



Prepared for the Office of the ACT Legislative Assembly,  
Standing Committee on Public Accounts

Samuel Thompson, Committee Secretary

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## Land Management Agreements: need for 'approved' form

1. The Standing Committee on Public Accounts of the Office of the ACT Legislative Assembly (the Committee) has requested advice regarding the operation of ss 283 and 425 of the *Planning and Development Act 2007* (ACT) (the PDA), and relevant provisions of the *Legislation Act 2001* (ACT) (the Legislation Act), in relation to approval of forms for Land Management Agreements (LMAs).

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### Summary

#### Q1 Can the form be relied on for the purposes of s 283 of the PDA?

If s 283 of the PDA stipulates the use of an approved form, and no such form is current, can the Directorate decide to use a web form and simply consider the form to be approved, although it is not approved under the Legislation Act and registered on the ACT Legislation Register?

2. There is a distinction between approving a form for the purposes of s 425 of the PDA and notifying a form as a notifiable instrument under the Legislation Act.
3. In our view, a form can be approved for the purposes of s 425 without being notified under the Legislation Act. In this case, the web form that we understand is now used for LMAs may have been approved for the purposes of s 425 (we would require further instructions to reach a concluded view on this point). However, because the form has not been notified under the Legislation Act, there is some risk that a court would hold that it could not be validly used for entry into an LMA under s 283 of the PDA, potentially preventing the ACT Planning and Land Authority (the Authority) from taking any of the steps in s 283(1) and thus undermining the purpose of the LMA.
4. On balance, and assuming the web form has in fact been approved for the purposes of s 425, we think it would be open to the Authority to proceed on the basis that the form can be, and has been, validly used for entry into LMAs under s 283. However, given the risk that a court would reach a different conclusion, the Authority may wish to consider notifying the form under the Legislation Act with retrospective effect.

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**Q2 Can an LMA be entered into without an approved form made under s 425 for the purposes of s 283 of the Act?**

2a If yes, would it be fully enforceable?

2b If no, what would the impact be on any LMA made in the period without an approved form?

5. In our view, an LMA cannot be entered into under s 283 of the PDA without an approved form. The effect of entering into an LMA other than in accordance with an approved form is that the Authority could not take any of the actions specified in s 283(1).

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**Next Steps**

6. Please let us know if you have any questions or concerns regarding this advice.

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## Reasons

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### Q1 Can the form be relied on for the purposes of s 283 of the PDA?

If s 283 of the PDA stipulates the use of an approved form, and no such form is current, can the Directorate decide to use a web form and simply consider the form to be approved, although it is not approved under the Legislation Act and registered on the ACT Legislation Register?

#### The web form may have been 'approved'

7. A form will be approved in accordance with s 425 of the PDA if it is approved by the Authority. Section 10(3) of the PDA provides that the Chief Planning Executive is the Authority. The Chief Planning Executive is an official appointed by the ACT Executive under s 21 of the PDA. The power to approve the form can be delegated to a public servant, under s 20 of the PDA.
8. Under s 425, an approved form is a notifiable instrument (which, under s 10 of the Legislation Act, is a form of statutory instrument). For the reasons discussed below, we consider that an approved form, as a notifiable instrument, is subject to the notification requirements of the Legislation Act.
9. However, it is clear that there is a distinction between *approving* a form (a requirement imposed by the PDA) and *notifying* a form as a notifiable instrument (a procedure under the Legislation Act). Accordingly, we think it is possible for a form to have been approved for the purposes of s 425 of the PDA but not notified under the Legislation Act. We have discussed this further below at [12] to [14].
10. The PDA does not impose any procedural requirements for the approval of forms. Accordingly, provided that the Chief Planning Executive (or a delegate) has turned his or her mind to the form and agreed to its use, we think there is a reasonable argument that the form has been 'approved' in the relevant sense. It is unclear from our instructions whether or not this has been done. For the purposes of the discussion below, we have assumed that it has, and that the web form has been approved for the purposes of s 425 of the PDA.
11. 'Making' a statutory instrument<sup>1</sup> is defined in the Dictionary to the Legislation Act to mean 'the signing, sealing, approval or other endorsement of the instrument by the entity authorised or required to make it.' There is no requirement in the Legislation Act that a particular method of approval be used. Accordingly, it is possible that the Authority (ie the Chief Planning Executive) could 'approve' or otherwise endorse a form within the meaning of the Legislation Act by some relatively informal internal process (similar to that described above for approval of such a form under the PDA). Again, for the purposes of this advice we have assumed that he or she has done so.

**Better view is that approval and notification are separate processes, and that a form can therefore be approved without being notified**

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<sup>1</sup> As noted above, a notifiable instrument is a statutory instrument.

12. Sub-section 425(3) states that 'an approved form is a notifiable instrument'. The question then arises as to whether an approved form *must* be notified in order to be approved for the purposes of s 425 (ie, the subsection is prescriptive), or whether it means that a form, by virtue of its approval, is a notifiable instrument that is capable of being notified in accordance with the Legislation Act (ie, the subsection is descriptive). In the former case, the fact that a form has not been notified would prevent it from also being an approved form; in the latter, the fact that it had not been notified would not.
13. On balance, we think that the latter view is more persuasive, for the following reasons. First, s 283(3)(a) requires an LMA to be 'in accordance with a form *approved* by the planning and land authority under section 425' (our emphasis). Section 425(1) then confers on the Authority the power to approve forms for the purposes of the PDA. Section 425(3) separately provides that an 'approved form' is a notifiable instrument. A form must therefore have *already been approved* by the Authority in order for s 425(3) to operate. In other words, a form must be approved under s 425(1) *before* the requirements attaching to a notifiable instrument under the Legislation Act become applicable to it. It follows that failure to comply with those requirements cannot be a basis for concluding that the form has not been approved.
14. Secondly, a notifiable instrument does not cease to be a notifiable instrument simply because it has not been notified; although it may not be enforceable under the Legislation Act, it is still a notifiable instrument. Accordingly, in addition to refuting the reasoning in the preceding paragraph, any argument that a form has not been approved for the purposes of s 425 unless and until it has also been notified must contend with the difficulty that s 425 does not actually require notification. To reach that conclusion it would be necessary to read such an additional requirement into the provision. Given the absence of any textual support for such a construction, we think the better view is that s 425(3) is merely declaratory in the sense described above.
15. Accordingly, we think that a form approved by the Authority under s 425(1) will be an approved form for the purposes of s 283, whether or not it has been notified.

**The next question is whether the Legislation Act's notification requirements apply to notifiable instruments and, if so, what the consequences of failure to notify a form would be for the operation of s 283 of the PDA. A form is a legislative instrument within the meaning of s 12 of the Legislation Act**

16. It is clear from s 10 of the Legislation Act that a notifiable instrument is a statutory instrument. It is also clear that a notifiable instrument is capable of simultaneously being a legislative instrument, as s 12(1) provides that a legislative instrument is, amongst other things, a notifiable instrument. There is some question as to whether this means that a notifiable instrument *is always* a legislative instrument, however, or whether it just means that a notifiable instrument *can* be a legislative instrument.
17. It is significant that there are no other provisions in the Act defining the expression 'legislative instrument'. This would mean that, if the things listed in s 12(1) are not *always* legislative instruments, there is no guidance provided by the Act to

determine *when* those things will be legislative instruments. In other words, the boundaries of the concept of a 'legislative instrument' would be uncertain; all that could be inferred from the Act (on this construction) is that the things listed in s 12(1) will sometimes be legislative instruments. This would appear to be an absurd result, as it would be impossible to determine precisely what each reference to a 'legislative instrument' in the Legislation Act encompasses. In our view, this suggests that there is complete identity between legislative instruments and the things listed in s 12(1). It would follow that a notifiable instrument would always be a legislative instrument, and therefore subject to the Legislation Act's requirements for notification of legislative instruments.

18. This construction is consistent with the Explanatory Statement to the Legislation (Access and Operation) Bill 2000 (the ES). When enacted as the Legislation Act, that Bill included ss 10 and 12 (although until the commencement of the *Statute Law Amendment Act 2006*, what are now 'legislative instruments' were described as 'registrable instruments').

19. The ES says the following about the definition of 'notifiable instrument' (at [34]):

The definition is essentially a convenient device to enable the Bill to deal in a consistent way with statutory instruments (other than subordinate laws, disallowable instruments and commencement notices) **that are required to be notified under the Bill.**

(Our emphasis)

20. The ES then says the following about what is now s 12 of the Legislation Act:

36. This clause, which lists the statutory instruments to be published (ie registered) on the legislation register, is a machinery provision to facilitate the operation of Part 5.3 (Numbering and notification of registrable instruments). The provisions of that Part would apply in a similar way to all registrable instruments.

37. **The concept of registrable instrument is used for all statutory instruments required to be notified.**

(Our emphasis)

Accordingly, it seems clear that the concept of 'legislative instrument' in s 12 is intended to capture any instruments which are required to be notified, including notifiable instruments. This is reflected in s 61 of the Legislation Act, which deals with notification. That provision is confined to legislative instruments, and there is no separate provision for notification of, eg, notifiable instruments or subordinate laws. This reading is also consistent with the note to s 425(3) of the PDA, which states:

A notifiable instrument must be notified under the Legislation Act.

21. Therefore, it is our view that any sections of the Legislation Act which apply to legislative instruments also apply to notifiable instruments, including the provisions dealing with notification.

**A failure to notify the form under the Legislation Act would arguably not prevent reliance under s 283**

22. There is nothing in the Legislation Act expressly requiring notifiable instruments to be notified. However, s 62(1) provides that 'a legislative instrument is not enforceable by or against the Territory or anyone else unless it is notified', and the effect of s 73(2) is that a notifiable instrument will not commence until it has been notified. We discuss possible effect of these provisions in the context of ss 283 and 425 of the PDA below.
23. First, it is unclear what operation s 62(1) could have in relation to a form.<sup>2</sup> A form is not ordinarily 'enforceable' against anyone; it is a facilitative instrument without any legislative character.
24. We think there is a reasonable argument that s 62 only affects the operation of legislative instruments that have a legislative character (broadly, instruments that impose requirements and/or confer rights). Referring to a form or other instrument of a non-legislative character as 'enforceable' is arguably nonsensical, as a form does not itself impose a requirement or confer a right upon anyone. Further, if s 62 had been intended to affect the operation of instruments of a non-legislative character, the legislature could have chosen terminology that would clearly apply to such instruments. For example, s 62(1) could have provided that such instruments are 'invalid' or 'of no effect'. Instead, the language of s 62(1) arguably reflects a deliberate choice to encourage notification and registration by way of a sanction (unenforceability) less drastic than invalidity. On this view, s 62(1) would have no operation in relation to a form, which means failure to notify the form would have no legal consequences (such as invalidity or nullification of the form's approval under the PDA). Accordingly, we think a court may take the view that, as long as a form has been approved by the Authority for the purposes of s 425 of the LDA, s 62(1) will not affect the ability to rely on an approved form for the purposes of s 283 of the PDA.
25. Having said this, there is scope for a contrary argument. An alternative view might be that the notion of 'unenforceability' should be read broadly, such that a form cannot be used or relied on unless notified in accordance with the Legislation Act. On this view, the purpose of s 62(1) is to supply an incentive to notify legislative instruments, and a construction that would give it some meaningful operation in relation to all legislative instruments (including instruments, like forms, of a non-legislative character) should be preferred to a construction that would effectively confine its operation to instruments of a legislative character. That is, if there are no consequences for failing to notify a form in accordance with the Act, why specify that a form will be an instrument of a sort that requires notification? On this view, the effect of s 62(1) would be to deprive a notifiable instrument (including a form approved for the purposes of s 425 of the PDA) of any operation unless and until it

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<sup>2</sup> Unfortunately, the ES to the Legislation (Access and Operation) Bill 2000 is silent as to the purpose of s 62, which appears to have been inserted into the Bill after circulation of the ES.

had been notified. Arguably, such a form could not be relied on for the purposes of s 283 of the PDA, with the consequences that:

- an LMA made in accordance with that form would not have complied with the requirements of s 283
  - the Authority could not take any of the actions specified in s 283(1), and
  - to the extent that the Authority had purported to take any of these actions in reliance on the LMA, they would have been beyond power and invalid.
26. On balance, we think that a court would be more likely to accept the former argument, and that it would therefore be open to the Authority to proceed on the basis that the web form can be, and has been, validly relied on for the purposes of s 283. However, there is some risk that a court would reach a different conclusion.
27. Secondly, s 73(2)(a) of the Legislation Act provides that a legislative instrument ordinarily commences on the day after its notification day. It follows that the lack of notification in relation to the web form means that the form cannot have commenced as a legislative instrument. However, as discussed above at [12]-[14], if it is sufficient for the purposes of s 283 merely that the Authority has approved the form, the fact that it has not also commenced as a legislative instrument is irrelevant; it remains approved, even if not commenced.
28. We note that s 76 of the Legislation Act provides for non-prejudicial provisions of statutory instruments to commence retrospectively. Accordingly, it may be possible for the Authority to notify the existing form, and have it commence retrospectively, thus eliminating any risk that LMAs made in the intervening period would be invalid on the basis of non-registration. Our *prima facie* view is that a form, in and of itself, could not be said to be prejudicial; nor does it appear that the effect of a form being retrospectively notified such as to authorise agreements that people thought were valid is likely to be prejudicial. Please let us know if you would like further advice on this option.
29. Should the Authority wish to pursue this option, they will need to ensure that the form complies with ss 7 and 10 of the *Legislation Regulation 2003*, which set out the requirements an approved form must comply with in order to be notified.

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## **Q2 Can an LMA be entered into without an approved form made under s 425 for the purposes of s 283 of the Act?**

2a If yes, would it be fully enforceable?

2b If no, what would the impact be on any LMA made in the period without an approved form?

### **LMA cannot be entered into without an approved form**

30. The language of s 283 of the PDA clearly requires an LMA to be entered into in accordance with an approved form.<sup>3</sup> Specifically, s 283(2)(b) provides that the

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<sup>3</sup> Strictly speaking, the Authority could enter an agreement with a person about the matters to which s 283 relates that is not in accordance with an approved form. However, because



Authority 'may take action to which this section applies *only if*...the agreement complies with this section' (our emphasis). Section 283(3)(a) then provides that an agreement only complies with the section if it is in accordance with a form approved under s 425. Thus, an LMA *must* be made in accordance with a form approved under s 425.

31. The effect of entering into an LMA other than in accordance with an approved form is that the Authority could not take any of the actions specified in s 283(1), namely:
- granting a rural lease
  - granting a further rural lease
  - varying a rural lease, or
  - consenting to the assignment or transfer of a rural lease.
32. To the extent that the Authority had purported to take any of these actions in reliance on the LMA, they would have been beyond power and invalid.

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## Context

33. The Auditor-General's Report on Land Management Agreements (para 2.34) notes that AF2016-26 was the designated approved form for the purposes of s 283 of the PDA from late April of 2016. The Report states that the Environment, Planning and Sustainable Development Directorate (the Directorate) reviewed and revised that form and replaced it with the new form AF2020-36 in early May 2020.
34. However, AF2020-36 only repealed AF2016-26, and did not create a new approved form. We are instructed that AF2020-36 was itself repealed under the Legislation Act the day after it took effect. The Committee understands that LMAs have been entered into between May 2020 and now, and that the Directorate has confirmed that:
- no form for s 283 of the PDA has been notified on the ACT Legislation Register, but
  - a new web form for s 283 is available on the Authority's website and can be used for entry into LMAs (we have not been able to locate this form).

We are instructed that the Directorate has expressed the view that this satisfied the need for an approved form.

35. We are instructed that the Directorate interprets s 283 to mean that 'if no approved form is made for the purposes of s 283, an agreement may be in any form [...] signed by the Conservator'. (We assume that 'made' in this context means made and notified under the Legislation Act.) In forming its view the Directorate stated it was relying on advice from the ACT Parliamentary Counsel's Office.

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it would not comply with s 283 (and the Authority therefore could not take any of the actions specified in s 283(1)), such an agreement could not properly be characterised as an LMA.



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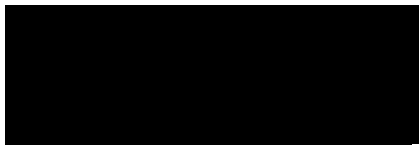
36. Your instructions contain links to responses to 2 Questions on Notice provided to the Committee by the Minister for Planning and Land Management, dated 25 and 30 June 2021. Both responses include the following passage from the Explanatory Statement to Statute Law Amendment Bill 2021 (p 11):

The standard provision authorises the Minister or another official to approve forms for an Act and provides that an approved form is a notifiable instrument. While originally the publication of approved forms on the Legislation Register increased their accessibility, this is no longer necessarily the best location for them. Many government agencies now have their own websites and make their forms available directly there. Additionally, forms that are of an interactive 'smart' nature and feed information directly into agency databases cannot be hosted on the Legislation Register.

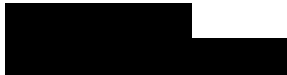
37. This might be taken to suggest that the *Statute Law Amendment Act 2021 (ACT)* amended the PDA to provide that forms under that Act are no longer notifiable instruments. However, as noted above, this is not the case; s 425(3) still provides that an approved form is a notifiable instrument.

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## Contact



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