

1993
THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Minister for the Environment, Land and Planning)

**Commissioner for the Environment Bill
1993**

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83031 1992/182 (T31/93)

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Commissioner for the Environment Bill
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A BILL
FOR

An Act to establish the office of Commissioner for
the Environment and for related matters

The Legislative Assembly for the Australian Capital Territory enacts as follows:

PART I—PRELIMINARY

Short title

- 5 1. This Act may be cited as the *Commissioner for the Environment Act 1993*.

Commencement

2. (1) Section 1 and this section commence on the day on which this Act is notified in the *Gazette*.
- 10 (2) The remaining provisions commence on a day, or respective days, fixed by the Minister by notice in the *Gazette*.

(3) If a provision referred to in subsection (2) has not commenced before the end of the period of 6 months commencing on the day on which this Act is notified in the *Gazette*, that provision, by force of this subsection, commences on the first day after the end of that period.

5 Interpretation

3. (1) In this Act, unless the contrary intention appears—

“agency” means a Department or a prescribed authority;

“authorised person” means a person appointed by the Commissioner to be an authorised person for the purposes of this Act;

10 “Commissioner” means the Commissioner for the Environment appointed in accordance with section 4;

“Department” means an administrative unit of the Public Service;

“law of the Territory” includes part of such a law;

“officer” means—

15 (a) in relation to a Department—

(i) a public servant (including the principal officer of that Department) who is a member of that Department; or

20 (ii) any other person (not being a Minister) authorised to exercise powers or perform functions on behalf of that Department by the principal officer of that Department; and

(b) in relation to a prescribed authority—

25 (i) the person who constitutes, or is acting as the person who constitutes, the authority;

(ii) a person who is, or is acting as, a member of the authority or is a deputy of such a member;

30 (iii) a person who is employed in the service of, or is a member of the staff of, the authority, whether or not the person is employed by the authority; or

(iv) a person authorised by the authority to exercise any powers or perform any functions of the authority on behalf of the authority;

“Ombudsman” has the same meaning as in the *Ombudsman Act 1989*;

35 “prescribed authority” means—

- 5
- (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, a law of the Territory, other than—
- (i) an incorporated company or association; or
- (ii) a body that, under subsection (2) or the regulations, is not a prescribed authority for the purposes of this Act;
- 10
- (b) any other body, whether incorporated or unincorporated, that is declared by the regulations to be a prescribed authority for the purposes of this Act, being—
- (i) a body established by the Executive or by a Minister; or
- (ii) an incorporated company or association over which the Territory is in a position to exercise control;
- 15
- (c) subject to subsection (3), the person holding or performing the duties of an office, other than the office of Ombudsman, established by a law of the Territory; or
- 20
- (d) a person holding, or performing the duties of, an office declared by the regulations to be an office the holder of which is a prescribed authority for the purposes of this Act, being an office created by the Executive or by a Minister otherwise than under a law of the Territory;

“principal officer” means—

- 25
- (a) in relation to a Department—the Head of Administration or, if an Associate Head of Administration has been placed in control of that Department, that Associate Head of Administration or a person acting in such an office; or
- (b) in relation to a prescribed authority—
- 30
- (i) if the regulations declare an office to be the principal office in respect of the authority—the person holding, or performing the duties of, that office; or
- (ii) in any other case—the person who constitutes that authority or a person acting in his or her office or, if the authority is constituted by 2 or more persons,
- 35
- the person who is entitled to preside at any meeting of the authority at which the person is present or a person acting in his or her office;

“responsible Minister”, in relation to an agency, means—

- (a) subject to paragraphs (b) and (c), the Minister who is responsible for that agency;
- 5 (b) in relation to a prescribed authority referred to in paragraph (c) of the definition of "prescribed authority"—the Minister administering the law of the Territory concerned; or
- (c) in relation to a prescribed authority referred to in paragraph (b) or (d) of the definition of "prescribed authority"—the Minister declared by the regulations to be the responsible Minister in respect of that authority;

10 or another Minister acting for and on behalf of that Minister.

(2) An unincorporated body, being a board, council, committee, subcommittee or other body established by or under a law of the Territory for the purpose of assisting, or performing functions connected with, a prescribed authority shall not be taken to be a prescribed authority, but
15 action taken by the body, or by a person on its behalf, shall be taken to have been taken by that prescribed authority.

(3) A person shall not be taken to be a prescribed authority only because the person holds or performs the duties of—

- (a) a prescribed office;
- 20 (b) an office the duties of which the person performs as duties of his or her employment as an officer of an agency;
- (c) an office of member of a body; or
- (d) an office established by a law of the Territory for the purposes of a prescribed authority;

25 but any action taken by or on behalf of a person holding or performing the duties of such an office shall be deemed to have been taken by the agency or body concerned.

PART II—OFFICE OF COMMISSIONER FOR THE ENVIRONMENT

30 Commissioner for the Environment

4. (1) There shall be a Commissioner for the Environment appointed by instrument by the Minister.

(2) The Commissioner holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as are determined by
35 instrument by the Minister.

Term of office

5. Subject to this Act, the Commissioner holds office for the period (not exceeding 5 years) specified in the instrument of appointment but is eligible for reappointment.

5 Remuneration and allowances

6. The Commissioner shall be paid such remuneration and allowances as are determined by instrument by the Minister.

Leave of absence

10 7. The Minister may grant leave of absence to the Commissioner upon such terms and conditions as to remuneration or otherwise as the Minister by instrument determines.

Resignation

8. The Commissioner may resign from office by signed notice given to the Minister.

15 Suspension and removal of Commissioner

9. (1) The Executive may remove the Commissioner from office on an address praying for his or her removal on the ground of misbehaviour or physical or mental incapacity being presented to the Executive by the Legislative Assembly.

20 (2) The Executive may suspend the Commissioner from office on the ground of misbehaviour or physical or mental incapacity.

25 (3) Where the Executive suspends the Commissioner from office, the Minister shall cause a statement of the grounds of the suspension to be laid before the Legislative Assembly within 7 sitting days of the Legislative Assembly after the suspension.

30 (4) Where such a statement has been laid before the Legislative Assembly, the Legislative Assembly may, within 15 sitting days of the Legislative Assembly after the day on which the statement has been laid before it, by resolution, declare that the Commissioner should be removed from office and, if the Legislative Assembly so passes such a resolution, the Executive shall remove the Commissioner from office.

(5) If, at the end of 15 sitting days of the Legislative Assembly after the day on which the statement has been laid before it, the Legislative Assembly has not passed such a resolution, the suspension terminates.

35 (6) If the Commissioner becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, the Executive shall remove the Commissioner from office.

(7) The Commissioner shall not be removed or suspended from office except as provided by this section.

5 (8) The suspension of the Commissioner from office does not affect any entitlement of the Commissioner to be paid remuneration and allowances.

Retirement

10 10. The Minister may, by instrument and with the consent of the Commissioner, retire the Commissioner on the grounds of physical or mental incapacity from such date and upon such terms and conditions as the Minister determines.

Delegation

11. The Commissioner may, by signed instrument, delegate to a public servant all or any of his or her powers under this Act.

15 PART III—FUNCTIONS AND POWERS OF THE COMMISSIONER FOR THE ENVIRONMENT

Functions

12. (1) The Commissioner has the following functions:

- 20 (a) investigating complaints regarding the management of the environment by the Territory or a Territory authority;
- (b) conducting such investigations as may be directed by the Minister;
- (c) conducting, of his or her own motion, investigations into actions of an agency where those actions would have a substantial impact on the environment of the Territory.

25 (2) The Commissioner is not authorised to investigate action taken by—

- (a) a Judge or the Master of the Supreme Court;
- (b) a Magistrate or Coroner for the Territory;
- (c) a Royal Commission under the *Royal Commissions Act 1991*;
- (d) a Board of Inquiry under the *Inquiries Act 1991*;
- 30 (e) a panel conducting an Inquiry under the *Land (Planning and Environment) Act 1991*; or
- (f) the Ombudsman.

(3) In addition to the specific powers provided by this Act, the Commissioner has such powers as are necessary and convenient for the performance of his or her functions.

Complaints

5 13. A person may make a complaint, in the manner or form approved by the Commissioner, to the Commissioner regarding the management of the environment of the Territory by the Territory or a Territory authority.

Discretion not to investigate certain complaints

10 14. (1) Where a complaint has been made to the Commissioner with respect to action taken by an agency, the Commissioner may, in his or her discretion, decide not to investigate the action or, if investigation has commenced, decide not to investigate the action further—

15 (a) if the Commissioner is satisfied that the complainant became aware of the action more than 12 months before the complaint was made to the Commissioner; or

(b) if, in the opinion of the Commissioner—

(i) the complaint is frivolous or vexatious or was not made in good faith; or

20 (ii) an investigation, or further investigation, of the action is not warranted having regard to all the circumstances.

(2) Where a person who makes a complaint to the Commissioner with respect to action taken by an agency has not complained to the agency with respect to that action, the Commissioner may, in his or her discretion, decide not to investigate the action.

25 (3) Where—

(a) a person who—

(i) has made a complaint to the Commissioner with respect to action taken by an agency;

30 (ii) has complained to the agency with respect to that action; and

(iii) informs the Commissioner that the agency has not responded or has not responded adequately; and

(b) the Commissioner is of the opinion—

35 (i) if the agency has not responded—that, since the complainant complained to the agency, a reasonable period has elapsed in which the agency could have responded; or

- (ii) if the agency has responded—that the response was not adequate;

the Commissioner shall, subject to this section, investigate the action.

5 (4) Where a complainant has caused or causes action to which his or her complaint relates to be reviewed by a court, or by a tribunal constituted by or under a law of the Territory, the Commissioner shall not investigate, or continue to investigate, the action unless the Commissioner is of the opinion that there are special reasons justifying the investigation or the continued investigation.

10 (5) Where the Commissioner is of the opinion that a complainant has or had a right to cause the action to which the complaint relates to be reviewed by a court, or by a tribunal constituted by or under a law of the Territory, but has not exercised that right, the Commissioner may decide not to investigate the action or not to investigate the action further, if he or she is
15 of the opinion that, in all the circumstances, it would be reasonable for the complainant to exercise, or would have been reasonable for the complainant to have exercised, that right.

(6) Where, before the Commissioner commences, or after the Commissioner has commenced, to investigate action taken by an agency, being action that is the subject matter of a complaint, the Commissioner forms the opinion that adequate provision is made under an administrative practice for the review of action of that kind, the Commissioner may decide
20 not to investigate the action or not to investigate the action further—

- 25 (a) if the action has been, is being or is to be reviewed under that practice at the request of the complainant; or
(b) if the Commissioner is satisfied that the complainant is entitled to cause the action to be reviewed under that practice and it would be reasonable for the complainant to cause it to be so reviewed.

30 (7) Where a complaint is made to the Commissioner by a complainant at the request of another person or of a body of persons, this section applies as if references to the complainant were references to the person or the body of persons at whose request the complaint is made.

35 (8) Where the Commissioner decides not to investigate a complaint he or she shall, in the annual report, advert to that decision and to the reasons for it.

Investigations

15. (1) The Commissioner shall, before commencing an investigation under this Act of action taken by an agency, inform the principal officer of the agency that the action is to be investigated.

5 (2) The Commissioner may from time to time make an arrangement with the principal officer of an agency with respect to the manner in which, and the period within which, the Commissioner is to inform the principal officer that he or she proposes to investigate action taken by the agency, being action to which the arrangement relates.

(3) An investigation under this Act shall be conducted in private and, subject to this Act, in such manner as the Commissioner thinks fit.

10 (4) Subject to this Act, the Commissioner may, for the purposes of this Act, obtain information from such persons, and make such inquiries, as he or she thinks fit.

(5) Subject to subsection (6), it is not necessary for the complainant or any other person to be afforded an opportunity to appear before the Commissioner or any other person in connection with an investigation by the Commissioner under this Act.

15 (6) The Commissioner shall not make a report in respect of an investigation under this Act in which he or she sets out opinions that are, either expressly or impliedly, critical of an agency or person unless, before completing the investigation, the Commissioner has—

20 (a) if the opinions relate to an agency—given the principal officer of the agency and the officer principally concerned in the action to which the investigation relates opportunities to appear before the Commissioner or before an authorised person, and to make such submissions, either orally or in writing, in relation to that action as they think fit; and

25 (b) if the opinions relate to a person—given that person an opportunity to appear before the Commissioner or before an authorised person, and to make such submissions, either orally or in writing, in relation to the action to which the investigation relates as the person thinks fit.

30 (7) Where the Commissioner gives the principal officer of an agency an opportunity to appear before the Commissioner or before an authorised person under subsection (6), the principal officer may appear in person or a person authorised by the principal officer may appear on behalf of the principal officer.

35 (8) Where the Commissioner gives a person other than the principal officer of an agency an opportunity to appear before the Commissioner or before an authorised person under subsection (6), the person may, with the approval of the Commissioner or of the authorised person, as the case may be, be represented by another person.

40 (9) Where, in relation to an investigation under this Act, the Commissioner proposes to give a person an opportunity to appear before the

Commissioner or before an authorised person and to make submissions under subsection (6), or proposes to make a requirement of a person under section 17—

- 5 (a) if a complaint was made orally with respect to the action and the complaint has not been put in writing—the complaint shall be put in writing; and
- (b) the Commissioner shall, if he or she has not previously informed the responsible Minister that the action is being investigated, inform that Minister accordingly.

10 (10) The Commissioner may, either before or after the completion of an investigation under this Act, discuss any matter that is relevant to the investigation with a Minister concerned with the matter.

15 (11) On the request of the responsible Minister, the Commissioner shall consult that Minister before forming a final opinion on any of the matters referred to in subsection 17 (1) or (2) that are relevant to the action under investigation.

20 (12) Where the Commissioner becomes of the opinion, either before or after completing an investigation under this Act, that there is evidence that a person, being an officer of an agency, has been guilty of a breach of duty or of misconduct and that the evidence is, in all the circumstances, of sufficient force to justify doing so, the Commissioner shall bring the evidence to the notice of—

- (a) in the case of a Department—
- 25 (i) if the person is the principal officer of the Department and is also the Head of Administration—the responsible Minister of the Department;
- (ii) if the person is the principal officer of the Department and is also an Associate Head of Administration—the Head of Administration; or
- 30 (iii) if the person is a member of the Department but is not the principal officer of the Department—the principal officer of the Department; or
- (b) in the case of a prescribed authority—
- 35 (i) if the person is the principal officer of the authority—the responsible Minister of the authority; or
- (ii) if the person is not the principal officer of the authority—the principal officer of the authority.

Power to enter premises

5 **16. (1)** For the purposes of an investigation under this Act the Commissioner or an authorised person may, at any reasonable time of the day, enter any place occupied by an agency and may carry on the investigation at that place.

10 **(2)** For the purposes of an investigation under this Act, an authorised person is entitled to inspect any documents relevant to the investigation that are kept at premises entered under this section, other than documents to which a certificate under subsection 17 (6) applies, at a reasonable time of the day arranged with the principal officer of the agency concerned.

Power to obtain information and documents

15 **17. (1)** Where the Commissioner has reason to believe that an agency is capable of providing information or producing documents or other records relevant to an investigation under this Act, the Commissioner may, by notice in writing served on the head of the agency, require the agency, at such place, and within such period or on such day and at such time, as are specified in the notice—

- 20
- (a) to provide to the Commissioner any such information, in writing;
 - (b) to produce to the Commissioner such documents or other records as are specified in the notice; or
 - (c) to provide to the Commissioner any such information and to produce to the Commissioner such documents or other records as are specified in the notice.

25 **(2)** Where the Commissioner has reason to believe that an officer of an agency is capable of providing information or producing documents or other records relevant to an investigation under this Act, or both providing information and producing documents or other records of that kind, but the Commissioner does not know the identity of the officer, the Commissioner may, by notice in writing served on the principal officer of the agency, require the principal officer or a person nominated by the principal officer, at such place, and within such period or on such day and at such time, as are specified in the notice—

- 30
- (a) to attend before a person specified in the notice to answer questions relevant to the investigation;
 - 35 (b) to produce to a person specified in the notice such documents or other records as are so specified; or
 - (c) to attend before a person so specified to answer questions of that kind and to produce to a person so specified such documents or other records as are so specified.

(3) Where documents or other records are produced to the Commissioner in accordance with a requirement under subsection (1) or (2) or an order under subsection 26 (2), the Commissioner—

- 5 (a) may take possession of, and may make copies of, or take extracts from, the documents or other records; and
- (b) may retain possession of the documents or other records for such period as is necessary for the purposes of the investigation to which the documents or other records relate.

10 (4) Where a document is retained by the Commissioner under subsection (3) a person who would be entitled to inspect the document, if it were not in the possession of the Commissioner, may at any reasonable time inspect the document.

15 (5) Where the Commissioner has reason to believe that a person is able to give information relevant to an investigation under this Act, the Commissioner may, by notice in writing served on the person, require the person to attend before a person specified in the notice, on such day and at such time and place as are specified in the notice, to answer questions relevant to the investigation.

20 (6) Where the Minister certifies in writing that the disclosure to the Commissioner of information concerning a specified matter (including the providing of information in answer to a question) or the disclosure to the Commissioner of the contents of any documents or records would be contrary to the public interest—

- 25 (a) because it would involve the disclosure of communications between a Minister and a Commonwealth Minister or a Minister of a State or of a Territory, being a disclosure that would prejudice relations between the Territory and the Commonwealth, between the Territory and a State or between the Territory and another Territory, as the case may be; or
- 30 (b) because it would involve the disclosure of deliberations or decisions of the Executive or of a Committee of the Executive;

the Commissioner is not entitled to require a person to provide any information concerning the matter, to answer questions concerning the matter or to produce those documents or records to the Commissioner.

35 (7) Notwithstanding the provisions of any law of the Territory, a person is not excused from providing any information, producing a document or other record or answering a question when required to do so under this Act on the ground that the providing of the information, the production of the document or record or the answer to the question—

- (a) would contravene the provisions of any other law of the Territory, would be contrary to the public interest or might tend to incriminate the person or make the person liable to a penalty; or
 - (b) would disclose legal advice provided to a Minister or an agency;
- 5 but the information, the document or record produced or the answer to the question is not admissible in evidence against the person in proceedings other than—
- (c) an application under subsection 26 (2); or
 - (d) proceedings for an offence against section 27.
- 10 (8) A person is not liable to any penalty under the provisions of any other law of the Territory because of the person having furnished information, produced a document or other record or answered a question when required to do so under this Act.

Assistance to the Commissioner

- 15 18. Where—
- (a) the Commissioner requests in writing that the head of an agency provide information for use in preparing a State of the Environment Report; and
 - (b) the agency does not provide that information within a reasonable
- 20 time;
- that agency head shall, at the written request of the Commissioner, make staff available for a period not exceeding 3 months to assist the Commissioner in the preparation of that report.

PART IV—REPORTS

25 State of the Environment Report

19. (1) The Commissioner shall, as soon as practicable, and in any event by each 31 August, submit to the Minister for presentation to the Legislative Assembly, a State of the Environment Report for the year that ended on the preceding 30 June.
- 30 (2) The Report shall—
- (a) include an assessment of the quality of the environment, including reference to its impact on flora and fauna;
 - (b) evaluate the adequacy or appropriateness of existing practices and
- 35 procedures that are directed towards achieving prescribed environmental standards;

- (c) include an assessment of ambient air and water quality, noise, hazardous wastes, soil quality, site contamination and the impact of waste;
- 5 (d) include an assessment of the effectiveness of any pollution control measures, planning and development control, national standards and the feasibility of any goals and other environment management practices that have been accepted by the Executive;
- (e) include such matters as may be specified by instrument by the Minister; and
- 10 (f) include such other matters as may be considered relevant by the Commissioner.

Annual report

20. The Commissioner shall, as soon as practicable, and in any event by each 31 August, submit to the Minister for presentation to the Legislative Assembly, a report of the operations of the Commissioner during the year that ended on the preceding 30 June.

Special reports

21. Where—
- 20 (a) the Minister has directed the Commissioner to conduct an inquiry; or
 - (b) the Commissioner has of his or her own motion, conducted an investigation into an issue of environmental significance to the Territory;

the Commissioner shall—

- 25 (c) prepare a special report on that inquiry or investigation; and
- (d) within 28 days of the completion of the report, submit that report to the Minister.

Minister to table reports

- 30 22. Where the Commissioner submits any report to the Minister, the Minister shall cause that report to be laid before the Legislative Assembly within 15 sitting days of the Legislative Assembly after its receipt by the Minister.

PART V—MISCELLANEOUS

Agencies' annual report obligations

- 35 23. The principal officer of an agency shall include in the annual report of that agency—

- (a) details of any request under section 18 received by the agency;
- (b) details of any assistance provided in response to that request;
- (c) details of any investigation carried out by the Commissioner in respect of any activity of the agency; and
- 5 (d) details of any recommendation made by the Commissioner following an investigation of the activities of the agency and what action the agency has taken in respect of each recommendation.

Commissioner not to be sued

- 10 24. Neither the Commissioner, a person to whom the Commissioner has delegated any or all of his or her powers, nor a person acting under the Commissioner's direction or authority is liable to an action, suit or proceeding in relation to any act done or omitted to be done in good faith in the exercise or purported exercise of any power or authority conferred by this Act.

15 Referral to Ombudsman

25. Where the Commissioner forms the opinion that a complaint falls within the jurisdiction of the Ombudsman, the Commissioner shall, whether or not he or she has commenced an inquiry, refer the complaint, together with relevant documents and information, to the Ombudsman.

20 Powers of Supreme Court

- 25 26. (1) Where a question with respect to the exercise of a power, or the performance of a function, of the Commissioner by or under this Act or any other enactment arises between the Commissioner and the principal officer of any agency that is affected by that exercise or performance, the Commissioner or the principal officer of the agency may, subject to subsections (3) and (4), make an application to the Supreme Court for a determination of the question.

- 30 (2) Where a person fails to comply with a requirement made by the Commissioner by notice under section 17 to provide information, to produce documents or other records or to attend before the Commissioner to answer questions, the Commissioner may make an application to the Supreme Court for an order directing that person to provide the information, to produce the documents or other records, or to attend before the Commissioner to answer questions, at such place, and within such period or
35 on such day and at such time, as are specified in the order.

(3) The Commissioner shall not make an application to the Supreme Court under this section unless he or she has informed the responsible Minister of the agency concerned in writing of the reasons for the proposed application.

(4) The principal officer of an agency shall not make an application to the Supreme Court under subsection (1) unless he or she has informed the responsible Minister of the agency in writing of the reasons for the proposed application.

- 5 (5) The Supreme Court has jurisdiction with respect to matters arising under this section in respect of which applications are made to the Supreme Court.

Offences

27. A person shall not—

- 10 (a) wilfully obstruct, hinder or resist the Commissioner or any other person in the exercise of functions under this Act without reasonable excuse; or
- 15 (b) provide information or make a statement to the Commissioner or to an authorised person knowing that it is false or misleading in a material particular.

Penalty: \$5,000 or imprisonment for 6 months or both.

Regulations

- 20 28. The Executive may make regulations not inconsistent with this Act, prescribing all matters that by this Act are required or permitted to be prescribed, or that are necessary or convenient to be prescribed, for carrying out or giving effect to this Act.