



chapter one

ACT legal framework

Introduction

This chapter summarises the general framework of the Australian legal system, the sources of Australian law and the processes associated with the creation of new laws in Australia. The chapter also introduces some of the key environmental and planning laws applicable in the Australian Capital Territory (ACT) that are discussed in more detail later in this handbook.

Australian legal system

Federalism

The Australian legal system is based on a federal system of government, like that of the United States. In a federal political system, governmental 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, which also underpins the United Kingdom's political system. 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

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applies to a limited extent in Australia. For example, Parliaments often delegate powers to the executive to make laws (see the sections on delegated legislation below).

Sources of law

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.

Delegated legislation

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. 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.

Case law

The other main source of law in Australia is case law, also known as the common law. Case law 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.

Parliament and legislation

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. For a summary of the most important ACT laws concerning the environment, see the section on environmental and planning laws below.

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.

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. In the ACT, all Acts must be included on the ACT legislation register (see discussion on the ACT legislation register below).

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.

In the ACT, s.65 of the *Legislation Act 2001* (ACT) provides 12 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. This Act contains many other

important provisions about the making and notifying of rules and regulations. It requires all delegated legislation, for example, to be placed on the ACT legislation register (see below).

ACT legislation register

The register was established under the Legislation Act and it provides ready access to up-to-date, authorised versions of all Acts and subordinate legislation in force in the ACT, and all new legislation since 2001 is placed on the register (see Contacts list at the back of this book).

In addition, a range of instruments made under legislation, including disallowable instruments, notifiable instruments and commencement notices, are published on the register. A number of chapters in this handbook refer particularly to disallowable instruments, for example, the instruments identifying plants and animals that are endangered or threatened in Chapter 5.

Acts and subordinate legislation that predate the register are being added to the register as part of a back capture program. Now many Acts and instruments that predate the register can be found on the register. However, if an Act or subordinate instrument is not on the register you can contact the ACT Parliamentary Counsel's Office (see Contacts list at the back of this book).

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 contains a dictionary setting out the meaning of words and expressions that are commonly used in ACT laws. Section 133 of the Act, for example, states that a penalty unit means \$100 for an individual and \$500 for a corporation. 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.

Executive and administration of legislation

Once an Act has been passed and is an enforceable law, it is administered by a minister and his or her department. To find out which members of the ACT Legislative Assembly are

ministers in the ACT and what portfolios they have, consult the ACT government listing in the phone book, or visit the Legislative Assembly's website. For the same information concerning Commonwealth ministers, visit the Parliament of Australia's website under Who's Who (see Contacts list at the back of this book).

Courts and case law

Introduction

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; these decisions are known as 'precedents'.

Broadly speaking, there are two main types of cases that come before the different courts, criminal cases and civil cases. A brief overview of the differences between criminal and civil law, and of some general areas of civil law that may be important in the environmental context, is provided below.

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 \$200,000 fine for individuals, \$1,000,000 fine for corporations), five years' imprisonment or both (s.137). Chapter 10 has more information on these offences.

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. Chapter 12 has more detail on taking civil cases to court.

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. Defamation, which is another area of tort law, is discussed in Chapter 12.

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 (see Chapter 10).

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

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.

There are many different avenues of review of government decisions. This chapter briefly mentions two: merits review by the ACT Civil and Administrative Tribunal (ACAT) and judicial review by a court.

In 2008 the ACT passed legislation which abolished a number of ACT tribunals, including the Administrative Appeals Tribunal (AAT), and consolidated them in a single tribunal, ACAT. The operations of ACAT are discussed in greater detail in Chapter 12.

In reviewing a decision by a minister or other official, 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 ACAT are relatively informal. This is a very important avenue of review in environmental cases in the ACT.

Most decisions are also subject to judicial review by the courts. Judicial review generally involves a challenge to the lawfulness, rather than the merits, of a decision. In the ACT, these

cases are heard initially in the Supreme Court, so are much more complex (and expensive to run) than cases in ACAT.

Further options, such as making complaints to the Ombudsman or the ACT Commissioner for Sustainability and the Environment, are discussed in Chapter 12.

For decisions made by Commonwealth officials, judicial review is usually available in the Federal Magistrates Court, Federal Court and High Court. For some types of decisions, review of the merits of the decision is also available in the Commonwealth AAT.

Environment and planning laws

This section summarises the most important Commonwealth and ACT environment and planning laws that apply in the ACT. All of these Acts are discussed in greater detail in later chapters of this handbook.

Australian Capital Territory (Planning and Land Management) Act 1988 (Cth)

Prior to self-government in 1988, the Commonwealth government owned and administered all land in the ACT. Under the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) (Planning and Land Management Act), the Commonwealth retains ownership of all land, and land in the ACT continues to be leased to occupiers rather than sold as freehold.

However, responsibility for administering ACT land was divided between the Commonwealth and the ACT governments. The land that remains under the Commonwealth's administrative control is known as national land (ss.6 and 27). The ACT government has primary responsibility for administering the rest of the land in the ACT, which is known as territory land (s.29).

However, the ACT does not have sole control over all of that land. The Planning and Land Management Act states that the National Capital Authority is responsible for developments on 'designated areas' of territory land (s.12). 'Designated areas' are areas of land that are designated because they have the special characteristics of the national capital (ss.4 and 10). Other territory land may be subject to 'special requirements' so that it must be developed by the ACT and the Commonwealth governments in the interests of the national capital.

The Planning and Land Management Act also provides that the National Capital Authority must prepare and maintain a National Capital Plan, setting out planning principles for all land in the ACT, as well as dealing specifically with national land, designated areas and special requirements areas (s.10). The ACT Legislative Assembly is given power to establish its own planning authority and to prepare a Territory Plan that is consistent with the National Capital Plan and deals with more specific planning for territory land (s.25).

See Chapter 2 for more detail on the National Capital Plan, the Territory Plan and the leasehold system.

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) is the Commonwealth's most important environmental legislation. It came into force on 16 July 2000 and replaced five Commonwealth Acts: the *Environmental Protection (Impact of Proposals) Act 1974*; the *Endangered Species Protection Act 1992* the *National Parks and Wildlife Conservation Act 1975*; the *World Heritage Properties Conservation Act 1988*; and the *Whale Protection Act 1980*. The EPBC Act has also replaced the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*, and together with the *Australian Heritage Council Act 2003*, the EPBC Act has replaced the *Australian Heritage Commission Act 1975*.

The EPBC Act regulates the assessment and approval of activities that have a significant impact on matters of national environmental significance, have a significant impact on Commonwealth heritage places overseas, are undertaken by Commonwealth agencies, or are undertaken by any person in Commonwealth areas. The approval processes under the EPBC Act are additional to those applicable under state and territory laws, although approval of the Commonwealth minister under the EPBC Act may not be necessary if an activity is undertaken in accordance with an accredited state approval process. Through bilateral agreements, the Commonwealth may accredit and rely upon state assessment and approval processes for actions impacting upon matters of national environmental significance. However, to date there have only been bilateral assessment agreements; there are no bilateral approval agreements which accredit state approval processes.

Through creating and regulating protected areas, such as World Heritage properties, and providing for the listing and management of threatened species and ecological communities, the Act also protects biodiversity. See Chapter 5 for a full discussion of the EPBC Act.

Planning and Development Act 2007 (ACT)

The *Planning and Development Act 2007* (ACT) (Planning Act) replaces the old *Land (Planning and Environment) Act 1991* (Land Act) and the *Planning and Land Act 2002* as the ACT's primary piece of planning legislation. This Act introduced substantial changes to the previous planning regime. The ACT Legislative Assembly passed this Act in September 2007, but it did not commence until 31 March 2008.

The Planning Act deals with the administration of the leasehold system (see Chapter 2); the Territory Plan, including its content and processes for variation; the development of a planning strategy; the process of gaining approval for developments (see Chapter 3), including the provision for environmental impact assessments (see Chapter 4); and the reservation of public land for national parks and reserves (see Chapter 7).

The existence of an independent planning authority, the ACT Planning and Land Authority (ACTPLA), which was previously established under the Land Act, is continued under this Act. ACTPLA has the functions of administering the Territory Plan, and managing the leasing of land and approvals for development applications. The establishment of the Land Development Agency to develop land is also provided for in the Planning Act.

Land (Planning and Environment) Act 1991 (ACT) (repealed)

The *Land (Planning and Environment) Act 1991 (ACT)* (Land Act) was repealed by the *Planning and Development Act 2007*. Prior to its repeal the Land Act was the ACT's primary piece of planning legislation dealing with the administration of the leasehold system; the development of the Territory Plan; the process of gaining approval for developments, including the provision of environmental impact assessments; and the reservation of public land for national parks and reserves.

Although the Land Act has been repealed, transitional arrangements are in place for a number of matters, including development applications lodged prior to the commencement of the new Planning Act, and appeals on foot prior to the commencement of the new Act. The transitional provisions in the Planning Act mean that certain development applications and appeals will continue to be considered under the Land Act, not the new Planning Act.

Nature Conservation Act 1980 (ACT)

The Nature Conservation Act protects the flora, fauna, ecology and natural beauty of the ACT, thereby assisting Canberra to retain its status as the bush capital. It establishes the office of Conservator of Flora and Fauna, the ACT Parks and Conservation Service, and a Flora and Fauna Committee. Under the Act declarations are made identifying vulnerable and endangered plants, animals and communities and the activities that threaten them. These declarations are supported by action plans to preserve and protect these plants, animals and communities. The Act also sets up a system of licences for activities involving native plants and animals and establishes offences for unlicensed activities. It also regulates areas reserved for conservation. See Chapters 5 and 7 for more detail.

Water Resources Act 2007 (ACT)

The Water Resources Act sets up a system of sustainable management and use of the territory's water resources and protects aquatic ecosystems and aquifers. Section 7 of the Act states that the Territory has the right to the use, flow and control of all the water resources in the ACT. In effect this means that the ACT government has the right to determine the appropriate use of water, appropriate water flows, and limits on water usage in the ACT. It sets up an ecologically sustainable management system that is managed by the Environment Protection Authority, incorporating environmental flow guidelines, water access entitlements, and a licensing system for using surface and underground water. See Chapter 8 for more detail.

Environment Protection Act 1997 (ACT)

The Environment Protection Act is designed to prevent harm to the environment by pollution and to enhance the quality of the environment. It places a duty on all citizens to prevent such harm; creates a system of licences, authorisations and agreements to control activities that might cause pollution; and establishes an Environment Protection Authority to administer this system. See Chapter 10 for more detail.

