

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN
CAPITAL TERRITORY**

**ENVIRONMENT PROTECTION (AMENDMENT) BILL 1999
EXPLANATORY MEMORANDUM**

Circulated by authority of

**Brendan Smyth MLA
Minister for Urban Services**

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Outline

This Bill amends the Environment Protection Act 1997, referred to in the Bill as the Principal Act. The Bill provides the ACT with its first contaminated land management legislation and amends the powers given to the Environment Management Authority in the Principal Act to include the management of assessment and remediation of contaminated land.

A number of technical amendments have resulted from a public inquiry conducted by the Urban Services Committee into the exposure draft Bill. The amendments seek to clarify certain aspects of the Bill, including, public access to information and consistency with the corresponding NSW legislation.

The Bill also provides a legal basis for the implementation of the National Environment Protection Measures for the National Pollutant Inventory and the Movement of Controlled Waste between States and Territories. It also addresses few minor issues that were identified during the implementation of the Principal Act.

Formal requirements (Clauses 1,2 and 3)

Clauses 1 and 2 of the Bill are formal requirements of all Acts, specifying the title and commencement arrangements. These clauses take effect from the day on which the Bill is notified in the Gazette. The rest of the Bill's provisions take effect from the date, or dates the Minister notifies in the Gazette. There is also a provision for any remaining parts of the Bill to take effect 6 months after it is first notified in the Gazette. This is a 'catch all' provision which will ensure all provisions commence no later than 6 months after first notification.

Clause 3 defines the Principal Act as the Environment Protection Act 1997 which this Bill amends.

Objects (Clause 4)

Clause 4 amends the objects of the Environment Protection Act to include the objects listed in this clause. Firstly, to establish a process for assessment and remediation of contaminated land where contamination presents a significant risk of harm to

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human health or any other aspects of the environment. And secondly to ensure that contaminated land is managed to take into account human health and the protection of the environment.

Interpretation (Clause 5)

There are nine new definitions to be added to the Environment Protection Act. The words 'appropriate person', 'contaminated' or 'contamination', 'land', 'financial controller', 'National Capital Plan', 'notional lessee', 'Register', 'remediation' and 'site audit statement' have specific meanings for the purposes of the Bill.

Definition of appropriate person

The Environment Management Authority must choose an appropriate person to bear the costs of commissioning an assessment or remediation when it makes an order. The legislation establishes a hierarchy of who is the most appropriate person -refer clause 16.

Definition of 'contaminated' or 'contamination'

If land is to be considered contaminated then the land must have in, on or under it substances which are in greater concentration than is naturally present and by their nature pose a risk. There are two types of risk, the first is the test of a potential or actual risk to human health and the second a potential or actual risk to the environment such as to cause or have potential to cause environmental harm. Contaminated land may pose a risk to either human health, the environment or both.

The assessment as to whether or not there is any risk of harm is dependent in part upon the approved uses of the land. The Environment Management Authority will only declare land to be contaminated where there are reasonable grounds for believing that the contamination may pose a significant risk to human health or the environment.

Definition of financial controller

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For the purposes of this Bill, a financial controller is a person who has possession or control of the land for the purpose of realising part or all of the value of the land in order to discharge an obligation secured over the land.

Definition of land

For the purposes of this Bill, land includes water.

Definition of National Capital Plan

For the purposes of this Bill, National Capital Plan has the same meaning as in Part III of the *Australian Capital Territory (Planning and Land Management) Act 1988*.

Definition of notional lessee

For the purposes of this Bill, a notional lessee is a person who undertakes day to day management responsibility for the lease in their role as mortgagee in possession or other person with vested rights in the lease that include the right to deal with the land to their own benefit.

Definition of Register

For the purposes of this Bill, the Register is the Register of contaminated sites. The Register will record all current Orders to assess, remediate or manage land made by the Environment Management Authority and the land to which the Orders refer.

Definition of remediation

Remediation refers to a range of actions, which have the outcome of reducing the potential or actual harm to human health or the environment. The choice of remediation options for any site is dependent upon the nature of the contamination, the level of risk and the costs and benefits that are associated with remediation options.

Definition of site audit statement

A site audit statement is a written statement prepared by an approved environmental auditor after the completion of an audit of potentially contaminated or

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contaminated land. The statement certifies the quality of the land and any limitations on its uses or range of uses.

**Limitation of application in respect of certain people and things
(Clause 6)**

This clause addresses a minor drafting issue, namely, corrects, the reference to Commonwealth legislation in Section 8 of the Principal Act.

Inspection of documents (Clause 7)

Amends Section 19 of the Principal Act to include the Register of contaminated sites, Orders to assess and remediate and the list of approved auditors to the list of documents available for public inspection.

Exclusion of material (Clause 8)

Amends Section 21 of the Principal Act to allow a person to apply to have material contained in documents provide under an assessment or remediation order to be excluded from public inspection.

Insertion (Clause 9)

Register of contaminated sites

The Register of contaminated sites is created by clause 9 of this Bill, which inserts proposed Division 3 clause 21A into the Principal Act. The Register is a public document. Land will be placed on the Register when the Environment Management Authority issues an order to assess, remediate, or manage contaminated land. The Authority must notify the ACT Planning Authority or the National Capital Authority of entries or removals from the Register. This requirement ensures that the authorities that make land planning decisions in the ACT have up to date information. Land will be removed from the register when the Environment Management Authority accepts a site audit statement at the completion of an assessment or remediation that declares that the land no longer poses a significant risk of harm to human

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health or the environment. A lessee may appeal the entry of land or failure to remove the land from the Register, refer clause 19.

Insertion (Clause 10)

Duty to notify existence of contaminated land

Inserts proposed Section 23A, which creates a new duty for those that lease or occupy land in the ACT to notify the Environment Management Authority of any suspected contamination on their land even if they were not the person who was responsible for the contamination. This duty only applies if the suspected contamination has not already been reported to the Environment Management Authority. The person must notify the Environment Management Authority in writing.

Insertion (Clause 11)

This clause inserts proposed Section 41A defining environmental authorisations for the purpose of Part VIII of the Principal Act.

Insertion (Clause 12)

This section provides for the Minister to be able to recognise (for the purpose of the principal act) an environmental authorisation, permit, licence, notice or approval issued in other State or Territory for the conduct of an activity for which an environmental authorisation is necessary under the Principal Act.

The Minister may recognise such environmental authorisation, permit, licence, notice or approval be a disallowable instrument.

Certain auditors to be approved (Clause 13)

Amends section 75 of the Principal Act so that any auditor who is approved as an environmental auditor in the ACT on the basis of the interstate recognition process provided for in that section is only allowed to conduct audits under the same conditions that apply to them in the other State or Territory in which they are registered.

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Authority may require an environmental audit (Clause 14)

Amends section 76 of the Principal Act to provide the Environment Management Authority with the power to require an environmental audit of contaminated land. It requires that any auditor who conducts such an audit must be independent of any person that has conducted assessment or remediation work on that land.

Insertion (Clause 15)

Requests for auditor's statements

Inserts proposed section 76A, which requires an environmental auditor to contact the Environment Management Authority if they have been requested to undertake a statutory audit of potentially or actually contaminated land in the Territory. The auditor has seven working days to provide the Environment Management Authority with the details of the request. Within 15 working days of completing the audit the auditor is required to provide the Environment Management Authority with a site audit statement.

Annual returns – auditors

Clause 15 also inserts proposed section 76B, which requires an environmental auditor who conducts statutory audits on potentially or actually contaminated land for the purposes of this Act or any other to provide an annual return on the form provided by the Environment Management Authority. The return is based on work completed in the financial year.

Insertion (Clause 16)

Division 5- Assessment and remediation

Inserts new Divisions 5 and 6 in Part IX of the Principal Act. These divisions detail the process by which the Environment Management Authority makes an Order to Assess or an Order to Remediate. They also provide for the recovery of costs associated with assessment and remediation for those parties not responsible for the contamination or who are only partially responsible for the contamination.

Interpretation

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Definition of approved use

Proposed section 91A deals with the definition of approved use in relation to land for the purposes of the new Division 5.

Definition of substance

Proposed section 91A deals with the definition of substance for the purposes of the new Division 5.

Definition of audit for contaminated lands purposes

Proposed section 91A deals with the definition of audit for the purposes of the new Division 5.

Required inclusion of certain matters in assessments

Proposed section 91B deals with matters that must be included in assessing whether land is contaminated so as to pose a significant risk of harm.

Order to assess whether land contaminated

Proposed section 91C deals with the process by which an Order to assess is made. An Order to Assess is triggered by the notification of potentially contaminated land which presents or is likely to present a significant risk of harm. The notification should come from one of either the polluter, the lessee or the occupier of the land - refer clause 10 and Section 23 of the Principal Act. If the Environment Management Authority is satisfied that there is a potential significant risk of harm to human health or of serious or material environmental harm, the Authority will make an Order.

An Order to Assess will require that the person so ordered commissions an assessment into the quality of the land. The person ordered may not be the lessee and the order does not give the person or their agents the right to enter the land without the lessee's or occupier's permission. The assessment of the land will be conducted through the use of the appropriate guidelines (set out in an Environment Protection Policy and any relevant national environment protection measures) and will investigate whether or not there exists in, on or under the land substances that have the potential to pose a significant risk to human health or significant risk of material or serious environmental harm.

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The Environment Management Authority may also require the person ordered to take various action incidental to conducting an assessment, such as reporting on progress, or consulting neighbours or affected people. To comply with an Order to assess, the person must commission an environmental auditor. The name of the environmental auditor must be submitted to the Environment Management Authority for approval within 10 working days from the date of the Order. The Environment Management Authority will only reject an auditor's name if the auditor does not meet prescribed qualifications. The Order to Assess will be satisfied when the work has been completed, audited by the approved environmental auditor and a site audit statement from the auditor is received and accepted by the Environment Management Authority.

Order to remediate land

Proposed section 91D deals with the process by which an Order to remediate is made. An Order to Remediate is triggered by the notification of potentially contaminated land which poses or is likely to pose a significant risk of harm. This may include but is not dependent on the Authority receiving a site audit statement that recommends remediation. Once an order to remediate has been issued the land is entered on the Register of contaminated sites, refer clause 9. An Order to remediate will require that the person so ordered commissions a remediation of the land. The person ordered may not be the lessee or occupier and the Order does not give the person or their agents the right to enter the land without the lessee or the occupier's permission.

The Environment Management Authority will also require the person ordered to report on progress, consult neighbours or affected people, and most importantly require the person to commission an environmental auditor. The name of the environmental auditor must be submitted to the Environment Management Authority for approval within 10 working days from the date of the Order. The Environment Management Authority will only reject an auditor's name if the auditor does not meet prescribed qualifications. The Order to remediate will be satisfied when the work has been completed, audited by the approved environmental auditor and a report and site

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audit statement from the auditor is received and accepted by the Environment Management Authority.

Land will be removed from the Register of contaminated lands at the time that the Environment Management Authority accepts the environmental auditor's site audit statement that the land in its current or proposed use poses no significant risk to human health or a significant risk of material or serious environmental harm, refer clause 9 section 21A.

Most importantly section 91D also provides that a lessee may not transfer or sublet their land without the approval of the Authority while an order to remediate is in force. This requirement is to ensure that any buyer or occupier of the lease is made aware of the contamination and agrees to the conduct of remediation by the polluter or accepts responsibility for the costs of remediation.

Extension of time

Proposed section 91E deals with the process whereby a person who has been ordered to commission an assessment may apply for an extension of time to complete the order. The Environment Management Authority must take into account the reasons for the request and issues of risk to human health and/or the environment.

Further information

Proposed section 91F gives the Environment Management Authority the power to require further information from an auditor who has conducted an audit for the purposes of assessing the status of contaminated or potentially contaminated land. The Authority would normally use this power where the audit report or statement are incomplete or requires clarification.

Choice of appropriate person

Proposed section 91G deals with how the Environment Management Authority will determine who the appropriate subject of a remediation order is. The hierarchy of liability is first, the polluter, secondly the lessee and, thirdly, the notional lessee. For the definition of notional lessee - refer clause 5.

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The Environment Management Authority must be satisfied that the appropriate person has the resources to commission an assessment. If the polluter is not in a position to commission the assessment, the Environment Management Authority may order the lessee to do so. Proposed section 91I allows the lessee, if they are not the polluter or not the only polluter, a right to recover in a court that part of the costs that can be attributed to another person.

Division 6 – Costs of assessment and remediation

Interpretation

Proposed section 91H deals with the definition of assessment and remediation orders for the purposes of the new Division 6.

Recovery of costs associated with assessment or remediation

Proposed section 91I deals with the right of the Environment Management Authority to recover costs from the polluter where the EMA undertakes assessment or remediation work.

Priority for costs where owner insolvent

Proposed section 91J deals with the right of the Environment Management Authority to recover costs in priority to other parties, if he or she undertakes assessment or remediation of land in lieu of this being done by an insolvent lessee. Because the general law about priority in recovery of debts from insolvent persons is Commonwealth law, this provision only applies in the very limited circumstances where a liquidator or trustee in bankruptcy appointed under Commonwealth law has disclaimed the land as onerous property (ie where the liquidator or trustee believes the land has a negative worth).

Recovery of costs - assessment and remediation

Proposed section 91K establishes a right on the part of persons either not responsible or only partially responsible for the contamination, and who have incurred costs as a result of an order to assess or remediate a site, to recover from another responsible

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party the whole or a portion of those costs through the courts.

Costs - person responsible for contamination

Proposed section 91L deals with identifying those persons responsible for the contamination in any proceedings under section 91K and creates a rebuttable presumption that a previous occupant of land, who carried out activities generating the substances that have caused contamination of the land, is responsible for the contamination.

Liability for losses

Proposed section 91M deals with the right of lessees or occupiers to recover loss and damages from a person conducting assessment or remediation work on their land. This right will arise where the lessee or occupier has consented to a person (typically a former lessee or occupier who was the polluter) entering the land to comply with an order to assess or remediate.

Director of body corporate that is wound up

Proposed section 91N deals with the right of the Environment Management Authority to apply to the Supreme Court for an order that a person who was a director of a body corporate that is wound up be made personally liable for the costs of assessment or remediation. The Court may make such an order if satisfied that the company failed to comply with an Order to assess or remediate, or only partially completed the order, or was wound up to avoid compliance.

Director of body corporate that disposed of land

Proposed section 91O deals with the right of the Environment Management Authority to apply to the Supreme Court for an order that a person who was a director of a body corporate be made personally liable for the costs of assessment or remediation. The Court may make such an order if satisfied that the body corporate of which the person was a director disposed of the land to avoid having to comply with an assessment or remediation order in respect of the land.

Holding company of body corporate that is wound up

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Proposed section 91P deals with the right of the Environment Management Authority to pursue through the Court a corporation, where a holding company of the corporation is wound up to avoid costs of complying with an Order to assess or remediate.

Infringement notices (Clause 17)

This clause amends section 115 of the Principal Act to include address of the person to whom an infringement notice is being issued.

Environment protection orders (Clause 18)

Amends Section 125 of the Principal Act to give the EMA the power to make an Environment Protection Order on the grounds that land is contaminated and while its current use, specified use(s) or measures for its containment continue there is not a significant risk of harm to human health or the environment. This provision deals with those instances where should circumstances change the land may present a significant risk of harm. The order will detail the action required to be taken by the occupier or lessee to manage the site.

Review of decisions (Clause 19)

Provides for rights of review in respect of various decisions under the Bill to the Administrative Appeals Tribunal.

Strict liability offences (Clause 20)

This clause makes contravention of an environment protection order as a strict liability offence.

Insertion (Clause 21)

National Pollutant Inventory – provisions of information

This clause provides the legislative basis for the implementation of the National Environment Protection (National Pollutant Inventory) Measure (the Measure). Specifically, it requires occupiers of facilities to which the Measure applies to provide the information required by the Measure.

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Recovery of clean-up costs (Clause 22)

Corrects the reference used in section 160(4) of the Principal Act from 164 to 165.

Determination of fees (Clause 23)

Amends section 165 of the Principal Act so that the Minister may gazette the appropriate rate of interest that would apply to the recovery of costs associated with the EMA undertaking assessment and or remediation work on a lease where the lessee is bankrupt and the liquidator or trustee has disclaimed the lease as onerous property - refer clause 16.

Schedule 1 (Clause 24)

Sub-clause (a)

This sub-clause adds another activity to the list of activities requiring environmental authorisations. The acceptance of large quantities of soil (more than 100 cubic metres) for placement on the land, by the lessee or an occupier of the land, will now require environmental authorisation. This requirement will apply only in areas of the ACT specified in this sub-clause.

Sub-clause (b)

This sub-clause amends sub-section 2(f) of Schedule 1 of the Principal Act to incorporate the correct name of the National Environment Protection (Movement of Controlled Waste between States and Territories) Measure.

Sub-clause (c)

This sub-clause amends sub-section 2(f) of Schedule 1 of the Principal Act to include commercial aquaculture of saltwater organisms as well as freshwater.

Schedule 2 (Clause 25)

Sub-clause (a)

This sub-clause amends the definition of "maximum lead concentration" so it refers to the correct NSW legislation.

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Sub-clauses (b) and (c)

These sub-clauses introduce a system permitting sale of petrol containing more than the maximum lead concentration if the petrol is to be used in aircraft.

Repeal (Clause 26)

Effects the repeal of certain related Acts passed after the introduction of the Bill for the Environment Protection (Consequential Provisions) Act 1997 but before the final passage of that Act. The Acts to be repealed amended Acts that have since been repealed by the Environment Protection (Consequential Provisions) Act 1997.