

## ***A brief guide to Legislation and Subordinate Legislative Instruments***

(Primarily sourced from the ACT Government Legislation Handbook 2009

[http://www.cmd.act.gov.au/\\_data/assets/pdf\\_file/0017/113624/actgov-legislation-handbook.pdf](http://www.cmd.act.gov.au/_data/assets/pdf_file/0017/113624/actgov-legislation-handbook.pdf) and “About Legislation” [http://www.legislation.act.gov.au/updates/about\\_act\\_legislation.asp](http://www.legislation.act.gov.au/updates/about_act_legislation.asp) as at 4 May 2013)

### ***Legislation***

As the ACT is a Territory legislation in the ACT is made under the authority of Section 22 of the *Australian Capital Territory (Self-Government) Act 1988 (Cwlth)* (the Self-Government Act) which gives the Legislative Assembly power to make laws ‘for the peace, order and good Government of the Territory’.

While it is not possible to list every situation where legislation is needed, the following provides a guide:

- appropriations of money;
- new or amending policies which impose taxes or levies;
- new or amending policies which impose fees and charges;
- amendments to Acts;
- significant questions of policy including fundamental changes to existing policy;
- procedural matters involving legislative scheme/s;
- provisions which create offences or impose criminal or administrative penalties;
- provisions which impose obligations, or confer enforceable rights on citizens or organisations (such as to provide information or submit documentation, to prohibit an activity or impose penalties); and
- policies that have a significant impact on individual rights and liberties.

The ACT Legislative Assembly makes legislation or authorises the making of legislation by enacting an Act. Acts are the primary form of law in the Territory. An Act may take several forms, for example:

- a new Act dealing comprehensively with a particular topic;
- an amending Act, amending one or more other Acts or subordinate laws;
- a portfolio Act, making less significant amendments to two or more Acts administered by a particular Minister—it may allow for some policy change but not important new initiatives; or
- a Statute Law Amendment Act, making minor and technical amendments across a number of Acts.

### ***Subordinate Legislation***

Many Acts (known as an enabling or delegating Acts) provide for subordinate or delegated legislation. Enabling Acts stipulate the manner in which the subordinate legislation is to be made and the authority entrusted with the power to make these laws. Subordinate legislation is typically made by the Governor or Governor-General, Ministers of the Crown, Commonwealth or State Government agencies, local government bodies and Rule Committees of courts.

Subordinate legislation includes a range of legislative instruments and the degree to which the authority to make these instruments is delegated and the extent of consultation, analysis, and scrutiny by the public and ACT Legislative Assembly that is required before the instrument passes in to law. Legislative instruments include

- subordinate laws - Regulations, Rules and By-laws that are disallowable instruments;
- Notifiable instruments such as Determinations, Directions, Orders and Variations (including approved forms); and
- Commencement notices.

### ***Bills, Acts and Regulations***

An Act is a legal instrument for which the Bill has been debated and passed by the ACT Legislative Assembly (for Commonwealth this would be both houses of Parliament). The decision to make legislation is usually made by the Cabinet, although private members can introduce Bills. The Bill is subject to considerable scrutiny both before introduction and during debate. Usually the decision to make legislation is subject to a Regulation Impact Assessment – that is an economic assessment on the net benefit of introducing legislation. It is considered to be good practice to release an Exposure Draft of a proposed Bill for public consultation before finalizing the Bill. There is broad stakeholder consultation as part of this process the Bill is subject to assessment by the Scrutiny of Bills Committee which runs the ruler over the powers contained in the Bill, whether stakeholder engagement has been comprehensive and the extent to which stakeholder views have been addressed.

Regulations are the most common subordinate laws and provide for matters of greater detail needed to implement the Act. Regulations should not provide for greater powers than in the Act itself. Because of the importance of Regulations in establishing the legal framework they also provide for regulation impact assessments to be undertaken, stakeholder consultation and Legislative Assembly (or Parliament in the Commonwealth or States) and public scrutiny before passing into law. It is also considered to be good practice to release an Exposure Draft of a proposed Regulations for public consultation before finalizing the Bill.

Regulations need to be compatible with the scope of the empowering legislation. Regulations may deal with any matters that a statute allows or requires to be prescribed and they may deal with any other matters that are necessary or convenient for carrying out or giving effect to the statute. However, in general, regulations can only expand upon what is already in the empowering legislation, not introduce new issues. Cabinet approval is generally not required for the drafting of regulations, unless there are sensitive issues, or whole of Government or cross portfolio considerations. Normally the responsible minister gives approval for the drafting of regulations.

In the ACT Regulations can be made by the ACT Executive (in this case, by two ministers) Regulations are disallowable Instruments that must sit before the Assembly for a specified period. They are also subject to assessment by the Scrutiny of Bills Committee.

The Assembly can disallow or amend a subordinate law by resolution. The Scrutiny of Bills Committee considers, in addition to bills, subordinate laws and disallowable instruments to examine whether each instrument:

- meets the objective of the Act under which it is made;
- unduly trespasses on rights previously established by law;
- makes rights, liberties and/or obligations unduly dependent on non-reviewable decisions;
- or
- contains matter that should properly be dealt with in an Act of the Legislative Assembly.

***Notifiable instruments*** such as Determinations, Directions, Orders and Variations

Notifiable instruments such as Determinations, Directions, Orders and Variations are subordinate legal instruments that are applied for matters that may need regular updating but are generally non-contentious and are not of such significance that requires scrutiny by the Legislative Assembly (or Parliament for the Commonwealth and States), public debate or widespread stakeholder engagement. They are not required to be subject to a Regulation Impact Assessment with its associated economic analysis and assessment of net community benefit. Making of such instruments can be delegated to middle management levels in an Agency and the level to which the delegated authority can be made is specified in the Act. For a notifiable instrument to enter into force it must be listed on the appropriate register for such instruments in the ACT