Chapter 1

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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, with governmental power shared between a central government, which has powers in relation to the whole country, and regional governments having powers to make laws in relation to their respective regions.

The Australian federal system consists of the Commonwealth government, which has power over specific matters set out in the Commonwealth Constitution, and six state and two territory governments, which have power to make laws in relation to all other matters applicable in their region. Local councils also exist in the states and the Northern Territory, as a third level of government.

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, government is split into three independent arms, the legislature (Parliament), the executive (government ministers and their departments) and the judiciary (courts), each of which 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 is not pure in its application. 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 defines the roles and structure of the arms of government in each jurisdiction. 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. In the ACT this is the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

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 voting and passing Bills that have been brought before them. These can then be enforced as law.

Delegated legislation

Due to a lack of time and resources and the need for local flexibility, 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 and government agencies, 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 when members of the judiciary use legal principles to decide contested issues that are brought before them. Members of the judiciary interpret legislation and, in areas where there is no legislation in force, develop and apply 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 parliament can generally change case law principles that it considers unsuitable.

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 (s 109). 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 several of its broad constitutional powers to make important environmental laws. Commonwealth legislation about environmental issues has been mainly justified through the corporations power (s 51(xx)), the external affairs power (s 51(xxix)), taxation power (s 51(ii)), and trade and commerce power (s 51(i)).

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.

State parliaments and territory legislative assemblies create most environmental laws in Australia. For a summary of the most important ACT laws concerning the environment, see the section on environmental and planning laws below.

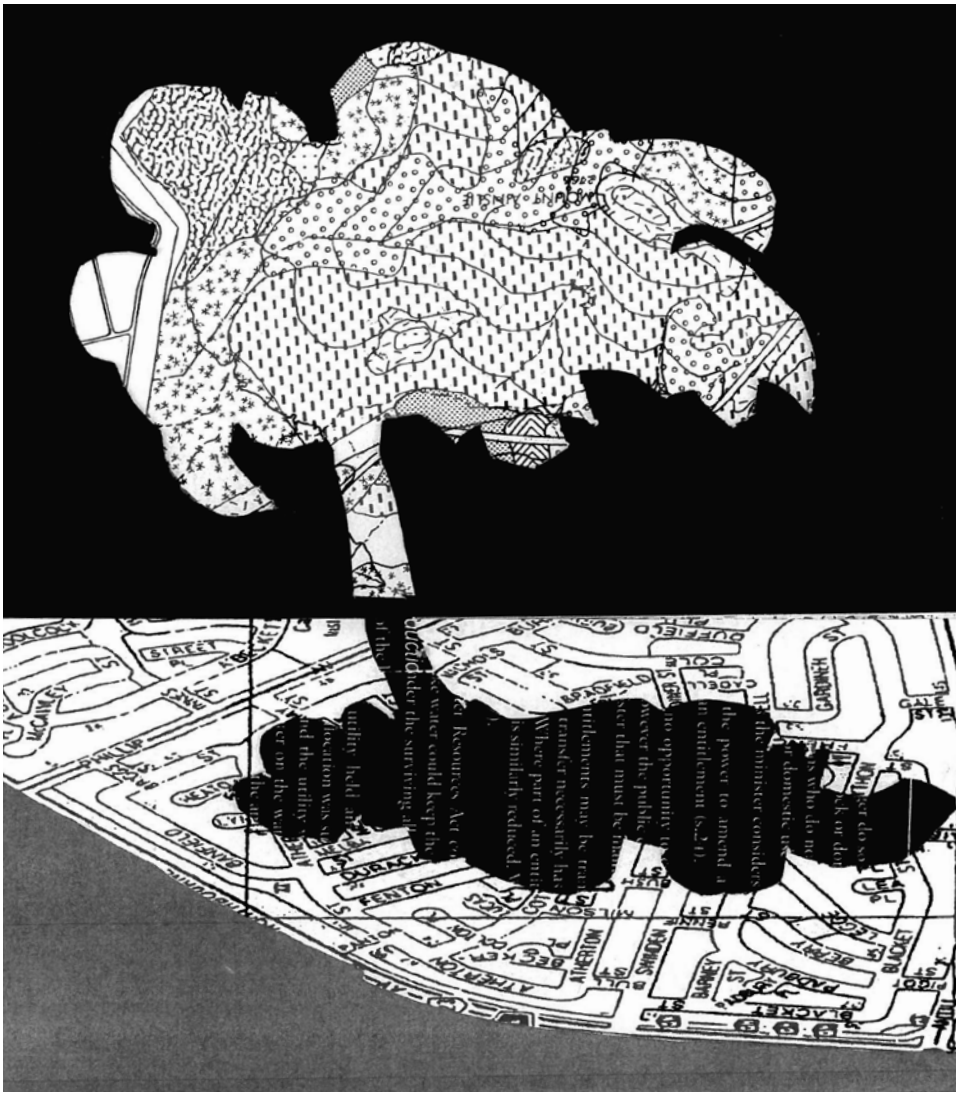
In some cases local councils also have powers to make rules about matters that impact on the environment, such as development applications and waste management, and to enforce existing environmental laws. As there are no local councils in the ACT, the ACT government deals with these matters.

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, section 65 of the *Legislation Act 2001* (ACT) provides 12 sitting days (6 sitting days to present the delegated legislation (s 64) and 6 sitting days to make the motion of disallowance) for the Legislative Assembly to disallow or amend the delegated legislation after it is tabled, after which time it will become enforceable. 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.

ACT legislation register

The ACT legislation register was established under section 18 of the *Legislation Act 2001* (ACT). Sections 18 and 19 of the *Legislation Act 2001* requires that up-to-date, electronic, authorised versions of all Acts and subordinate legislation (such as Regulations) in force in the ACT are contained in the register, which provides ready access for users. The register is available on the ACT Government website.

A number of chapters in this Handbook refer to disallowable and notifiable instruments. Disallowable instruments are determinations or guidelines for decisions made by ministers or departments, which must be tabled in the Legislative Assembly to have force, and can be vetoed by parliament. Examples include the setting of fees or charges, or notification of place names or appointments to ACT councils. Notifiable instruments are legislative instruments that are not subject to parliamentary scrutiny, but are declared by an authorising law to be notifiable. Examples include approved forms for licences and permits.

Section 19 of the *Legislation Act 2001* requires these instruments to be published on the legislation register. Other important instruments are also in the legislation register, including Bills, explanatory statements, and resolutions. The parliamentary counsel can also enter additional material that is likely to be helpful to users of the register and to increase public accessibility.

Acts and subordinate legislation (ie Regulations) that predate the register are being added to the register as part of a back capture program, so many can now 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 or download their detailed guide about notification of legislative instruments from the PCO's website (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 *Legislation Act 2001* contains a dictionary which sets out the meaning of words and expressions that are commonly used in ACT laws. For example, section 133 of the Act states that a penalty unit means $150 for an individual and $750 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 in a 'dictionary' at the end of the Act. If a term is used within

the 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. Acts may also contain a section defining the Act's objects or purposes. This section can 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 the particular legislation.

Executive and administration of legislation

Once an Act has been passed and is an enforceable law, it is administered by a minister and their department. To find out which members of the ACT Legislative Assembly are ministers in the ACT and what portfolios they have, visit the Legislative Assembly's website or consult the ACT government listing in the phone book. For information concerning Commonwealth ministers, visit the 'Current Ministry List' on the Parliament of Australia's website (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 Magistrates Court is at the first level of the ACT courts system, followed by the Supreme Court of the ACT, the ACT Court of Appeal and 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 specific rules and requirements about what can be appealed). The lower courts are bound by the decisions of higher courts; these decisions are known as legal 'precedents'. This practice provides continuity and stability to judicial decisions.

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 context of environmental law, 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 (currently a $300,000 fine for individuals and a $1,500,000 fine for corporations), five years' imprisonment or both (s 137) (see Chapter 10 of this Handbook for more information on offences against the environment). The *Nature Conservation Act 2014* (ACT) also contains criminal offence provisions. For example, section 128 makes it an offence to interfere with the nest of a native animal, with a penalty of currently $3,000 for individuals and $15,000 for a corporation (see Chapter 5 of this Handbook for more information on offences against biodiversity).

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 damages (an award of money as compensation for loss or injury) and/or costs, which are the expenses incurred as a result of bringing the matter before the court. Remedies sought in a civil dispute can include 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 (see Chapter 12 of this Handbook for more information on commencing civil action before the courts).

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. Many of these situations are now dealt with by legislation dealing with pollution and other environmental harms (see Chapter 10 of this Handbook for information on environmental harm).

In an action for negligence, it is necessary to show that the defendant owed the claimant a duty of care, that he or she breached that duty, and that the claimant 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 time-consuming, complex and 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 that affect the environment.

There are various avenues for 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, being ACAT (see Chapter 12 of this Handbook for more information on ACAT).

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. Most of the ACT legislation includes a schedule towards the end of each Act which lists exactly what are the 'reviewable decisions' made pursuant to that Act. For example, Schedule 1 of the *Planning and Development Act 2007* lists decisions made under the Act that are reviewable, such as a decision made under section 162 to refuse or approve a development application in the impact track.

The schedules also list what entity or party is eligible (has standing) to ask for a review of the decision. Using the above example, a decision under section 162 of the *Planning Act* to approve a development application in the impact track may be reviewed by the applicant for the DA or an entity such as an individual or organisation subject to the stated conditions (s 408A and Sch 1 col 1 item 5 & 6). The procedures in ACAT are relatively informal and usually each party bears its own costs. This is a very important avenue of review for decisions affecting the environment in the ACT.

Most decisions are also subject to judicial review by the courts. Judicial review generally involves a challenge to the lawfulness of the procedure that has been undertaken, rather than the merits of the decision. Reasons for judicial review could include a breach of natural justice. This can occur where the decision-maker does not observe the procedures required by law when making the decision, or was without the jurisdiction to make the decision. These and other grounds are noted in section 5 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT) (*ADJR Act)* which contemplate procedural errors in decision-making and allow an opportunity for the decision to be judicially reviewed. Some decisions are exempt from review pursuant to the *ADJR Act* and are specifically listed in Schedule 1 of that Act – 'Decisions to which this Act does not apply'.

In the ACT, decisions are judicially reviewed in the Supreme Court and are much more complex (and expensive to run) than cases in ACAT. Alternative 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 under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) 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 Administrative Appeals Tribunal.

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'. These areas are developed by the both 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 (ACTPLA) 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 of this Handbook for more information 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 (MNES), which include nationally important flora, fauna, ecological communities and heritage places. There are currently 9 listed matters of national environmental significance, including world and national heritage properties, Ramsar wetlands, migratory species, Commonwealth marine areas, water resources and nuclear actions. The assessment and approval processes for MNES under the *EPBC Act* are additional to those applicable under state and territory laws, although assessment and approval of the Commonwealth minister under the *EPBC Act* may not be necessary if an activity is undertaken in accordance with an accredited state assessment or approval process. Through bilateral agreements, the Commonwealth may accredit and rely upon state assessment and approval processes for actions impacting upon MNES. To date, only bilateral assessment agreements have been entered into; although all states and territories have released notices of intent or draft bilateral approval agreements, which may also accredit state approval processes. At the time of writing however, no bilateral approval agreements have been concluded (see Chapter 4 of this Handbook for more information on the bilateral assessment and approval processes).

The *EPBC Act* also protects biodiversity, through the creation and regulation of protected areas, such as World Heritage properties, and the listing and management of threatened species and ecological communities (see Chapter 5 of this Handbook for more information on the *EPBC Act*).

Planning and Development Act 2007 (ACT)

The *Planning and Development Act 2007* (ACT) ('*Planning Act*') replaced the old *Land (Planning and Environment) Act 1991* (ACT) and the *Planning and Land Act 2002* (ACT) as the ACT's primary piece of planning legislation. This Act introduced substantial changes to the previous planning regime. The Act commenced on 31 March 2008.

A planning authority, the ACT Planning and Land Authority (ACTPLA), which was previously established under the *Land (Planning and Environment) Act*, was continued under the *Planning Act*. ACTPLA has the functions of administering the Territory Plan, and managing the leasing of land and approvals for development applications (Chapter 3 of the *Planning Act*). The establishment and functions of the Land Development Agency to develop land is also provided for in the *Planning Act* (Chapter 4).

The Act also includes the creation of the Territory Plan, including its content and processes for variation (Chapter 5); and provisions for the development of a planning strategy (Chapter 6); the process of gaining approval for developments (Chapter 7); provision for environmental impact assessments (Chapter 8); the administration of the leasehold system (Chapter 9); and the reservation of public land for national parks and reserves (Chapter 10) (see Chapters 2, 3, 4 and 7 of this Handbook for more information on the *Planning Act*).

Nature Conservation Act 2014 (ACT)

The *Nature Conservation Act 2014* amends and updates the previous 1980 Act. The *Nature Conservation Act* aims to protect, conserve and enhance the biodiversity in the Territory, and considers biodiversity at genetic, species, ecological community and ecosystem levels.

The Act establishes the ACT Parks and Conservation Service (s 27) and the office of the Conservator of Flora and Fauna (Part 2.1). The conservator is responsible for monitoring biodiversity and can develop and publish guidelines that articulate the biodiversity priorities that the conservator will pursue through the development and planning process. The conservator must develop a Nature Conservation Strategy (Part 3) and has a responsibility to monitor the state of nature conservation in the ACT, its management and to make these reports publicly available. The conservator must prepare and implement Action Plans (Part 4.5) for each relevant species, ecological community and key threatening process, if they occur in the ACT. The action plans

must consider matters such as the impact of climate change and other threats on the species or ecological community, connectivity requirements and critical habitat of the species or ecological community. Progress reports on each action plan are required after five years with a review by the Scientific Committee every 10 years.

The Act also restricts activities that can be undertaken in reserved areas including wilderness areas, national park, nature reserves and public land (Part 8). It also sets up a system of nature conservation licences for activities involving native plants and animals (Part 11) and establishes a range of offences for the protection of native species (Part 6) and offences for illegal activity in reserves (Chapters 9 and 10). For example, section 236 creates an offence when a person knowingly clears native vegetation in a reserved area causing serious harm, with a maximum fine of currently $350,000 for individuals, $1,750,000 fine for corporations or seven years' imprisonment (see Chapters 5 and 7 of this Handbook for more information on biodiversity and ACT public land).

Water Resources Act 2007 (ACT)

The *Water Resources Act 2007* sets up a system of sustainable management and use of the territory's water resources. 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, allowing the ACT government to determine the appropriate use of water, water flows, and limits on water usage.

The Act gives the ACT government broad powers to define access rights to water resources, environmental flow provisions, and water licensing requirements. It also sets up resource management and monitoring responsibilities, such as an ecologically sustainable management system that is managed by the Environment Protection Authority (see below), and penalties for water-related offences. For example, section 77A makes it an offence to take surface or ground water without a licence, with a maximum penalty 6 months imprisonment or payment of a fine (see Chapter 8 of this Handbook for more information about the *Water Resources Act*).

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. The Act establishes the Environment Protection Authority (EPA) as the statutory decision maker for environmental regulation and policy (Part 2). The EPA also administers the regulatory framework set out in the Act.

The *Environment Protection Act* places a general environmental duty on all citizens to prevent or minimise environmental harm and nuisance (s 22). It also regulates activity through a system of environmental protection agreements (Part 7) and environmental authorisations (Part 8) to control activities that might cause pollution. For example,

section 42 states that a person must not conduct an activity listed in Schedule 1 unless they hold an environmental authorisation in relation to that activity. Activities requiring an environmental authorisation include the conduct of motor racing events, large outdoor concerts, or the operation of a sewage treatment plant (see Chapter 10 of this Handbook for more information about this Act and the EPA).