

ACT ENVIRONMENTAL LEGISLATION AND STATUTORY AUTHORITIES AND TERRITORY OWNED CORPORATIONS

INTRODUCTION

1.1 Crown immunity

1.2 It is not self-evident that Australian governments are able to recover from a government corporation acting in breach of environmental laws in all cases. This is because there is a presumption of statutory interpretation in Australia that a statute does not bind the Crown, or government, except by express words or necessary implication. A necessary implication may be found through a process of statutory interpretation requiring analysis of both the express words of the legislation in question and of the legislation's purpose, policy, subject matter and operation.¹

1.3 The existence of the presumption that a statute does not bind the Crown except by express mention or necessary implication means that, in the majority of Australian jurisdictions, it is possible to frame environmental legislation in such a way as to not bind the Crown, without express words to that effect.² That said, Australia wide, 'most, if not all, environmental legislation is expressed to bind the Crown; which means that the institutions of government must comply with environmental statutes'.³ As this submission explains following, it is EDO's position that ACT environmental laws should reflect this nationally accepted standard.

¹ (1990) 171 CLR 1; see also *Jacobsen v Rogers* (1995) 182 CLR 572 and S Kneebone, 'The Crown's Presumptive Immunity from Statute: New Light in Australia' *Public Law* (1991) 361.

² See PW Hogg and PJ Monahan, *Liability of the Crown* (2000, 3rd ed.), Carswell, Ontario at 275-276; T Blackshield and G Williams G, *Australian Constitutional Law & Theory – Commentary and Materials* (2nd ed, 1998) The Federation Press, Sydney at 450; DE Fisher, 'Environmental Accountability of the Water and Electricity Industries in Australia' *Journal of Energy and Natural Resources Law*, (1997) 15(2), 97 at 100-101.

³ Bates 'Environmental Law in Australia', 5th Edition 2002, pg 49.

1.4 Crown immunity – application to Crown agents and instrumentalities.

1.5 Traditionally, where a statute does not bind the Crown, this immunity, or shield, also extends to agents and instrumentalities of the Crown.⁴ However, in the case of *Bropho v Western Australia*,⁵ the High Court held that “*the strength of the presumption... will depend upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question ... arises.*” Therefore, whether or not an agent or instrumentality of the Crown is protected by the shield of the Crown is also a question of statutory interpretation to be determined by looking at the legislation under which the body in question is constituted.⁶

1.6 ACT legislative framework analysed in relation to Crown immunity

1.7 This submission will focus upon the four main environment and planning laws in the ACT. These laws are:

- (a) the *Land (Planning and Environment) Act 1991* (ACT);
- (b) the *Environment Protection Act 1997* (ACT);
- (c) the *Nature Conservation Act 1980* (ACT); and
- (d) the *Water Resources Act 1998* (ACT).

1.8 Also, this submission will note the effect of the *Legislation Act 2001* (ACT). Section 121 of that Act reverses, to some extent, the presumption that the Crown will not be bound by legislation.

1.9 The submission will consider whether certain statutory authorities and public corporations in the ACT, in terms of the likelihood of their activities being regulated by environmental legislation, benefit from any immunity that the Crown has. The entities considered are:

- (a) ACTEW Corporation ('ACTEW') and Totalcare Industries ('Totalcare') (both incorporated under the *Territory Owned Corporations Act 1990*); and

⁴ *Bropho v Western Australia* (1990) 171 CLR 1.

⁵ *Id* at 23.

⁶ *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282.

- (b) the Australian Capital Tourism Corporation ('Tourism Corporation') (incorporated under the *Australian Capital Tourism Act 1997*).⁷

1.10 The Legislation Act 2001 (ACT)

- 1.11 The *Legislation Act 2001 (ACT)* ('**Legislation Act**') replaced the *Interpretation Act 1967 (ACT)* and provides the basis for interpreting legislation in the ACT.
- 1.12 Section 121 (1) of the *Legislation Act* deals with the binding effect of ACT legislation. It specifies that ACT legislation binds all governments, subject to express or manifest contrary intention in the legislation in question.
- 1.13 However, subsections 121 (2) and (3) then specify certain circumstances in which the ACT government will not be bound by ACT legislation. In summary, the exceptions are that:
 - (a) an Act does not bind the Territory to the extent that it requires or provides for the payment of money that, on payment, would form part of the public money of the Territory (an exemption from paying fines, for example); and
 - (b) a government is not made liable to be prosecuted for an offence.
- 1.14 Subsection 121 (4) extends the above immunities to ACT government entities, by stating '*[t]o the extent that an Act does not bind a government, the same degree of immunity extends to a government entity in relation to an authorized act or omission of the entity.*' 'Government entity' includes an instrumentality, officer or employee of the government; and a contractor or anyone else who exercises a function on behalf of the government (subsection (6). See further 1.15 below.).
- 1.15 Subsection 121(6) of the *Legislation Act* thus provides an inclusive definition of 'government entity'.⁸ On an initial consideration, the definition appears broad enough to include all statutory authorities and government owned corporations and it appears arguable that subsection 121(4) is an express provision holding that all bodies

⁷ Formerly the Canberra Tourism and Events Corporation

⁸ I.e. not necessarily limited to those bodies and individuals listed in the definition of government entity in subsection 121(6).

created by government, including statutory authorities and public corporations are entitled to the Crown immunities set out in subsections 121(2) and (3).

1.16 However, this submission recognises that the proposition set out in point 1.15 (above) is not definite. The answer to the general question of whether a statutory authority or government corporation will benefit from Crown immunities, or whether a particular body is an agent of the Crown, is a question of statutory interpretation to be approached by looking at the legislation under which the entity in question is constituted.⁹ The analysis is obviously assisted where legislation clearly sets out its intention.

1.17 **Environmental legislation in the ACT – scope of binding effect**

1.18 The starting point in determining whether ACT environmental legislation binds the ACT government and ACT government entities, is that they generally will be bound, with exceptions. The two exceptions are that, if they engage in an activity in breach of environmental legislation (but in the case of a government entity within the scope of its authority), they will not be liable to pay fines that will, on payment, form part of the public money of the ACT or be liable to be prosecuted for an offence. This will be the case unless there is an express or manifest contrary intention in the environmental legislation.

1.19 The first exception prevents public funds from being moved around within the ACT government. It may appear logical to avoid such movement within a 'single entity', because at first instance it does not appear to serve any useful purpose. However, the ACT government, as defined in section 121, includes a number of departments and agencies, and potentially statutory authorities and government owned corporations, which each have a separate budget. We submit therefore, that the payment of such fines, out of the budget of the offending entity, may still serve as a powerful incentive to comply with environmental legislation.¹⁰

⁹ See *Superannuation Fund Investment Trust v Cmr of Stamps* (SA) (1979) 145 CLR 330 at 351.

¹⁰ As PW Hogg and PJ Monahan, *Liability of the Crown* (2000, 3rd ed.), Carswell, Ontario hold at 314: 'If the public accounts are to reflect the costs and benefits of running each department, [the payment of fines for breaches of statute law] seems an entirely appropriate procedure.'

1.20 The second exception reflects, firstly, the finding in *Bropho*¹¹ that the presumption against a statute binding the Crown would be very strong in cases where, if binding, the legislation would impose criminal liability on the Crown, and secondly, Latham CJ's judgment in *Cain v Doyle*¹² that the Crown cannot be guilty of a criminal offence.¹³ Latham CJ based this conclusion on the argument that it would be incongruous to impose criminal liability on the Crown, because the Crown cannot be imprisoned, and also on the argument that even if the criminal penalty was a fine, rather than imprisonment, it would be incongruous for a government to have to pay a fine to itself.¹⁴ While it is obviously not feasible to imprison a government department, statutory authority or public corporation, we submit that each can clearly be made liable to pay a criminal fine. Provision for the alternative punishments of a prison sentence or a fine is made in most environmental legislation today. It is clear from the discussion in paragraph 1.19 that the payment of fines can be a useful deterrent even within government. The obligation to pay a fine also gives expression to public condemnation of the offending activity.¹⁵

1.21 ***Land (Planning and Environment) Act (ACT)*** - This Act does not contain a general clause that states whether or not the Act binds the ACT government. This means that the general provisions in the *Legislation Act* apply to all sections in the Act which do not specify who is bound. These general provisions are that the ACT government and its entities will be bound by the *Land (Planning and Environment) Act*, except where the ACT government or the ACT government entity, acting within the scope of its functions, has done something for which the Act imposes a fine that will on payment form part of the public money of the ACT or for which the Act creates an offence. Section 225, dealing with development approvals,¹⁶ and section 255, dealing with orders prohibiting controlled activities,¹⁷ of the *Land (Planning and*

¹¹ (1990) 171 CLR 1 at 23.

¹² (1946) 72 CLR 409.

¹³ Note, however, that crown employees can be made subject to criminal penalties if they break the law in the course of their employment.

¹⁴ (1946) 72 CLR 409 at 417-418.

¹⁵ See PW Hogg and PJ Monahan, *Liability of the Crown* (2000, 3rd ed), Carswell, Ontario at 314; see also S Kneebone, 'The Crown's Presumptive Immunity from Statute: New Light in Australia' *Public Law*, 1991, 361 at 368-369.

¹⁶ Which includes assessing environmental considerations; see sections 229(4A) and 236 of the *Land (Planning and Environment) Act*.

¹⁷ Controlled activities include: activities likely to impede the conservation of heritage places; activities likely to cause soil erosion, including the destruction, damage or removal of vegetation on steep slopes and in proximity to watercourses; or failing to control the

Environment) Act, contain specific binding provisions, which are broadly consistent with the general provisions in the *Legislation Act*. Under these sections, Territory authorities are subject to the same obligations but not to the fine.

- 1.22 ***Environment Protection Act 1997 (ACT)*** - The effect of section 10 of this Act (no immunity from criminal liability for government entities) is to modify the general provisions in the *Legislation Act* (i.e. the ACT government and its entities are bound by legislation, except that the ACT government and government entities, when acting within the scope of their functions, are not liable to pay fines that will on payment form part of the public money of the ACT and are not liable to be prosecuted for an offence,) by establishing that government entities can be criminally liable under a range of important provisions in the *Environment Protection Act*.
- 1.23 Offences for which the government and government entities can be held criminally liable under the *Environment Protection Act* include:
- (a) failure to notify the Environmental Protection Authority of actual or threatened environmental harm caused by an activity or of the existence of contaminated land (s. 23 and 23A);
 - (b) failure to obtain an environmental authorisation or failure to enter into an environmental protection agreement (s. 42-44);¹⁸
 - (c) failure to undertake an ordered land contamination assessment or comply with an order to remediate land (ss. 91C and 91D) contravention of an environmental protection order (s. 126);¹⁹

propagation of pest animals or pest plants, see Schedule 5 to the *Land (Planning and Environment) Act*.

¹⁸ Environmental authorisations are required for activities such as: dealings with ozone depleting substances, the operation of incineration facilities, certain excavation activities, the operation of a commercial landfill, the sterilisation of clinical waste, sewerage treatment, dealings with regulated waste, large scale agricultural operations, electricity generation, forestry activities and major land developments (see Schedule 1 to the *Environment Protection Act*). An environmental protection agreement is an agreement entered into by the EPA and another legal entity which seeks to further the objectives of the *Environment Protection Act*, through for example meeting progressively higher environmental standards (see s. 39).

¹⁹ An environmental protection order may be served on a person who has contravened or is contravening an environmental authorisation or another provision of the *Environment Protection Act* (s. 125(1)). An environmental protection order may require a person to stop any further contravention of the environmental authorisation or other breach of the Act, and

- (d) contravention of an information discovery order (s. 134);²⁰
- (e) knowingly, recklessly or negligently causing serious environmental harm (s. 137(1) and (2));
- (f) knowingly, recklessly or negligently causing material environmental harm (s. 138(1) and (2));
- (g) knowingly, recklessly or negligently causing environmental harm (s. 139(1) and (2)); and
- (h) a range of offences relating to excessive noise emissions, emission of pollutants from fuel burning equipment and pollutants in petrol (s.145 and Schedule 2).

1.24 Where a government department or a government entity is found to be criminally liable for an offence, the Court can impose additional orders under section 157 requiring the government department or entity to:

- (a) take specified action to remedy or mitigate the environmental harm and prevent further environmental harm;
- (b) carry out specified action for the restoration or enhancement of the environment in a public place or for the public benefit;
- (c) take specified action to publicise the contravention and its environmental and other consequences; and any other orders made against the government department or entity;
- (d) pay such an amount as is determined by the court to the Territory for any reasonable costs and expenses incurred by the Territory in taking action to remedy or mitigate the environmental harm or prevent further harm, or to any other person as compensation for any injury, loss or damage to property as a result of the contravention; or mitigation thereof; or
- (e) pay the other reasonable costs and expenses of the Territory (including legal and enforcement costs).

can include the requirement that any environmental harm caused be remedied (s. 125(2) and (3)).

²⁰ This is an order to provide information, which is required by the EPA for the administration or enforcement of the *Environment Protection Act*.

There are, however, a number of offences for which the government and government entities *cannot* be held criminally liable. These are set out in subsection 10(2), which refers in turn to ss45, 137, 138, 139 and 141.

10 Criminal liability of government entities

(2) Subsection (1) does not apply in relation to a prosecution for—

(a) an offence against any of the following provisions:

- section 45 (Compliance with an authorization)
- section 137 (3) (which is about polluting the environment causing serious environmental harm)
- section 138 (3) (which is about polluting the environment causing material environmental harm)
- section 139 (3) (which is about polluting the environment causing environmental harm)

- 1.25 Section 45 creates an offence for contravening an environmental authorisation. An environmental authorisation can be breached, for example, by emitting pollutants in excess of the authorised amount.²¹
- 1.26 It is also important to note that sections 137(3), 138(3) and 139(3) only relate to pollution of the environment causing serious environmental harm, material environmental harm or environmental harm, which is neither knowing, reckless or negligent. The ACT government and its entities are liable to be prosecuted for causing such harm knowingly, recklessly or negligently, (see paragraphs 1.23(e), 1.23(f) and 1.23(g) above.)
- 1.27 Minor environmental offences, set out in Division 13.1 of the *Environment Protection Act* and Schedule 5 of the *Environment Protection Regulations 1997*, include activities such as allowing pollutants to enter the stormwater system, storing hazardous materials, or emitting excess noise from a property, (see Schedule 5). The penalty for minor environmental offences is an on-the-spot fine.
- 1.28 ***Nature Conservation Act 1980 (ACT)*** - The *Nature Conservation Act* does not contain a general clause that states whether or not the Act binds the ACT government. This means that the general provisions in the *Legislation Act* apply to all sections in the Act which do not specify who is bound. These general provisions are that the ACT government and its entities will be bound by the *Nature Conservation Act*, except where the ACT government or a government entity (acting within authority) has done something for which the Act imposes a fine that will on payment form part of the public money of the ACT, or for which the Act creates an offence.
- 1.29 There are two specific exemptions in the *Nature Conservation Act*, which widen the scope of immunity for conservation officers and for persons appointed for the purposes of section 33 of the *Electricity Safety Act 1971* (connecting electrical installations to network— inspections) in the exercise of their powers under that section. These are in sections 76 and 76A (set out below). The sections establish that

²¹ Note, however, that as described above an environmental protection order may be served on a person who has contravened or is contravening an environmental authorisation or another provision of the *Environment Protection Act* (s. 125). It seems therefore that if the ACT government or a government entity contravened any of the exempt offences in section 10, an environmental protection order could be issued requiring that the ACT government or government entity stop contravening the provision in question and remedy any environmental harm caused. If that order were subsequently breached, the ACT

a number of the provisions of the Act do not apply to conservation officers and persons appointed under the *Electricity Safety Act 1971*. For example, the offences relating to interfering with native animal nests, killing, taking and keeping native animals, do not apply to conservation officers acting in the performance of his or her duties as a conservation officer.

- 76 Certain provisions not to apply to conservation officers**
Nothing in section 24, 25, 26, 27, 39, 42, 43, 45AB, 45AC, 55, 56 or 57 applies to or in relation to the conservator or a conservation officer acting in the performance of his or her duties as conservator or a conservation officer, as the case may be.
- 76A Act not to apply to certain appointed people**
This Act does not apply in relation to a person appointed for the purposes of the *Electricity Safety Act 1971*, section 33 (Connecting electrical installations to network—inspections) in the exercise of his or her powers under that section as a person so appointed.

- 1.30 Further, sections 60AA to 60AE are noteworthy in that they provide for the creation of management agreements with government agencies, and some of the related subsections set out allowable cost recovery from government agencies in specific circumstances (eg: contractual).
- 1.31 ***Water Resources Act 1998 (ACT)*** - The *Water Resources Act* includes a number of offences such as: the taking of water without a license, in contravention of license conditions, or in breach of a prohibition/restriction notice (ss. 33, 34 and 35); drilling for water without a license or in contravention of a license condition (s. 39); bore construction without a license or in contravention of a license condition (ss. 43 and 44); wasting bore water (s. 45); accessing recharge water without a license or in contravention of a license condition (s. 47); failure to comply with a notice requiring action to prevent or rectify damage to waterways (s. 65); interfering with supply and drainage of water (s. 67); and unauthorised construction of water control structures (s. 68).
- 1.32 However, the *Water Resources Act* does not contain a general clause that states whether or not the Act binds the ACT government. This means that the general provisions in the *Legislation Act* apply to all sections in the Act. These general provisions are that the ACT government and its entities will be bound by the *Water Resources Act*,

government or government entity would be liable to be prosecuted for the offence of breaching the environmental protection order (s. 126).

except where the ACT government or a government entity (acting within the scope of its functions) has done something for which the Act imposes a fine that will on payment form part of the public money of the ACT, or for which the Act creates an offence.

1.33 The above analysis of the ACT *Land Act 1991*, *Environment Protection Act 1997*, *Nature Conservation Act 1980* and *Water Resources Act 1988* demonstrates that, apparently, the ACT government is in many instances bound by ACT environmental legislation.

1.34 However, neither the ACT government nor its entities are liable for any fines resulting from a breach of a section of any of the four acts considered, if the fines will form part of the public money of the ACT.

1.35 In addition, neither the ACT government nor its entities are criminally liable for a breach of environmental legislation, except in relation to an important range of offences in the *Environment Protection Act*. This remains so, as long as the government entity in question is acting within the scope of its authority.

1.36 Injunctions, orders to undertake remedial work, and recovery of clean-up costs are still available remedies in some instances.²² Nonetheless, while the ACT government and ACT government entities appear legally bound by environmental legislation in the ACT, their immunity from fines and offences means that there remains little in the way of enforcement mechanisms, except perhaps public opinion (discussed later,) at least in the three Acts where the ACT government and its entities are exempt from liability for all offences: the *Land Act 1991*, the *Nature Conservation Act 1980* and the *Water Resource Act 1988*.

1.37 Statutory authorities and Government owned corporations – application of ACT environmental legislation.

1.38 An important, discrete matter for consideration is whether ACT government corporations and statutory authorities, whose activities may have significant impacts on the environment, such as ACTEW, Totalcare and the Tourism Corporation, are in fact government entities which fall under the shield of the Crown provided for in the *Legislation Act*, in the context of compliance with environmental legislation, or

²² See for example *Land (Planning and Environment) Act 1991*, s. 259 in relation to injunctions, orders to undertake remedial work and imposing the reasonable cost of remedial work as a debt; and *Environment Protection Act 1997*, Div 13.3 in relation to injunctive orders and ss. 91K and 160 in relation to recovery of clean-up costs.

whether they do not fall into that category. This requires further analysis.

- 1.39 For the purposes of analysis this submission has considered ACTEW Corporation, Totalcare and the Tourism Corporation.
- 1.40 ACTEW is an ACT government-owned company providing water, wastewater, natural gas and energy services in Canberra and the surrounding region. Totalcare is an ACT government owned company incorporated in 1991. It provides healthcare related linen, sterilization and waste management services; road maintenance; facilities management and property service; and fleet management and leasing services in the ACT.
- 1.41 Both government corporations are established under both the *Corporations Act 2001* (Cth) and the *Territory Owned Corporations Act 1990* (ACT).
- 1.42 Section 8 (1) of the *Territory Owned Corporations Act 1990* provides, '[S]ubject to this and any other act, a Territory owned corporation or subsidiary, by reason only of its status as such, is not entitled to any immunity or privilege of the Crown...' (See below).

8 Status

- (1) Subject to this and any other Act, a Territory owned corporation or a subsidiary, by reason only of its status as such—
- (a) is not entitled to any immunity or privilege of the Crown; and
 - (b) is not and does not represent the Territory; and
 - (c) is not exempt from a tax, duty, fee or charge payable under an Act.

- 1.43 At first glance, 8 (1) appears to be an express statement that ACTEW and Totalcare are not entitled to the limited Crown immunities provided for in section 121 of the *Legislation Act*. However, the qualifying words 'subject to this and any other Act' mean that this section has to be read not only in light of other provisions in the *Territory Owned Corporations Act*²³ but also in light of section 121(4) of the *Legislation Act* which states: '*To the extent that an Act does not bind a government, the same degree of immunity extends to a government entity in relation to an authorized act or omission of the entity.*'

²³ Note that the only provisions in the *Territory Owned Corporations Act*, which suggest that government owned corporations are entitled to an immunity or privilege of the Crown, are in Part 5 and relate to Territory Taxes.

- 1.44 Therefore, despite section 8(1), it is still necessary to determine whether ACTEW and Totalcare satisfy a control test in order to determine whether they share the immunity of the ACT government from fines and prosecution for a significant number of offences under ACT environmental law.²⁴
- 1.45 Because ACTEW and Totalcare are set up under the same constituting statute, the *Territory Owned Corporations Act*, this determination can be undertaken for both simultaneously.
- 1.46 Existing case law suggests that ACTEW and Totalcare will probably not be entitled to the shield of the Crown. In both *Launceston Corporation v Hydro-Electric Commission*²⁵ and *State Electricity Commission (Vic) v City of South Melbourne*,²⁶ the Court held that:
- ‘There is evidence of a strong tendency to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless parliament has by express provision given it the character of a servant of the Crown.’
- 1.47 However, it is not possible to provide a definitive answer to whether ACTEW or Totalcare would benefit from the shield of the Crown in the context of fines or offences provided for in environmental legislation without a court decision on this issue. However, the weight of authority suggests that the *Territory Owned Corporations Act* does not include sufficient measures of government control to entitle ACTEW and Totalcare to the shield of the Crown. Therefore, both ACTEW and Totalcare are most probably liable for all offences and fines provided for in ACT environmental legislation. We submit, however, that ACT law would benefit from clarification of this issue.
- 1.48 **The Australian Capital Tourism Corporation** - the Australian Capital Tourism Corporation (**‘Tourism Corporation’**) was established under the *Australian Capital Tourism Corporation Act 1997* (ACT).²⁷ The corporation’s functions are set out in section 5 of the Act and include promoting the ACT as a tourist destination, managing tourist services, identifying tourism opportunities, managing major tourist events and

²⁴ Note however that on a purposive analysis (see ss. 138-139 of the *Legislation Act*), it could be argued that this section evidences an intention for ACTEW and Totalcare not be entitled to the immunities of the Crown and that the overriding effect of s. 121 of the *Legislation Act* over s. 8 of the *Territory Owned Corporations Act* was not intended. This argument is supported by the fact that s. 8 of the *Territory Owned Corporations Act* has not been amended since its introduction in 1990 and the predecessor to section 121, s. 7 of the *Interpretation Act 1967* was only inserted in 1993.

²⁵ (1959) 100 CLR 654 at 662.

²⁶ (1969) 118 CLR 504 at 510.

festivals and constructing and operating tourist facilities, in the ACT. It is also charged with advising its Minister on matters relating to tourism, and in advising the tourist and travel industry on reducing the environmental impact of tourism related activities.

- 1.49 There is no express provision in the *Australian Capital Tourism Corporation Act* that states whether or not the Tourism Corporation benefits from the immunities of the ACT government.
- 1.50 Under section 16 of the *Australian Capital Tourism Act*, the Chief Executive Officer is an executive member of the public service under the *Public Sector Management Act*. This provision, in conjunction with sections 3, 24 and 29 (outlining the powers and responsibilities of executive officers of certain Territory instrumentalities,) in conjunction with section 54(1) of the *Financial Management Act*, make the Chief Executive Officer of the Tourism Corporation, and through him or her the Corporation, responsible to the Minister for the administration and financial management of the Corporation. Section 29(1)(c) also requires the Tourism Corporation to be managed in the interests of the Government. It is, therefore, possible, if not probable, that as in *NT Power Generation Pty Ltd v Power and Water Authority*,²⁸ the courts would find the Tourism Corporation to be an agent of the Crown and hence protected by the ACT government's immunity from fines and a significant number of offences under environmental legislation.
- 1.51 However, again, we submit that ACT law would benefit from clarification of this issue.
- 1.52 Conclusion – submission summary**
- 1.53 EDO urges relevant amendments ACT environmental legislation to ensure that the ACT Government and its statutory authorities and corporations can be adequately held accountable for breaches of environmental laws.
- 1.54 The ACT Government and ACT Government owned corporations and statutory authorities *prima facie* appear bound by ACT environmental legislation. However, under section 121 (2) and (3) of the *Legislation Act 2001* (ACT) the ACT government is not liable to pay fines for breaching environmental legislation and, except for a range of offences

²⁷ Formerly the *Canberra Tourism and Events Corporation Act 1997* (ACT).

²⁸ [2002] FCAFC 302

under the *Environment Protection Act 1997* (ACT), it will not be held criminally liable for such breaches.

- 1.55 There is a strong case for abolishing Crown immunities in relation to environmental law. It is difficult to justify government and government entity immunity from environmental penalties in today's society, where government activities reach into a diversity of spheres, and when environmental sustainability is of increasing importance. The provision of immunity to statutory bodies and government corporations, that are not directly elected and over which the government does not always exercise a controlling influence, is unsatisfactory. Public opinion is not a sufficient enforcement mechanism in these circumstances.
- 1.56 The ACT Government and its creations must abide by the laws created. By treating the Government and its bodies differently from other environment offenders, the current laws may undermine the public's belief in the ability of our legal system to adequately protect the environment. It will also make the Government appear hypocritical when it attempts to promote the protection of the environment and the importance of the rule of law.
- 1.57 The argument for providing the ACT government and its entities with immunity from criminal liability is also weak. While it is obviously not feasible to imprison a government department, statutory authority or public corporation, each can clearly be made liable to pay a criminal fine. Provision for the alternative punishments of a prison sentence or a fine is made in most environmental legislation today. It is clear that the payment of fines can be a useful deterrent, even within government. The obligation to pay a fine also gives expression to public condemnation of the offending activity.
- 1.58 It is sometimes argued that little would be achieved by holding the ACT Government and its entities liable to pay fines as it would merely mean that public funds from being moved around within the ACT government. However, the ACT government, as defined in section 121, includes a number of departments and agencies, and potentially statutory authorities and government owned corporations, which each have a separate budget. Therefore, the payment of such a fine, out of the budget of the offending entity, may still serve as a powerful incentive to comply with environmental legislation.
- 1.59 The EDO urges the amendment of current environmental legislation to ensure that the Government and its entities can be held properly

accountable for breaches of ACT environmental law. This may be achieved, for example, by inserting a provision into the Land (*Planning and Environment Act 1991* (ACT), *Environment Protection Act 1997* (ACT), *Nature Conservation Act 1980* (ACT) and the *Water Resources Act 1998* (ACT), expressly stipulating that a government entity is not immune from criminal liability, or the payment of fee, under this Act in relation to an act or omission of the entity. This would successfully override the crown immunities provisions of section 121 (2) and (3) of the *Legislation Act 2001* in relation to the ACT's environmental legislation.
