

Application by the ACT Civil and Administrative Tribunal (ACAT) for approval as an EDR scheme

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The Applicant – the applicable legislation

The ACT Civil and Administrative Tribunal (**ACAT**) was established by section 88 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) (**ACAT Act**).

The objects of the ACAT Act include:

to provide for a wide range of matters arising under legislation to be resolved by the ACT Civil and Administrative Tribunal (section 6(a)).

The ACAT Act sets out the powers and functions of the ACAT, which exercises those powers and functions under approximately 150 ACT statutes known as “authorising laws”. The expression “authorising law” is defined in the ACAT Act to include a territory law that provides that an application may be made to the tribunal (Dictionary, see section 3).

Section 6 of the *National Energy Retail Law (ACT) Act 2012* states that the National Energy Retail Law as set out in the schedule to the South Australian Act, applies as a territory law.

Section 5 of the *National Energy Retail Regulations (SA)* prescribes the ACAT to be the jurisdictional energy ombudsman for the ACT. The ACAT Act and the *Utilities Act 2000* (ACT) (**Utilities Act**) provide an additional jurisdictional framework, and the Utilities Act is an authorising law.

In summary the ACAT Act provides that:

- A person may apply to the ACAT if an authorising law provides that the application may be made (section 9).
- The right under an authorising law to make an application to the ACAT is subject to any condition stated in the authorising law (section 11).
- An authorising law may set out the powers of the ACAT and the decisions it may make on an application made under the authorising law (section 57).

The Utilities Act includes Part 12: Complaints to ACAT about utilities. Sub-sections 178(1) to (3) state:

- (1) *This section applies if the ACAT is satisfied, in relation to a complainant, that—*
 - (a) *the respondent has—*
 - (i) *contravened a customer contract; or*
 - (ii) *contravened section 51 (Protection of personal information); or*

- (iii) *contravened an obligation under this Act in relation to its network operations; or*
 - (b) *the respondent has caused, or would cause, substantial hardship by failing to provide, or withdrawing, a utility service; or*
 - (c) *an authorised person for the respondent has acted improperly in relation to network operations; or*
 - (d) *a capital contribution charge, of an amount of not more than \$10 000, imposed by the respondent is excessive.*
- (2) *Without limiting the orders the ACAT may make, the ACAT may—*
 - (a) *for a complaint that a capital contribution charge is excessive—give a direction under section 182 (Reviewable capital contribution charges); or*
 - (b) *in any other case—*
 - (i) *give the written directions to the respondent that it considers necessary requiring the respondent to remedy the matter mentioned in subsection (1); or*
 - (ii) *give another direction under this division; or*
 - (iii) *make a declaration under this division.*
- (3) *A respondent must comply with a direction given to it under this division.*

For present purposes it is relevant to note that section 51 of the Utilities Act states:

51 Protection of personal information

- (1) *This section applies to personal information gained by a utility in relation to the provision of a utility service.*
- (2) *A utility, when dealing with personal information, must comply with—*
 - (a) *the Australian Privacy Principles; and*
 - (b) *the [Privacy Act](#), part 3A (Credit reporting); and*
 - (c) *the registered CR code.*
- (3) *In this section:*

Australian Privacy Principles means the Australian Privacy Principles under the [Privacy Act](#), schedule 1.

Privacy Act means the [Privacy Act 1988](#) (Cwlth).

registered CR code—see the [Privacy Act](#), section 26M.

*Note The **registered CR code** is a written code of practice about credit reporting registered under the [Privacy Act](#).*

It will be apparent from the outline of the scheme above that if the ACAT is recognised as an External Dispute Resolution (EDR) scheme for the purpose of the *Privacy Act 1988* (Cwlth) then the ACAT would continue to operate the scheme which operated in the ACT until 31 December 2021.

ACAT's structure

The ACAT has full-time presidential and senior members, and sessional senior and ordinary members who are appointed under the ACAT Act for specified terms. The ACAT President allocates members to conduct conferences, hearings, and other listings in each application.

Registry staff who work at the tribunal are ACT Public Servants employed under the *Public Sector Management Act 1994* (ACT) and are subject to the ACT Public Service Code of Conduct 2013 which gives further context to the standards and behaviours required and expected of all ACT Public Servants under Section 9 of the *Public Sector Management Act 1994*.

The Energy and Water section of the ACAT registry (ACAT EW) operates within the ACAT organisational structure. ACAT EW currently comprises an Assistant Director, a Team Leader, two Senior Support officers and one Registry Support officer. All team members hold the delegation of a Deputy Registrar. The ACAT EW registry team is the first point of contact for complainants. The registry team maintains this role for the duration of an ACAT application about an energy and water complaint.

ACAT's way of operating

In exercising its functions under the ACAT Act, the ACAT must:

- (a) *seek to ensure the procedures of the tribunal—*
 - (i) *are as simple, quick, inexpensive and informal as is consistent with achieving justice; and*
 - (ii) *are implemented in a way that facilitates the resolution of the issues between the parties so that the cost to the parties and the tribunal is proportionate to the importance and complexity of the subject matter of the proceeding; and*
- (b) *observe natural justice and procedural fairness. (section 7)*

The tribunal in its consideration of a matter need not comply with the rules of evidence applying in the ACT (section 8) and may inform itself in any way it considers appropriate in the circumstances (section 26).

In exercising its functions under Part 12 of the Utilities Act, the ACAT must consider the following principles:

- (a) *that utility services should continue to be provided to complainants suffering financial hardship;*
- (b) *that the rights of complainants under the Act should be protected (section 171).*

Under the ACAT Act:

- the ACAT may make rules (which are a notifiable instrument) in relation to its practice and procedure (section 24) – (ACAT has done so, see the *ACT Civil and Administrative Tribunal Procedures Rules 2020 (ACAT Rules)*);
- the ACAT may decide its own procedure in relation to a particular matter at any stage in dealing with an application if no procedure is prescribed under the ACAT Act, an authorising law or the ACAT Rules (section 23);
- an authorising law may set out procedures for dealing with an application made under that law, and any procedure under an authorising law prevails over the procedures set out in the ACAT Act or the ACAT Rules to the extent of any inconsistency (section 27);
- the ACAT may take all reasonably practicable steps to resolve matters arising in an application before it hears the application (section 31), including referring matters for mediation (section 35).

Oversight of the ACAT

The ACAT sits within the Courts and Tribunal functions of the Justice and Community Safety Directorate which is within the portfolio of the ACT Attorney General.

Under section 174 of the Utilities Act, the President of the ACAT is required to report to the relevant Minister(s) and the Independent Competition and Regulatory Commission (ICRC) any systemic failures of the Utilities Act or that come to the ACAT's attention when exercising its functions under that Act. This same requirement is imposed on the President of ACAT to report any identified issues to the ACT Attorney General under S105A of the ACAT Act.

Accountability for the ACAT's operations is achieved through the ACAT Annual Review which is published (including on the ACAT website) and at the ACT Legislative Standing Committee inquiry into annual and financial reports and inquiry into the ACT budget.

Department of Industry Science and Technology (DIST) Benchmarks

In support of its application for recognition as an EDR scheme, the ACAT provides the following information in relation to each of the DIST benchmarks by reference to legislative provisions and the ACAT's practices. If the ACAT's application to be a recognised EDR is successful, similar information will be made available on the ACAT website (Attachment A).

Accessibility

That the EDR scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

Legislation: The objects of ACAT Act include:

- (b) *to ensure that access to the tribunal is simple and inexpensive, for all people who need to deal with the tribunal; and*
- (c) *to ensure that applications to the tribunal are resolved as quickly as is consistent with achieving justice; (section 6).*

Practice: Information regarding the functions that the ACAT performs, and a statement that reflects the legislation above, can be found on the ACAT website at <https://www.acat.act.gov.au/about-acat>.

The ACAT website has information for energy and water complainants about the types of complaints that can be lodged in the ACAT here: <https://www.acat.act.gov.au/case-types/energy-and-water-cases>.

Complainants can submit complaints directly to the ACAT through an online application form found here: <https://www.acat.act.gov.au/fees-and-forms/online-forms/energy-and-water-complaint-form>

Utility providers operating in the ACT refer complainants to the ACAT when a complaint is not resolved by utilising the utilities own internal dispute resolution processes.

Energy and Water matters are fee free. Conferences, hearings, and other listings are conducted informally, either in person or remotely (by telephone or videoconference facilities)

The ACAT EW registry team further promotes accessibility by participating in external activities, arranged by community organisations, designed to raise consumer rights awareness.

Independence

The decision-making process and administration of the EDR scheme are independent from EDR scheme members.

As a statutory authority (and unlike some other energy and water ombudsman schemes), the ACAT has no facility that would allow energy and water providers in the ACT to become

members. Accordingly, the providers have no influence over ACAT processes and administration.

Reference to ACAT Members in the following paragraphs is a reference to ACAT Members appointed by the ACT Government under the ACAT Act to undertake decision making, or other dispute resolution functions in ACAT. The ACAT as an organisation, does not have members who are part of the organisation in a way that term is generally understood.

Legislation: ACAT Members are appointed by the Executive or the ACT Attorney-General under the ACAT Act for specified terms. The qualifications for membership and the appointment process are set out in the ACAT Act (sections 94-96, 98).

Each ACAT Member gives an undertaking to the Territory to “well and truly serve in the office” as an ACAT Member and that they ‘will do right to all people, according to law, without fear or favour, affection or ill-will” (section 109, Schedule 1)

ACAT Members are required to disclose any material interest they have in a matter and must not take any part in the tribunal dealing with the application unless each party is made aware of the disclosed interest and consents (section 50)

The appointment of a non-presidential member may be ended by the Executive for misbehaviour, physical or mental incapacity, or failure to disclose a material interest (section 99). Presidential members may only be removed from office, like judicial officers, in accordance with the provisions of the *Judicial Commission Act 1994* (section 99(2) Note).

Fairness

The EDR scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

Legislation: The objects of the ACAT Act include:

(d) *to ensure that decisions of the tribunal are fair* (section 6).

In exercising its functions under the ACAT Act, the ACAT must:

(a) *seek to ensure the procedures of the tribunal—*

(i) *are as simple, quick, inexpensive and informal as is consistent with achieving justice; and*

(ii) *are implemented in a way that facilitates the resolution of the issues between the parties so that the cost to the parties and the tribunal is proportionate to the importance and complexity of the subject matter of the proceeding; and*

(b) *observe natural justice and procedural fairness.* (section 7)

The ACAT need not comply with the rules of evidence applying in the ACT (section 8) and may inform itself in any way it considers appropriate in the circumstances (section 26).

As noted earlier, in exercising its functions under Part 12 of the Utilities Act, the ACAT must consider the following principles:

- (a) *that utility services should continue to be provided to complainants suffering financial hardship;*
- (b) *that the rights of complainants under the Act should be protected (section 171).*

Practice: Resolutions and decisions on Energy and Water complaints in the ACAT are arrived at by a variety of means. Wherever possible, the preferred approach is an agreed resolution achieved through ACAT registry officer level facilitated communication between the complainant and the relevant utility. If resolution is not achieved, complainants are offered the opportunity to participate in ACAT processes. These processes include Member led conferences or hearings. Conferences are limited to parties to the proceedings. However, hearings are recorded and, except where specific orders are made in relation to non-disclosure or non-publication under section 39 of the ACAT Act, are open to members of the public. Conferences and hearings are conducted using information provided by both the complainant and utility and in accordance with legislative and general legal principles.

Accountability

The EDR scheme publicly accounts for its operations by publishing its decisions and information about complaints and highlighting any systemic industry problems.

Legislation: The objects of the ACAT Act include:

- (e) *to enhance the quality of decision making under legislation; and*
- (f) *to encourage, and bring about, compliance in decision making under legislation; and*
- (g) *...*
- (h) *to identify and bring to the Attorney-General's attention systemic problems in relation to the operation of authorising laws. (section 6, see also section 105A)*

Section 174 of the Utilities Act provides:

Advising Minister etc about systemic problems

- (1) *This section applies if it appears to the ACAT that applications under this part to the ACAT indicate a systemic problem in relation to—*
 - (a) *the operation of this part; or*
 - (b) *other matters that come to the ACAT's attention in the course of exercising its functions under this part.*
- (2) *The ACAT must tell the following about the problem:*

- (a) each Minister responsible for administering the Act;
 - (b) the ICRC.
- (3) This section is in addition to the [ACT Civil and Administrative Tribunal Act 2008](#), section 105A (Advising Attorney-General about systemic problems).

Practice: The ACAT (including ACAT EW) publishes its written decisions on its website at [Home - ACAT \(act.gov.au\)](#), unless non-publication orders have been made.

As noted above, the ACAT also has responsibility to provide information on systemic industry issues to the ACT Attorney-General, any other Minister with relevant responsibility under the Utilities Act Part 12 and the ICRC.

Detailed information about ACAT EW is included in the ACAT Annual Review. A copy of the latest Annual Review can be found here [Publications and policies - ACAT \(act.gov.au\)](#)

The operations of the ACAT are also held to account at the ACT Legislative Standing Committee inquiry into annual and financial reports and inquiry into the ACT budget.

Efficiency

The EDR scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by appropriate process or forum and regularly reviewing its performance.

Legislation: The objects of the ACAT Act include:

- (c) to ensure that applications to the tribunal are resolved as quickly as is consistent with achieving justice; (section 6)

Practice: The ACAT EW registry team uses detailed reporting measures to track complaints. These measures include spreadsheets and bespoke databases. Additionally, weekly meetings with the ACAT Case Managing Senior Member are used as a mechanism to assess new and existing complaints and to escalate existing complaints to a different process where required. As noted above, the best and most efficient results are generally achieved through ACAT registry officer level involvement. However, where it becomes apparent that this is not possible, conferences, hearings or other listings are held to promote resolution or, if not achieved, to determine outcomes. These outcomes may include binding determinations.

Data on Complaints handling and information about the efficiency of ACAT EW is published in the ACAT Annual Review. A copy of the latest Annual Review can be found here [Publications and policies - ACAT \(act.gov.au\)](#)

Effectiveness

The EDR scheme is effective by having appropriate and comprehensive terms of reference and periodic independent review of its performance.

Legislation: The objects of the ACAT Act include:

- (a) *to provide for a wide range of matters arising under legislation to be resolved by the ACT Civil and Administrative Tribunal;*’ (section 6)

Practice: The ACAT is guided and bound by legislation in its operation, including the Utilities Act (see provisions quoted above).

Information about the effectiveness of ACAT EW is published in the ACAT Annual Review. A copy of the latest Annual Review can be found here [Publications and policies - ACAT \(act.gov.au\)](#)

As a tribunal, the ACAT is not subject to a formal, independent review. However, the operations of the ACAT are held to account at the annual report hearings of the ACT Legislative Assembly. The ACAT also participates in ACT Estimate Committee processes, where the ACAT is bound by parliamentary process to provide responses to any Tribunal performance measures that might be questioned.

Decisions by ACAT Members are public (except where suppression or non-publication orders are made – see section 39 of the ACAT Act). Also, a party may, on a question of fact or law, appeal within the Tribunal a decision by an ACAT Member (ACAT Act, section 79). Further, a party may, with leave of the Supreme Court, appeal to the ACT Supreme Court against an Appeal Tribunal decision on a question of fact or law (ACAT Act section 86). These procedures allow public scrutiny and provide independent review mechanisms which support the transparency, quality, reliability and correctness of ACAT’s dispute resolution process of energy and water complaints.

ACAT reporting

Information about the work of the ACAT generally is included in the Annual Report of the Justice and Community Safety Directorate.

Detailed information about ACAT EW is included in the ACAT Annual Review. A copy of the latest Annual Review can be found here [Publications and policies - ACAT \(act.gov.au\)](#)

The ACAT also provides data about complaints to the Australian and New Zealand Energy and Water Ombudsman Network (**ANZEWON**).

The ACAT EW team maintains comprehensive records relating to complaints and the issues raised. The ACAT has responsibility under section 174 of the Utilities Act to report systemic issues to each Minister responsible for administering the Act, and to the ICRC. Currently, the responsible Minister is the ACT Attorney General. The ACAT President also has responsibility under section 105A of the ACAT Act to report to the ACT Attorney General any systemic problems in relation to the operation of an authorising law or other matters that might come to the attention of the tribunal when exercising its functions.

To fulfill these obligations, there is a process for the President of the ACAT to provide formal briefing papers to the ACT Attorney General outlining the identified issues and to send correspondence to the ICRC. The ACT Attorney General also holds quarterly meetings with the ACAT President where relevant matters are discussed.

In addition to the legislative requirements above, the ACAT EW team also provides quarterly reporting on systemic issues to the Australian Energy Regulator (AER) through a provided template. (Attachment B). Using the information in this template, the ACAT EW team will be well placed to identify systemic privacy issues, allowing timely reporting to the OAIC.

ACAT Privacy Policy

The ACAT is not an entity that is subject to the APPs in the *Privacy Act 1988*. However, the ACAT is bound by the *Information Privacy Act 2014* (ACT) in which the Territory Privacy Principles are contained. Information on the Privacy Policy associated with ACAT matters, and associated documents may be found here: [Privacy policy - ACAT \(act.gov.au\)](https://www.act.gov.au/privacy-policy)