act. The main offences are: causing serious or material environmental harm [ss.137, 138], causing an environmental nuisance [s.141] and placing a pollutant where it could cause harm [s.142], Penalties are higher if the environmental harm is 'material' or 'serious', which is when the harm:

- continues over time, occurs frequently, or has a cumulative effect;
- is in an area of high conservation value;
- results in the loss of property of \$5,000 or more for material harm, or \$50,000 or more for serious harm;
- results in remediation costs of \$5,000 or more for material harm, or \$50,000 or more for serious harm.

Each offence carries different penalties according to whether a person:

- knowingly or recklessly polluted – for material environmental harm, 1,000 penalty units, imprisonment for two years, or both and for serious environmental harm 2,000 penalty units, imprisonment for five years, or both
- negligently polluted – for material environmental harm, 750 penalty units, or one year imprisonment, or both and for serious environmental harm, 1,500 penalty units, imprisonment for three years, or both



- polluted the environment – for material environmental harm 500 penalty units and for serious environmental harm 1,000 units.

A penalty unit is currently \$110 for an individual and \$550 for a corporation [s.133 *Legislation Aev'2001* (ACT)]. There are further specific offences prescribed under Schedule 2 of the Act.

What is the liability of Government entities?

Generally, governmental entities are not immune from the provisions of the Act [s.10]. However, they are specifically exempt from prosecution in matters concerning:

- compliance with an authorisation [s.45];
- pollution of the environment causing environmental harm [s.139(3)], including serious [s.137(3)] or material [s.138(3)] environmental harm;
- causing an environmental nuisance [s.141]; or
- placing a pollutant where it could cause harm [s.142].

Can decisions be challenged?

Under the Act an eligible person may apply to the ACT Civil and Administrative Tribunal for review of certain decisions made by the EPA [s.136B]. An eligible person is a person to mentioned in column 4 of Schedule 3 to the Act or any other person whose interests are affected by the decision. Numerous types of decisions may be reviewed, including:

- exclusion of or refusing to exclude a document or part of a document from public inspection;
- not taking any action under the Act; and
- granting an environmental authorisation.

In addition it is possible to apply to the Supreme Court for an injunction [Division 13.3]. Where there is a breach or a likely breach of the Act, an environmental authorisation or protection order, the Supreme Court may order the respondent to remedy or to stop committing the breach [s.128]. If the matter is urgent, it is possible to seek an interim order, but the court must be convinced that there is a real or significant likelihood that serious or material damage will occur before the application is decided [s.129].

Applications for injunctions can be made by the EPA or by any other person. The Supreme Court may grant leave for 'any other person' to make an application if the person has first asked the EPA to take action and it has failed to do so, and the proceedings are in the public interest [s.127].

The Supreme Court may make an order for security of costs, which involves the applicant having to prove that they can pay the costs of the other party if the application fails. Additionally, failure of the case may result in the applicant having to pay compensation to the person alleged to be in breach [s.131-132].

The Act also provides that civil and common law remedies are not affected or diminished by its operation [s.9] stating that compliance with the Act "is not, of itself, evidence that a common law duty of care has been satisfied". In other words, the Act suggests that a nuisance action may succeed even if there is an apparent compliance with the legislation. For example, pollution may be found to amount to a nuisance at common law, even if the conduct or activity causing it is authorised and lawful under the 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

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