



# Environmental Defenders Office

## Appealing Planning and Environment Decisions in the ACAT

*Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice please visit our [website](#).*

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The ACT government makes a wide range of decisions on planning and environmental matters. Many government decisions have an impact on applicants and the general public, depending on the nature of the decision. Some, but not all, government decisions are reviewable by the ACT Civil and Administrative Tribunal (**ACAT**).

The ACAT has the power to review some decisions made by ACT government decision-makers, including some decisions about:

- planning and development (under the [Planning and Development Act 2007 \(ACT\)](#) (**PD Act**));
- environment protection (under the [Environment Protection Act 1997 \(ACT\)](#) (**EP Act**));
- heritage (under the [Heritage Act 2004 \(ACT\)](#) (**Heritage Act**));
- tree protection (under the [Tree Protection Act 2005 \(ACT\)](#) (**TP Act**));
- water (under the [Water Resources Act 2007 \(ACT\)](#) (**WR Act**)); and
- nature conservation (under the [Nature Conservation Act 2014 \(ACT\)](#) (**NC Act**)).

Please note that this factsheet discusses government decisions that are reviewable at the ACAT. Some government decisions are not reviewable by the ACAT, however they may be reviewable by the ACT Supreme Court. If you are not sure whether a government decision is reviewable by the ACAT or the Court, you are welcome to contact the EDO to check.

### What is the ACT Civil and Administrative Tribunal?

The ACT Civil and Administrative Tribunal (**ACAT**) is an independent body with exclusive jurisdiction to hear and determine particular disputes in the ACT. It is created under the [ACT Civil and Administrative Tribunal Act 2008 \(ACT\)](#) (**ACAT Act**).

ACAT has many functions including the power to review government decisions. When making decisions, ACAT stands in the shoes of the decision-maker and decides whether the correct or preferable decision has been made. This is called ‘merits review’.

### What can ACAT do?

When the ACAT reviews a government decision, it can exercise any function the original decision-maker can exercise under an Act (see Part 6, of the [ACAT Act](#)). So, once ACAT has reviewed a decision, it may either:

- confirm the original decision;<sup>1</sup>
- vary the original decision;<sup>2</sup>
- set aside the decision and make a substitute decision;<sup>3</sup> or
- set aside the decision and send the matter back to the original decision-maker for reconsideration, with a direction or recommendation of the ACAT.<sup>4</sup>

### Which decisions can ACAT review?

ACAT only has jurisdiction to review a matter if the decision is a “reviewable decision”.<sup>5</sup> A “reviewable decision” is a decision that ACAT is specifically allowed to review under an *authorising law* (this is a law that gives authority for ACAT to review the decision).

Visit: ACAT’s [Legislation and authorising laws](#) page to see the list of authorising laws for reviewable decisions

#### Reviewable decisions under the *Planning and Development Act 2007* (ACT)

Reviewable decisions under the PD Act are listed in Column 2, Schedule 1 of the PD Act. Some of the decisions ACAT can review are:

- A decision made under section 162 of the [PD Act](#) to approve a development application in the merit track (Item 4);
- A decision made under section 162 of the PD Act to approve a development application in the impact track (Item 6);
- A decision made under section 184(3) of the PD Act to refuse to extend the period for finishing development (Item 9).

#### Reviewable decisions under the *Environment Protection Act 1997* (ACT)

Reviewable decisions under the EP Act are listed in Column 3, Schedule 3 of the EP Act. Some of the decisions ACAT can review are:

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<sup>1</sup> [ACAT Act](#), s 68(3)(a).

<sup>2</sup> *Ibid*, s 68(3)(b).

<sup>3</sup> [ACAT Act](#), s 68(3)(c)(i).

<sup>4</sup> *Ibid*, s 68(3)(c)(ii).

<sup>5</sup> *Ibid*, s 22A.

- a decision by the Environment Protection Authority (**EPA**) under section 21(1) of the EP Act to refuse to exclude making certain information available for public inspection (Item 1);
- a decision by the EPA under section 49 of the EP Act to grant, or refuse to grant, an environmental authorisation (Items 5-8).

#### Reviewable decisions under the *Heritage Act 2004* (ACT)

Reviewable decisions under the Heritage Act are listed in Column 3, Schedule 1 of the Heritage Act. Some of the decisions ACAT can review are:

- a decision by the ACT Heritage Council under section 40 of the Heritage Act to include, or not include, a place or object on the heritage register (Item 1);
- a decision by the ACT Heritage Council under section 67A of the Heritage Act to give a direction to repair damage to a registered heritage place or object (Item 6).

#### Reviewable decisions under the *Tree Protection Act 2005* (ACT)

Reviewable decisions under the TP Act are listed in Column 3, Schedule 1, Part 1.2 of the TP Act. Some of the decisions ACAT can review are:

- a decision by the Conservator of Flora and Fauna (**Conservator**) under section 52 of the TP Act to approve, or refuse to approve, registration of a tree (Item 1); and
- a decision by the Conservator under section 58 of the TP Act to cancel, or refuse to cancel, registration of a tree (Item 2);
- a decision by the Conservator under section 76 of the TP Act to give a tree protection direction to the owner or occupier of land where a protected tree is located (Item 5).

#### Reviewable decisions under the *Water Resources Act 2007* (ACT)

Reviewable decisions under the WR Act are listed in Column 3, Schedule 1 of the WR Act. Some of the decisions ACAT can review are decisions by the EPA to refuse to issue a licence or to impose a condition on a licence, including for example:

- a licence to take water (sections 30 and 31) (Items 3 and 4);
- a driller's licence (sections 35 and 36) (Items 5 and 6);
- a bore work licence (sections 39 and 40) (Items 7 and 8); or
- a waterway work licence (sections 44 and 45) (Items 9 and 10).

#### Reviewable decisions under the *Nature Conservation Act 2014* (ACT)

Reviewable decisions under the NC Act are listed in Column 3, Schedule 1 of the NC Act. Some of the decisions ACAT can review are:

- a decision by the Conservator under section 229(2) of the NC Act to issue a direction to repair damage to a person who has caused damage to a reserve or ACT property on a reserve (Item 2);

- a decision by the Conservator under section 299(3) to take regulatory action against a person who holds a nature conservation licence (Item 15);
- a decision by the Conservator under section 331(2) of the NC Act to issue a direction to the occupier of land about the protection or conservation of native species, community or habitat that is on the land (Item 17).

## Standing in ACAT

In order to challenge an ACT government decision that is a reviewable decision, you must have “standing” to appeal the decision.

N.B. “Standing” is the right to appeal a decision or have an issue heard before a court or tribunal

Generally, there are two parties involved in government decisions – an applicant and a decision maker. A third party is a person or group who is not directly involved in the decision. For example, if you are a group or an individual trying to challenge the approval of a development, and you are not the applicant for the development application, you are a third party or party joined to that decision.

N.B. Applicants almost always have standing to seek review of an ACT government decision.

Third parties have standing for some, but not all, government decisions.

### Third party standing in ACAT

Recognising that third parties are sometimes impacted by decisions, many environment and planning laws in the ACT include a list of parties who can appeal decisions (that is, who have standing), including third parties, provided they fulfil specific criteria.

For example, some laws (see [below](#) for examples) state that a person has standing in ACAT if their interests are affected by the relevant decision.

The [ACT Civil and Administrative Tribunal Act 2008 \(ACT\)](#) (**ACAT Act**) establishes that:

- ACAT may decide whether or not your interests are affected by a decision, and ACAT’s decision is conclusive;<sup>6</sup>
- A person whose interests are affected by a decision can be an unincorporated body, the Territory, the Commonwealth, a territory authority or Commonwealth authority;<sup>7</sup>

<sup>6</sup> [ACAT Act](#), s 22Q(4).

<sup>7</sup> *Ibid*, s 22Q(1).

- A body has interests that are affected by a decision, if the decision relates to a matter included in the objects or purposes of the body before that decision was made.<sup>8</sup>

If you are part of a group, for your group to have standing, you will need to show that the decision relates to a matter included in your group's "objects or purposes". You do not need to be an incorporated association to have standing,<sup>9</sup> but it can be helpful because incorporated associations must have a constitution where their objects and purposes are stated.

If you are an incorporated association, "objects or purposes" refers to the objects or purposes stated in your constitution. You should make sure that the objects in your constitution clearly relate to the issue that you are working on so that you can prove that your "interests are affected" by a decision, and you can argue that you have standing to review a decision.

### Do I have standing under the Planning and Development Act 2007?

Schedule 1 of the [PD Act](#) lists the decisions that ACAT can review, and *who* can apply to ACAT for a review. Entities who are eligible to apply to the ACAT for review of the decision are described as "eligible entities" (section 408A). Eligible entities for each reviewable decision are listed in Column 3 of Schedule 1 of the PD Act.

In order to have standing, you need to show that you are an eligible entity for the reviewable decision (sections 408A and Schedule 1 of the PD Act).

As an example, if you want to apply to ACAT for the review of a decision made by the ACT planning and land authority under section 162 of the [PD Act](#) to approve a development application in the merit track (Item 4), then in order to show that you are an eligible entity to bring an application, you will need to prove that:

1. you previously made a representation under section 156 of the [PD Act](#) about the development proposal when it was open for public comment or had a reasonable excuse for not making a representation; AND
2. that the approval of the development application may cause you to suffer 'material detriment' (see Item 4, Column 3, Schedule 1 of the PD Act).

*Material detriment* is defined in section 419 of the PD Act. If you are an individual, *material detriment* means that the government decision has, or is likely to have an adverse impact on your use or enjoyment of the land.<sup>10</sup> If you are a group or organisation, *material detriment* means that the decision relates to a matter included in your entity's objects or purposes.<sup>11</sup>

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<sup>8</sup> [ACAT Act](#), s 22Q(2)-(3).

<sup>9</sup> *Ibid*, s 22Q(1).

<sup>10</sup> [PD Act](#), s 419(1)(a).

<sup>11</sup> *Ibid*, s 419(1)(b).

Importantly, you will not be taken to suffer material detriment if the decision increases (or is likely to increase) direct or indirect competition with your business or your business partner, close friend or family.<sup>12</sup>

**Case Study:** [North Canberra Community Council v ACT Planning and Land Authority & Canberra District Rugby League Football Club Limited \(Administrative Review\) \[2014\] ACAT 1](#)

The North Canberra Community Council (**NCCC**) sought the review of a decision by the ACT Planning and Land Authority (**ACTPLA**) to vary a lease and remove its concessional status. To have standing, the NCCC needed to show that it was an ‘eligible entity’ that had suffered ‘material detriment’ under the PD Act.

A group or ‘body’ is deemed to have suffered ‘material detriment’ if the decision *related to a matter included in its objects or purposes* (section 22Q of the [ACAT Act](#)). The NCCC’s objects in its constitution involved the use of land for community and social purposes. The NCCC relied on its object ‘*to protect, promote and enhance the ... social and environmental well-being of the North Canberra resident community ...*’ to argue that the decision to remove the concessional status of a lease related to the physical and social planning of North Canberra. Even though the NCCC’s objects were broad, they were read down to be geographically confined and distinguished from the interest of the general public. ACAT decided that this decision related to a matter included in NCCC’s objects, and therefore NCCC had standing to appeal this matter.

**Case study:** [Ginninderra Falls Association Inc v ACTPLA \(Administrative Review\) \[2017\] ACAT 108](#)

As in *North Canberra Community Council* (above), the Ginninderra Falls Association (**GFA**) had to prove that a decision by ACTPLA to approve a development application was *related to a matter included in its objects or purposes*, in order to have suffered ‘material detriment’ and satisfy the definition of an ‘eligible entity’ under the PD Act.

This case was interesting because the question as to the date that standing is considered was addressed. ACAT found that the proper date upon which to consider whether the decision related to an entity’s objects or purposes was the date that the decision was made. Because the GFA had changed its objects after the decision was made, its standing was considered under its previous objects.

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<sup>12</sup> [PD Act](#), s 419(2)-(3).

Did the objects of the GFA relate to the decision?

The GFA's objects included the creation of a national park. The relevant decision was a decision to approve a development near a proposed national park. The Tribunal noted that the standing provisions have a 'wide operation' and, consistent with other cases, found that the decision related to the GFA's objects and purposes, and therefore that GFA had standing.

Do I have standing under the [Environment Protection Act 1997 \(ACT\)](#)?

A reviewable decision in the [EP Act](#) is a decision listed in Column 3, Schedule 3, next to the corresponding section in column 2. According to section 136D of the *EP Act*, 'eligible entities' listed in Column 4 Schedule 3 of the *EP Act* or "any other person whose interests are affected by the decision" have standing to apply in ACAT for review.

Third parties are not explicitly listed in column 4, Schedule 3 of the *EP Act*. However, section 136D(b) of the *EP Act* states that you may apply to the ACAT for review of a reviewable decision if, you are "any other person whose interests are affected by a decision". You will need to show that your *interests are affected* by the decision. See above for more on people whose interests are affected per section 22Q of the [ACAT Act](#).

Do I have standing under the [Heritage Act 2004 \(ACT\)](#)?

A reviewable decision in the *Heritage Act* is a decision listed in Schedule 1, Column 3, next to the corresponding section in column 2. Under section 114 of the *Heritage Act*, you need to be an 'interested person' to apply to ACAT for review of a decision. The meaning of interested person is set out in section 13 of the *Heritage Act*. For example, if you have submitted a comment during a public consultation period about a decision to register, or not register, a place or object which has been provisionally registered under section 40 by the Council, or to cancel a registration of a place or object under section 49, you are classed as an "interested person" (section 13(1)(g) and (h) and section 13(2)(a) and (2)(b) of the *Heritage Act*).

Do I have standing under the [Tree Protection Act 2005 \(ACT\)](#)?

The *TP Act* contains a list of entities that may seek an internal review of the reviewable decisions listed in Part 1.1 Schedule 1. The only third party to a decision that can apply for an internal review is a representative Aboriginal organisation (Items 1 and 3, Schedule 1).

Do I have standing under the [Water Resources Act 2007 \(ACT\)](#)?

A reviewable decision in the *WR Act* is a decision listed in Column 3, Schedule 1, next to the corresponding section in column 2. According to section 96 of the *WR Act*, entities listed in schedule 1, column 4 or "any other person whose interests are affected by the decision" have standing to apply to ACAT for review. Third parties are not explicitly

listed in Schedule 1, column 4 of the *WR Act*. However, if you can show that your interests are affected by the decision, you may be able to apply for a review of the decision under section 96(b) of the *WR Act*. See above for more on people whose interests are affected per section 22Q of the [ACAT Act](#).

#### Do I have standing under the [Nature Conservation Act 2014 \(ACT\)](#)?

A reviewable decision in the *NC Act* is a decision listed in Schedule 1, column 3, under a provision of the Act mentioned in Column 2. According to section 362 of the *NC Act*, either an entity mentioned in schedule 1, column 4 has standing to apply to ACAT for review of a decision, or “any other person whose interests are affected by the decision”.

Third parties are not explicitly listed in Schedule 1, column 4 of the *NC Act*. However, if you can show that your interests are affected by the decision, you may be able to apply for a review of the decision under section 362(b) of the *NC Act*. See above for more on people whose interests are affected per section 22Q of the [ACAT Act](#).

### How to do I apply to ACAT for review of a decision?

#### **When do I need to apply to ACAT?**

There are special timing rules for filing an application in ACAT.

##### *Planning and Development Act 2007 (ACT)*

If you are not the person applying for the development application, and you want a review of a decision under the [PD Act](#), you need to lodge your application within 20 working days after the decision has been made (section 409(2) of the PD Act). A working day is a day that is not a Saturday or Sunday, or a public holiday in the ACT. ACAT cannot extend this time period for making an application (section 409(3) of the PD Act).

##### Other environmental laws in the ACT

The EP Act, Heritage Act, TP Act, WR Act and NC Act do not specify a time period for applying to ACAT. To apply for review of decisions made under these laws, the general rule is that an application to ACAT for review of a decision must be made within 28 calendar days after the day the decision is made (section 10(2) of the ACAT Act).



## How do I apply to ACAT?

To make an application for ACAT to review a planning decision, you need to:

1. Fill in the [Application for review of a decision](#) form
2. Lodge the form:
  - by email to: [ACATAdminReview@act.gov.au](mailto:ACATAdminReview@act.gov.au); or
  - by post to: GPO Box 370  
Canberra ACT 2601; or
  - in-person at the ACAT registry, which is located at:
    - Level 4
    - 1 Moore Street
    - Canberra City, ACT
3. Pay the lodgement fee

Visit: ACAT's [Forms](#) page to download the [Application for review of a decision](#)

ACAT's [Lodge or serve documents](#) page for more information on lodging documents with ACAT

ACAT's [ACAT fees](#) page for more information on lodgement fees

## What happens in the ACAT?

The general steps in ACAT are as follows:

### 1 – ACAT receives your application

After you lodge your application, the Registrar will decide what steps to take. You may be referred to a conference or mediation. You will receive written notice of the steps and the date, time and location of the next conference or hearing.

### 2 – Conference

The Registrar may conduct a pre-hearing conference. The purpose of the conference is to understand what issues are in dispute, make sure that you have tried to resolve the dispute and assess how long a hearing would take. A large number of disputes are dealt with through the tribunal's conference and mediation determination process.

If this is unsuccessful, you will proceed to a hearing. If you reach an agreement, the terms of the agreement can be lodged with ACAT. If you do not reach an agreement, you may go to a hearing.

### 3 – Hearing

You will receive written notice advising the date, time and location of the hearing. At the hearing, you will be asked if you have any further information or evidence to that already presented in the application or the response.

Visit: ACAT [website](#) for more information

#### **How long will it take for ACAT to get back to me?**

ACAT has 120 days to decide on your application (section 22P of the [ACAT Act](#)) if it is made under the [PD Act](#). However, this time can be extended in some circumstances (section 22P(3)).

The ACAT Act does not specify a time for deciding applications under the EP Act, WR Act or NC Act.

#### **How much does merits review in the ACAT cost?**

There are fees for making an administrative review application with the ACAT. In general, each ACAT party will pay for the cost of their own application, lawyers and other fees (section 48 of the [ACAT Act](#)). However, if ACAT finds in your favour, it can ask that the other party pay for the cost of your application fee and other tribunal fees you incurred (section 48(2)(a) of the ACAT Act).

If ACAT thinks that you have caused an unreasonable delay, or your application is frivolous or vexatious, it can order you to pay costs (section 48(2)(b) of the [ACAT Act](#)). If your application for review of a decision is under the [Heritage Act](#), [PD Act](#), or [TP Act](#) and ACAT makes an order under section 32(2) (Dismissing or striking out applications), ACAT may order you to pay the reasonable costs of the other party (section 48(2)(d) of the ACAT Act).

#### **Do I need to be represented by a lawyer in ACAT?**

You do not need a lawyer to make an application for merits review before ACAT. ACAT is less formal than a court and is designed for people to represent themselves.

N.B. The EDO may assist you if your matter involves public interest environmental law issues

## Where can I go for more information?

- Visit the ACAT [website](#)
- Read factsheets about the ACT on the [EDO website](#)
- [Request legal advice](#) from the EDO through our national intake service