THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

ENVIRONMENT PROTECTION BILL 1997

EXPLANATORY MEMORANDUM

Circulated by authority of

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Part I Preliminary

1.1 Formal requirements (clauses 1 & 2)

Clauses 1 & 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 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 six months after first notification.

1.2 Objects (clause 3)

The Bill is to be interpreted and administered to give effect to the goals listed in this clause. Most fundamentally, the Bill is designed to protect the environment, but it also recognises that environmental decision-making must have appropriate regard for economic and social considerations. It aims to achieve this by, for example, requiring all people to accept a shared responsibility for the environment.

This clause embodies principles endorsed by the Intergovernmental Agreement on the Environment, to which the ACT is a signatory. These principles are:

- the precautionary principle;
- intergenerational equity;
- conservation of biological diversity and ecological integrity; and
- improved valuation, pricing and incentive mechanisms (including measures such as polluter pays and user pays).

1.3 Interpretation (clause 4)

The interpretation clause sets out the meanings of important terms used throughout the Bill. Not all terms used in the Bill are defined. Some simply have their dictionary definition, while others are terms which are used in many Acts and are defined in the *Interpretation Act 1967*.

Some of the most significant definitions in clause 4 are described below.

1.3.1 Definition of environment (clause 4)

As defined in clause 4, the environment includes all the things which make up the world in which we live - plants, animals, water and air as well as the cultural, social and economic factors which inter-relate with the natural world. The term includes this whole range of components because the environment is made up of complex inter-dependencies.

1.3.2 Definition of environmental harm (clause 4)

As defined in clause 4, environmental harm means any degrading impact on the environment which is caused by human activity, whether that effect is temporary or permanent. Environmental harm is confined to the effects of human activity (direct or indirect) as this Bill is not designed to address the impacts of, for example, natural disasters.

The different levels of environmental harm (serious and material environmental harm) are explained below (please see 15.8.1 and 15.9.1).

1.3.3 Definition of environmental nuisance (clause 4)

As defined in clause 4, people can cause an environmental nuisance if their activities unreasonably interfere with others' enjoyment of a place. The term environmental nuisance generally refers to temporary and minor disturbances from things like dust, noise or smoke, as more serious problems would be more likely to be addressed within the category of environmental harm.

1.3.4 Definition of pollutant (clause 4)

As defined in clause 4, a pollutant can be anything at all which may cause environmental harm. Such things include organisms (whether micro- or macroscopic), forms of energy and substances. The breadth of this definition reflects the understanding that things which are harmless or beneficial in one context may cause environmental harm in another.

1.4 Deeming substances to be pollutants (clause 5)

This clause provides that the Regulations can specify that some pollutants are always considered to have an adverse impact when released to the environment. This can be either amounts over a specified measure, or the thing itself in any amount.

For example, this will allow a toxic substance to be banned altogether or an environmental noise standard to be set for a particular area.

This clause does not restrict the breadth of the definitions of environmental harm and pollutant, but simply provides that some pollutants may be dealt with in this way.

1.5 Relationship with the Bushfire Act and Fire Brigade Act (clause 6)

Clause 6 provides that this Bill does not apply to action taken in emergencies under the specified parts of the *Bushfire Act 1936* or the *Fire Brigade Act 1957*. The requirements of these emergency provisions will then take precedence over the provisions of this Bill.

1.6 Consistency with other environment and health laws (clause 7)

Clause 7 deals with how the Bill is to work with other environment laws and public health laws. As far as possible, the Bill is to be interpreted and administered consistent with these other laws.

1.7 Exclusions from noise and air provisions (clause 8)

In general, if other legislation already deals with certain types of noise and air pollution, or those matters are not within ACT jurisdiction (as is primarily the case with aircraft), this Bill does not apply. Therefore, the Bill does not apply to noise made, or pollutants emitted into the air by:

- trains;
- Commonwealth jurisdiction aircraft within the meaning of the Commonwealth *Aircraft Services Act 1985*;
- people (for example, a crowd);
- animals;
- motor vehicles being driven on a public street, unless they meet the criteria set out in subclause 8(1)(e). In this case, the provisions of the Bill dealing with noise made or pollutants emitted into the air apply to motor vehicles.

1.8 Civil remedies (clause 9)

This clause makes it clear that except as expressly provided in the Bill, nothing in the Bill affects people's rights and entitlements under common law.

1.9 Civil and criminal liability (clauses 10 & 19)

Clauses 10 and 19 deal with the question of civil and criminal liability.

The intention of the clauses is twofold. First, the provisions apply the criminal offences in the Bill to Territory officers and agents generally, with the exception of strict liability offences. Secondly, the provisions exempt the officers enforcing the legislation from personal civil and criminal liability, in relation to the enforcement of the Bill, on the proviso that they act in good faith. This ensures that officers are not at risk of any disincentive to enforce the provisions of the Bill by the risk of personal liability.

1.9.1 References to Interpretation Act

This Bill binds the Crown in right of the Territory by the *Interpretation Act 1967*. However, subsection 7(4) of the *Interpretation Act 1967* also provides an immunity from criminal liability for the Crown in right of the Territory and for agents of the Territory in respect of an act or omission occurring during the performance of a duty. The term 'agent' includes an instrumentality of the Territory and any public servant, employee or contractor who performs a function on behalf of the Territory.

1.9.2 Effect of clause 10

Clause 10 specifies that this immunity from criminal liability provided by the *Interpretation Act 1967* does not apply, in relation to matters dealt with under the Bill, to agents of the Territory in respect of an act or omission occurring within the scope of their authority. The result is that an agent of the Territory could be criminally liable for an act or a failure to act that was in breach of the Bill, except for strict liability offences.

1.9.3 Effect of clause 19

Clause 19, however, specifies an immunity from civil or criminal liability for the Environment Management Authority or an authorised officer in relation to an act or a failure to act, as long as this was done in good faith. This means that the Environment Management Authority or an authorised officer would have immunity from any civil or criminal liability for acts performed, or a failure to act, in the exercise of their duty exercised in good faith to administer and enforce the Bill.

Part II Administration

Division 1 - Environment Management Authority

2.1 Structure of administration (Part II)

The appointments provided for in this Part are:

- the Environment Management Authority (a single person);
- one or more authorised officers; and
- analysts.

2.2 The Environment Management Authority (clauses 11 & 12)

The Chief Executive administering the Bill, who is currently the Chief Executive of Urban Services, will create a specific ACT Public Service position. The occupant of this position will have the added responsibility of being the Environment Management Authority (the EMA). The EMA will administer the Bill in line with the objects as set out in clause 3.

2.2.1 Powers of delegation (clause 13)

Under clause 13, the EMA can delegate any of his or her powers under this Bill (except this power to delegate) to another public employee. This enables other public employees to assist with the administration of the Bill, while ensuring that these powers are not passed on too widely. The instrument of delegation can either be general or can place certain restrictions on the delegated powers.

2.2.2 How are conflicts of interest managed? (clause 17)

Clause 17 provides the process to be followed if situations arise which could cause a conflict of interest for the EMA. In line with the duty of all public servants, as set out in paragraph 9(k) of the *Public Sector Management Act 1994*, the EMA must disclose the situation to the Chief Executive as soon as possible. In these situations, the Chief Executive either determines that the EMA should still be the decision-maker, or appoints another public servant to act as the EMA and deal with the matter.

2.3 Authorised officers (clause 14)

As well as the EMA, other public servants will assist the EMA as authorised officers. Authorised officers occupy specified positions created by the Chief

Executive. They are given powers under the Bill to assist in its implementation, including the power to inspect premises and to direct action in an emergency. (Please see *Part XI - Authorised officers' powers* below for more information on this point.)

The EMA can appoint public servants as authorised officers. In addition, authorised officers under this Bill can be authorised for other purposes under other Acts. These clauses give the scope to administer related powers under other Acts cooperatively with other regulatory authorities, and to avoid overlaps and duplication.

2.4 Analysts (clause 15)

For the purposes of this Bill, analysts will be:

- any public servant occupying the position of Government Analyst established under the *Drugs of Dependence Act 1989*; and
- any other (suitably qualified) person the EMA appoints.

The EMA is unlikely to use this power of appointment frequently, as the Government Analyst is experienced and qualified not only in technical but also in forensic matters relevant to the administration of this Bill. However, it may be necessary to appoint non-public servants as analysts in circumstances where the use of the Government Analyst could constitute a real or perceived conflict of duty and interest.

2.5 Legal immunity (clause 19)

Clause 19 provides legal protection to the EMA, other authorised officers and analysts in the performance of their duties. (Please see *1.9 - Civil and criminal liability* above for more information on this point.)

2.6 Minimum disruption (clause 18)

In carrying out their duties under the Bill, authorised officers and analysts must minimise any disruption to businesses.

2.7 Identity cards (clause 16)

Because people who hold positions under this Act have significant powers, it is important that they are easily identifiable. Therefore, photographic identity cards are issued to the EMA (by the Chief Executive),

and to authorised officers and analysts (by the EMA). The identity cards must be returned when people cease to hold the particular position.

Division 2 - Public inspection of documents

2.8 Public access to information (clause 20)

To ensure both transparency in administration of the Bill and community access to information about significant steps taken under the Act, this clause provides for public access to certain records. Members of the public are entitled to view and copy documents listed in this clause at any reasonable time after paying the relevant fee.

2.8.1 Charges (clauses 20 & 21)

Fees are charged to inspect documents, however in cases where this is in the public interest, the EMA can reduce or waive the fee. There are also charges to copy documents.

2.8.1.1 Decision reviewable

Under clause 125, a decision by the EMA under subclause 20(3) to refuse to remit all or part of the determined fee is reviewable by AAT.

2.8.2 Information not in the EMA's possession (clause 20)

The same right of access applies when documents listed in this clause are not held by the EMA. For example, if routine monitoring data takes up large computer or paper storage facilities, the EMA can require the data to be stored on site at the business. The information remains under the control of the EMA, and, with reasonable notice, the EMA can arrange for public access to the information.

Part III Environmental duties

3.1 Environmental duties (clauses 22 & 23)

These clauses create two obligations: a general environmental duty and the duty to notify the EMA of actual or threatened environmental harm.

3.1.1 What is the general environmental duty? (clause 22)

The general environmental duty requires people to take reasonable steps to prevent or minimise any

environmental harm their actions may cause. This clause is intended to encourage everyone in the community to take responsibility for the environment.

3.1.1.1 Compliance and non-compliance with the general environmental duty (clause 22)

People who fail to comply with the general environmental duty can be required to do so through an environment protection order. Contravening this type of order is an offence. (Please see *13.6 - What are environment protection orders?* below for more information on this point.)

In some circumstances, the EMA can claim reasonable clean up costs and expenses from people who do not comply with the general environmental duty. Clause 150 provides that if a breach of the general environmental duty causes environmental harm, it is not practicable for the EMA to issue an environment protection order and the EMA remedies the environmental harm, the EMA can require the person who caused the harm to pay the EMA's reasonable clean up costs and expenses. (Please see *16.2 - Recovery of clean-up costs* below for more information on this point.)

In addition, compliance with the general environmental duty is a key aspect of the structure of general environmental offences under the Bill. A person does not commit an offence if their actions are lawful, and conducted in compliance general environmental duty. (Please see *15.6 - No offence committed* below for more information on this point.)

Apart from these three situations, failing to comply with the general environmental duty does not, by itself, lead to any action.

3.1.2 Duty to notify actual or threatened environmental harm (clause 23)

The second environmental duty arises where a person realises that their actions have caused or might cause serious or material environmental harm from pollution. The clause requires people in this situation to report the matter to the EMA as soon as possible, even if this might incriminate the person reporting the matter. To encourage compliance with this provision, clause 140 provides that this information is not admissible in evidence against the person in a prosecution under this Bill. (Please see *15.17 - Self-incrimination* below for more information on this point.)

Part IV Environment protection policies

4.1 What are environment protection policies? (clause 24)

Environment protection policies are policy and administrative guidelines intended to provide:

- information and advice to help businesses and members of the community satisfy the legal requirements of this Bill and Regulations made under it; and
- a source of relevant matters for the EMA's consideration in administering the Bill and making decisions under it.

4.1.1 What character do environment protection policies have? (clause 30)

While important, environment protection policies are non-mandatory and are administratively guiding, rather than legally binding, documents. Legally binding matters of a detailed nature will be found in Regulations under the Bill.

4.2 How are environment protection policies made? (clauses 25 & 26)

The EMA develops draft environment protection policies, but before these are finalised, must give members of the public the opportunity to formally comment on them. The EMA must consider these comments and may incorporate them into the environment protection policy if appropriate.

4.2.1 Role of the Minister (clauses 26 & 28)

The EMA cannot notify, vary or revoke an environment protection policy without the Minister's consent.

4.2.2 How will people know about changes to environment protection policies? (clauses 25 & 27)

The EMA must publish a notice in the *Gazette* when an environment protection policy is finalised, changed or revoked. Clause 27 provides an exception to this for changes that are only editorial. For example, if the name of a government branch has changed, the name can be changed in the environment protection policies without public consultation or notification in the *Gazette*.

4.3 Public access (clause 29)

As one of the aims in preparing the environment protection policies is to provide information to the community, these documents must be readily available to the public. Clause 29 provides that people will be able to inspect environment protection policies at any time during the EMA's office hours.

Part V Accredited codes of practice

5.1 What is a code of practice? (clause 31)

Because codes of practice can be as different from each other as the activities to which they relate, the interpretation section of this Bill does not include a formal definition of "code of practice". However, in essence, codes of practice are formal documents applying to a particular industry or activity. Codes will set out ways of minimising environmental harm and ensuring compliance with the general environmental duty. Codes may be specific to the particular activity or activities to which they relate or may apply across an industry. (Please see *3.1.1 - What is the general environmental duty?* above for more information on this point.)

5.2 Why have an accredited code of practice? (clause 32)

This Part is intended to provide industry with a mechanism to develop, and have recognised, codes of practice, or to seek recognition for codes already in place. The implementation of recognised codes of practice not only helps to reduce the environmental impact of an industry; it also signals to the public the environmental commitment of that industry.

In addition, through clause 32, substantial compliance with an accredited code of practice is deemed to be compliance with the general environmental duty. (Please see *3.1.1 - What is the general environmental duty?* above for more information on this point.)

5.3 Who accredits codes of practice? (clause 31)

Typically, codes of practice will be developed by persons in the industry to which the code relates.

The Minister may only accredit a code of practice if satisfied that people conducting the activity or industry to which the code relates have been adequately consulted in the development of that code. This accreditation is a disallowable instrument which is tabled in the Legislative Assembly.

Part VI Economic measures

6.1 Schemes for economic measures (clause 33)

This Part gives the EMA scope to set up schemes involving economic measures to assist in environmental regulation. This type of regulation is relatively new in Australia, and these provisions will facilitate innovative schemes developed in consultation with interested parties.

6.1.1 Bubble licenses (clause 34)

Bubble licences are licences that apply to a group of companies or sites. They allow the regulator to set total emissions for the group and for members of the group to apportion or trade emissions within the allocation.

6.1.2 Tradeable permits (clause 35)

Tradeable permits or quotas are similar in concept to bubble licences, but on a larger scale. They enable the regulator to set global emission limits and allocate authorisation holders a fraction of the total. Emissions can be traded within the total.

6.1.3 Regulations may make provisions (clause 36)

This clause provides scope for the Regulations to establish schemes such as bubble licences and tradeable permits. The clause also provides that, where authorising something that would otherwise not be authorised, such Regulations take precedence over the provisions of the Bill to the extent of any inconsistency.

Part VII Environmental protection agreements

7.1 What are environmental protection agreements? (Part VII)

Environmental protection agreements are formal agreements between the EMA and people conducting certain activities. Environmental protection agreements are one of the major new initiatives contained in this Bill. They allow scope for business people (other than those conducting the most potentially harmful ones listed as Class A activities in Schedule 1 to the Bill) to manage their environmental performance in partnership with the EMA, rather than the EMA acting solely as enforcer.

Environmental protection agreements acknowledge that many businesses and companies are motivated to ensure their business practices do not harm the environment. These businesses operate best through the provision of advice, support and recognition rather than onerous control requirements.

7.1.1 What will an environmental protection agreement look like? (clauses 37 &38)

Environmental protection agreements will be formal written agreements between the EMA and the activity manager. While environment protection agreements are not legally binding contracts, they can have indirect legal consequences. (Please see *7.3 - What happens if people do not abide by environmental protection agreements?* below for more information on this point.)

Agreements can deal with anything related to the environmental management of the activity, including, for example, a condition that the holder of an environmental authorisation will seek to achieve progressively higher environmental standards over a period.

7.2 When are they used?

Environmental protection agreements will probably be one of the most commonly used measures under this Bill. Under clause 40, Class B activities listed in Schedule 1 to the Bill must have an environmental authorisation unless they have an environmental protection agreement in effect. (Please see *8.1 - What are environmental authorisations?* below for more information on this point.) Environmental protection agreements can also be used in a wide variety of other situations to promote best environmental practice.

7.2.1 Effect of environmental protection agreements (clause 39)

Clause 39 provides that environmental protection agreements do not replace other legal obligations. While agreements are not intended to be directly legally enforceable, they do have some legal consequences. For example, clause 40(2) has the effect that where a person enters an environmental protection agreement in respect of a Class B activity, no environmental authorisation is required.

7.3 What happens if people do not abide by environmental protection agreements?

There is no direct legal penalty for breaking the terms of an environmental protection agreement as such. However, the EMA is unlikely to enter into, or to maintain, an environmental protection agreement where the other party has proved unreliable, and may instead require an environmental authorisation for an activity listed in Class B of Schedule 1. In addition, a person could lose the benefits of holding an accredited authorisation if an environmental protection agreement was terminated. (Please see *8.6.2 - Accredited authorisations* below for more information on this point.)

Part VIII Environmental authorisations

Overview of this Part

8.1 What are environmental authorisations? (Part VIII)

Environmental authorisations are one of the most important regulatory tools available to the EMA, as they set out conditions for activities carrying with them the greatest environmental risk. Each authorisation can be individually tailored for the activity it authorises, and can impose specific conditions on the conduct of the activity.

8.2 What are the differences between environmental protection agreements and environmental authorisations? (Part VII & Part VIII)

The three main differences between environmental protection agreements and environmental authorisations are in the areas of:

- the way in which an activity is regulated;
- relationship with the Bill; and
- cost.

These three matters are discussed below.

8.2.1 The way in which an activity is regulated

Environmental protection agreements promote co-regulation, where industry undertakes a measure of self-management and self-monitoring. Some high risk activities cannot be regulated solely through environmental protection agreements (and therefore are required to have an environmental authorisation).

However, most businesses will be able to avoid formal licensing (authorisations) and to both make their own assessment of the environmental impact of their activities and take the appropriate steps to minimise this impact.

8.2.2 Relationship with the Bill (clauses 39)

Clause 39 makes it clear that environmental protection agreements cannot override any of the provisions of the Bill. Instead, they supplement those legal obligations.

On the other hand, environmental authorisations are the source of legally binding environmental standards as part of the broader regulatory framework of the Bill.

8.2.3 Cost

Unlike authorisations, environmental protection agreements do not attract fees under the Bill. In addition, for "Class A" activities where an authorisation remains mandatory, entering an environmental protection agreement at the same time may assist the business to become eligible for the reduced fees applying to accredited authorisations. (Please see *8.6.2 - Accredited authorisations* below for more information on this point.)

Division 1 - Requirements to hold and comply with an authorisation

8.3 When are environmental authorisations required? (clauses 40 & 41)

The three situations where an environmental authorisation is required are:

- Class A activities (clause 40(1));
- Class B activities (clause 40(2)); and
- other situations determined by the EMA (clause 41).

8.3.1 Class A activities (clause 40(1))

The first situation where an environmental authorisation is needed is where Class A activities are undertaken. Class A activities, which are listed in Schedule 1 to the Bill, are activities which, due to their potential for causing significant environmental harm, must be regulated to the highest of the levels contemplated by the Bill. It is an offence to undertake these activities without an environmental authorisation. People proposing to undertake these activities apply for authorisations under clause 45.

8.3.2 Class B activities (clause 40(2))

The second situation where an environmental authorisation is needed is where Class B activities are undertaken and an environmental protection agreement is not in place. Class B activities, which are listed in Schedule 1 to the Bill, have less potential for significant environmental harm than Class A activities, but still require a level of detailed regulation. It is an offence to conduct these activities without either an environmental protection agreement or an environmental authorisation. If an environmental protection agreement is not in place, people proposing to undertake these activities must apply for an authorisation under clause 45.

8.3.3 Other situations (clause 41)

The third situation where an environmental authorisation is needed is where the EMA requires one on the grounds that the person conducting the activity has, is, or is likely to contravene the Bill, and this contravention has caused, or is likely to cause, serious or material environmental harm. Clause 41 therefore gives sufficient scope to allow the EMA to require the controls of an authorisation in these specific circumstances. These circumstances are more likely to relate to the way in which the activity is being conducted rather than to the activity itself.

In these situations, the EMA serves a notice on the operator of the activity to require them to apply for an environmental authorisation by a specified date (in accordance with clause 45) if they wish to continue the activity. If they do not do so, clause 42 makes it an offence to continue the activity. Notices requiring an authorisation can be revoked by the EMA, either on application by the person or on the EMA's own initiative.

8.3.3.1 Decisions reviewable

Under clause 125, a decision by the EMA under subclause 41(1) to notify a person that an authorisation is required for an activity is reviewable by the AAT. A decision by the EMA not to revoke such a notice is also reviewable.

8.4 Requirement to comply with an authorisation (clause 43)

It is an offence to contravene an authorisation without reasonable excuse.

8.4.1 Requirement to comply with an authorisation (subclause 43(2))

Subclause 43(2) is a sentencing provision which applies if a person has contravened an authorisation by releasing more than the authorised amount of a pollutant, and this release has caused environmental harm. In these cases, only the harm caused by the excess pollutant, rather than the harm caused by both the authorised amount and the excess amount, can be considered by the court in determining the penalty on the person. This subclause does not prevent the court having regard to matters other than the environmental harm caused in sentencing. For example, the environmental record of the offender could be a matter the court could consider in setting the sentence for the offence.

Division 2 - Grant, variation, cancellation and suspension

8.5 Overview (Division 2, Part VIII)

This Division deals with the procedures for management of environmental authorisations, including their grant, variation, cancellation and suspension.

8.5.1 Considerations to be taken into account by the EMA (clause 56)

This Division requires the EMA to make decisions about:

- granting or refusing to grant environmental authorisations;
- the types of conditions to which environmental authorisations should be subject;
- whether action should be taken on the findings of annual reviews of certain environmental authorisations; and
- varying environmental authorisations after they have been granted.

Under clause 56, the EMA must consider various factors in making these decisions, including the potential of the activity to cause environmental harm, as well as the economic and social benefits of the activity.

8.6 Kinds of environmental authorisation (clause 44)

There are three kinds of authorisations:

- standard authorisations;
- accredited authorisations; and
- special authorisations.

8.6.1 Standard authorisations (subclause 44(a))

Standard authorisations will probably be the most common form of authorisation. These authorisations can either be for unlimited duration or a specified period not longer than 3 years (see subclause 49(1)(a)). These authorisations are subject to an annual review (see clause 53). (Please see *8.7 - Decisions stemming from annual reviews reviewable* below for more information on this point.)

8.6.2 Accredited authorisations (subclause 44(b))

Accredited authorisations are intended to recognise activities achieving best environmental practice in their industry. The EMA will assess applications for accredited authorisations having regard to environmental improvement initiatives prescribed either in the Bill or by the Regulations.

8.6.2.1 Features of accredited authorisations

Features of accredited authorisations are:

- accredited authorisations can be granted for either an unlimited period or a specified period not longer than 3 years (see subclause 49(1)(a);
- because persons conducting these activities must continue to meet the high environmental standards expected of accredited authorisation holders, under clause 54, accredited authorisations are subject to review by the EMA at least once every 3 years; as opposed to standard and special authorisations which must be reviewed annually. The EMA can cancel the accredited authorisation, in which case the authorisation is taken to be a standard authorisation (under clause 125, this decision is reviewable by the AAT); and

as a further incentive for businesses to aim for best environmental practice, under subclause 50(4), whole of period fees for accredited authorisations will be less than for standard authorisations. (Please see *8.8 - Fees associated with environmental authorisations* below for more information on fees.)

8.6.3 Special authorisations (subclause 44(c))

Special authorisations are designed to recognise and encourage innovation and trials of experimental equipment.

8.6.3.1 Features of special authorisations

Features of special authorisations are:

- as by their nature, these authorisations may involve untested procedures or equipment, special authorisations can only be granted for a specified period not longer than 3 years (see subclause 49(1)(b);
- for similar reasons, special authorisations are reviewed annually (see clause 53); and
- to encourage this form of innovation, under subclause 50(4) whole of period fees for special authorisations will be less than for standard authorisations. (Please see *8.8 - Fees associated with environmental authorisations* below for more information on fees.)

8.7 Decisions stemming from annual reviews reviewable (clause 53)

As noted above, the EMA reviews standard and special authorisations annually. (Please see *8.6 - Kinds of environmental authorisations* above for more information on this matter.) If the EMA decides to take no action under this Bill, this decision is reviewable by the AAT.

8.8 Fees associated with environmental authorisations (clauses 45 & 50)

Fees associated with environmental authorisations are:

- application fees; and
- either annual fees (for standard authorisations issued for an unlimited period), or whole of period fees (for authorisations granted for a specified period).

8.8.1 Application fees (subclause 45(2))

EMA charges an application fee under subclause 45(2) to assess applications for environmental authorisations. Application fees will be set by applying the 'user-pays' principle, to which the Territory is committed under the Intergovernmental Agreement on the Environment.

8.8.2 Annual fees and whole of period fees (clause 50)

Annual fees and whole of period fees are made up of a determined amount (based on full recovery of administrative costs) and an amount worked out according to various factors relating to the volume of pollutants and the impact on the environment. These factors will all be specified in a fee determination under clause 51 which will apply the "polluter pays" principle to which the Territory is committed under the Intergovernmental Agreement on the Environment. (Please see *16.6 - Fees and charges to be determined* below for more information on the determination of fees.)

8.8.3 Timing of payments (clause 51)

Clause 51 provides for the timing of payments related to authorisations. This includes the capacity for fees to be made payable by instalments by a series of dates. This feature can be used in conjunction with load-based fees, for example where the fee for a certain period is determined by the volume of certain pollutants emitted in a previous period.

8.9 Non-payment of fees (clause 52)

If fees are not paid on time, the EMA gives notice to the authorisation holder that the payment must be made by a specified date. If the fee is not paid by that date, the EMA will cancel the authorisation.

8.10 How are applications for environmental authorisations processed? (clause 46)

Clause 46 sets out the procedure for assessing applications for environmental authorisations. The clause imposes a timing discipline on the EMA at each point the EMA assesses the application or associated information. This clause assures applicants that their applications will be addressed promptly.

8.10.1 Requirements for applications (clause 45)

As mentioned above, applications must be accompanied by the application fee. (Please see *8.8.1 - Application fees* above for more information.)

In addition, in order to ensure that all relevant parties consent to the application for the activity, subclause 45(3) provides that if the applicant is not the lessee of the land on which the activity is to be conducted, the application must be accompanied by written consent from:

- if the land is leased - these lessee;

- if the land is unleased Territory Land - the Territory; or
- if the land is unleased National Land - the Commonwealth.

8.10.2 Action on receipt of application (clause 46)

Within 20 working days of receiving the application, the EMA must:

- grant the authorisation;
- refuse to grant the authorisation;
- require further specified information by a particular date; or
- request the Minister to undertake a specific assessment under clause 88. (In practice, this request may be to the Minister's delegate).

8.10.3 Role of the Minister (subclause 46(1)(d))

If requested to by the EMA, the Minister can decide to investigate an application further. In addition, clause 88 provides that the Minister may make this decision on his or her own initiative. This investigation can be either:

- an Assessment of the environmental impact of the activity; or
- an Inquiry by a panel into the activity.

Both Assessments and Inquiries use provisions included in the Land Act. (Please see *10.2 - Environmental Assessments and Inquiries* below for more information on Assessments and Inquiries.)

8.10.4 What happens if further information is required?

If further information is required, the EMA has 10 working days from the time it receives that information to:

- grant the authorisation;
- refuse to grant the authorisation; or
- request the Minister to undertake a specific assessment under clause 88.

8.10.5 Requests for the Minister to undertake a specific assessment

The EMA can request the Minister to undertake a specific assessment either when the application is first received, or after receiving further information on the application. In either case, if the Minister has not agreed to the request within 20 days of the EMA making the request, the EMA must:

- grant the authorisation;
- refuse to grant the authorisation; or
- request further information by a specified date.

If more information is requested, when the EMA receives that information, the EMA must either grant or refuse to grant the authorisation.

8.10.6 Decisions reviewable

Clause 125 provides that decisions by the EMA to:

- grant an authorisation;
- grant an authorisation subject to a specified period; or
- refuse to grant an authorisation;

are reviewable by the AAT. The only exception is in relation to authorisations for fires in the open air (please see Schedule 1 to the Bill, subclause 2(r)). These authorisations would be granted immediately before burning-off is done to ensure that the weather conditions are suitable. In these cases, grant of an authorisation and grant subject to a specified period have not been made subject to AAT review, as this would be impractical in the time available.

8.11 What conditions can environmental authorisations require? (clause 48)

The EMA can decide on the most appropriate conditions of the environmental authorisation. Conditions can include providing instruments set out in the Bill (such as environmental audits and improvement plans). The EMA can also require the provision of a financial assurance. (Please see *9.14 - What is a financial assurance?* below for more information on this point).

8.11.1 Decision reviewable

Clause 125 provides that a decision by the EMA to grant an authorisation subject to a specified condition is reviewable by the AAT (except in the case of an authorisation for burning-off - please see *8.10.6 - Decisions reviewable* above for more information on this point).

8.11.2 Activity not to commence until certain conditions met (clause 48)

The EMA can also stipulate in the authorisation that the applicant is not permitted to start the activity until the EMA is satisfied of specified matters. This subclause allows businesses to apply for authorisations before the activity concerned has commenced. For example, a new business may wish to apply for an authorisation at the same time as applying for development approval under the Land Act.

Given sufficient information, the EMA can assess the activity and grant an authorisation in advance of the activity being established. In these cases, the authorisation conditions would include a requirement to satisfy the EMA that no material changes had been made to the activity since the application was assessed. By advising businesses of their standing with the Bill, this facility allows for greater business certainty.

8.11.2.1 Decision reviewable

Clause 125 provides that a decision by the EMA to prevent the commencement of a specified activity on the ground that the EMA is not satisfied of a specified matter is reviewable by the AAT.

8.11.3 Links with the Land Act (subclause 46(6))

This subclause provides a link between the Bill and the Land Act, by ensuring that the overall approval process takes account of all relevant matters.

In some cases, people running activities need to apply for certain approvals under the Land Act, as well as for an environmental authorisation under this Act. In these cases, the EMA will not grant an authorisation unless the development activity has been approved under the Land Act.

8.11.3.1 Consequential provisions

The Environment Protection (Consequential Provisions) Bill provides a further link to the Land Act. It amends the Land Act by requiring that notice be

given to the EMA of any application relating to activities:

- listed in Schedule 1 to the Bill; or
- that have the potential to cause serious or material environmental harm.

8.12 How can an environmental authorisation be changed? (clauses 55 & 57)

Clause 55 provides the grounds on which the EMA can vary environmental authorisations. These grounds are limited in order to ensure that conditions are not varied without good reason. As an example, the EMA can vary the authorisation if the holder has contravened the authorisation and the contravention has caused serious or material environmental harm.

The EMA cannot vary the term of an authorisation under this clause.

8.12.1 EMA must give notice of change

Under clause 57, the EMA must give authorisation holders 10 working days notice of changes to their authorisation. The only exceptions to this provision are if changes are minor corrections (and the holder has agreed to the changes), and if changes are needed to stop or prevent material or serious environmental harm.

8.12.1.1 Decision reviewable

Clause 125 provides that a decision by the EMA to notify authorisation holders of a variation to an authorisation is reviewable by the AAT.

8.12.2 Authorisation holders can apply

Clause 55 allows scope for authorisation holders to apply to the EMA to vary their environmental authorisations. For example, if changes have been made to processes or equipment which lessen the environmental impact of the business, the operator may wish to apply for a change in the conditions of the authorisation.

8.12.2.1 Decision reviewable

Clause 125 provides that a decision by the EMA to refuse to vary an authorisation on application from the authorisation holder is reviewable by the AAT.

8.13 *Suspension and cancellation of environmental authorisations* (clauses 58, 59, & 60)

The EMA has the power to suspend or cancel environmental authorisations on the grounds specified. Again, these are restricted to ensure they are not exercised inappropriately. For example, the EMA can suspend or cancel the authorisation if the holder, in conducting the activity, has contravened the Act or their authorisation and caused serious or material environmental harm.

The EMA can suspend environmental authorisations until certain conditions are met (which, under clause 60, means that they are not authorised to conduct the activity), or can cancel the authorisation outright. In either case under clause 59, the EMA must give notice to the authorisation holder setting out the reasons for the intended action and inviting them to provide a written submission on it.

8.13.1 Decision reviewable

Clause 125 provides that a decision by the EMA to:

- suspend an authorisation;
- suspend it until a specified condition has been met;
- refuse to lift a suspension on the ground that a specified condition has not been met; or
- cancel an authorisation;

is reviewable by the AAT.

8.14 Ceasing the activity (clauses 61 & 62)

Authorisation holders who cease to conduct authorised activities permanently are required to notify the EMA within five working days of the cessation. Authorisation holders can surrender their authorisation by notice in writing to the EMA.

Part IX Environmental protection

Division 1 - Environmental improvement plans

9.1 What are environmental improvement plans? (clauses 63 - 67)

Environmental improvement plans are formal plans to rectify problems, to minimise environmental impacts and to achieve best environmental practice over time.

9.2 When are they required? (clause 64)

The EMA can require an environmental improvement plan if there is, or is likely to be, serious or material environmental harm caused by a contravention of the Bill, and the EMA considers that an improvement plan will help to rectify the situation. Environmental improvement plans can also be required as a condition of an environmental authorisation. (Please see *8.11 - What conditions can environmental authorisations require?* above for more information on this point.) Plans must be submitted to the EMA within 20 working days of being required.

Alternatively, environmental improvement plans can be prepared on a voluntary basis. (Please see *9.6 - Voluntary improvement plans* below for more information on this point.)

9.3 Cost of environmental improvement plans (clause 65)

Draft improvement plans must be submitted with the determined fee.

9.4 How are draft environmental improvement plans processed? (clause 66)

In line with the process for assessing applications for environmental authorisations, clause 66 ensures that the EMA will deal with draft environmental improvement plans promptly and cannot require continual redrafts.

9.4.1 EMA's response to draft plans

Within 20 working days of receiving the draft environmental improvement plan, the EMA must respond to the applicant by:

- approving the draft plan; or
- rejecting the plan and requiring the person to resubmit the plan with specified amendments.

9.4.2 What happens if amendments are required?

When an amended draft environmental improvement plan is resubmitted, the EMA must either approve or reject the resubmitted plan within 10 working days of receiving it.

9.4.3 Decisions reviewable

Clause 125 provides that decisions by the EMA to:

- require an environmental improvement plan;
- reject a draft plan and require it to be amended and resubmitted; or
- reject the plan;

are reviewable by the AAT.

9.5 How are these provisions enforced? (clause 66)

People who do not:

- submit an environmental improvement plan when required to do so by the EMA;
- implement an approved improvement plan; or
- resubmit a draft plan with amendments required by the EMA;

commit an offence under clauses 64 or 66.

9.6 Voluntary improvement plans (clause 67)

Activity managers can also prepare improvement plans on their own initiative, and can apply to have the EMA consider these plans for accreditation.

Accreditation of a voluntary improvement plan can assist a person to attain an accredited authorisation. (Please see *8.6.2 - Accredited authorisations* above for more information on this point.)

9.6.1 Decision reviewable

Clause 125 provides that a decision by the EMA to accredit or refuse to accredit a voluntary environmental improvement plan is reviewable by the AAT.

Division 2 - Environmental audits

9.7 What are environmental audits? (clauses 68 - 74)

For the purposes of this Bill, environmental audits include:

- audits required by the EMA as a condition of an environmental authorisation (Please see *8.11 - What conditions can environmental authorisations require?* above for more information on this point);
- audits conducted as required by the EMA under clause 71; and
- audits undertaken voluntarily where the person conducting the activity seeks protection for the findings of the audit under clause 73.

Environmental audits are a key element in monitoring the environmental performance of businesses within the ACT. Clause 69 provides that audits identify causes of environmental harm or breaches of the Act, and determine the need for any change in management practices to reduce environmental impact.

9.7.1 Who conducts environmental audits? (clause 70)

The EMA is required to keep a list of auditors who meet prescribed criteria (auditors on similar lists in other jurisdictions will be automatically included in this list). A person approved by the EMA to conduct a particular audit must be on the list of auditors and be appropriately qualified to conduct that audit.

9.7.1.1 Decision reviewable

Clause 125 provides that a decision by the EMA to refuse to approve a person to conduct a particular environmental audit, or a decision to remove the name of an auditor from the list of auditors maintained by the EMA, is reviewable by the AAT.

9.7.2 When are environmental audits required? (clause 71)

The EMA has the power under clause 71 to require audits of activities that are contravening or may contravene their environmental authorisation, or this Act.

In addition, an audit can be a condition of an environmental authorisation under clause 48. (Please see *8.11 - What conditions can environmental authorisations require?* above for more information on this point.)

9.7.2.1 Decision reviewable

Clause 125 provides that a decision by the EMA to require an environmental audit is reviewable by the AAT.

9.7.3 Cost of environmental audits (clause 71)

Audits submitted to the EMA in compliance with a requirement under clause 71 must be submitted with the determined fee.

9.7.4 What happens to the findings? (clause 72)

Environmental audits required under clause 72 or as a condition of an environmental authorisation must be submitted to the EMA within a specified time. After receiving one of these types of audits, the EMA has 20 working days to respond to the person who submitted it. The EMA can:

- require the person to provide further information by a specified date;
- advise the person that the EMA intends to take specified action under this Act; or
- advise the person that the EMA will take no further action on the environmental audit.

9.7.5 How are these provisions enforced? (clauses 71 & 72)

People who do not:

- submit an environmental audit when required to do so by the EMA under subclause 71(1); or
- provide further specified information relating to an environmental audit under subclause 72(1)(c);

commit an offence.

9.8 Voluntary environmental audits (clause 73)

To encourage business to actively assess their environmental performance, people undertaking voluntary environmental audits can apply to the EMA for certain legal protection for information contained in the audit.

9.8.1 Protection can be granted

The protection which can be granted on certain conditions is that the audit is not admissible in evidence against the applicant in any enforcement proceedings under this Bill.

This protection does not lessen a person's obligations to comply with the conditions of any relevant environmental authorisation and to report actual or threatened environmental harm as required by clause 23.

9.8.2 Decision reviewable

Clause 125 provides that a decision by the EMA to refuse to grant protection in respect of an audit or to grant protection subject to a specified condition is reviewable by the AAT.

9.8.3 Cost of voluntary environmental audits (clause 73)

Where a person has been granted protection under clause 73, the environmental audit must be submitted along with the determined fee.

9.8.4 How are these provisions enforced? (clause 73)

Once protection has been granted to a voluntary audit, a copy of the audit must be submitted to the EMA, and people who fail to do so commit an offence under clause 73.

9.8.5 Protection does not extend to environment protection orders (clause 74)

Any protection granted under clause 73 does not prevent the EMA from serving an environment protection order related to the matters discussed in the environmental audit. (Please see *13.6 - What are environment protection orders?* below for more information on this point.)

Division 3 - Emergency plans

9.9 What are emergency plans? (clauses 75 - 79)

Emergency plans are designed to encourage businesses to consider foreseeable emergencies, their likely environmental implications and how best to cope with them.

Especially for large or environmentally significant activities, emergency plans are an important part of overall environmental management.

9.9.1 Content (clause 76)

As well as setting in place an overall plan in case of an emergency, plans can also contain implementation timetables. For example, plans could specify a timetable for up-grading fire-fighting equipment or training for staff in emergency procedures.

9.10 When are emergency plans required? (clause 77)

The EMA can require the preparation of an emergency plan as a condition of an environmental authorisation. (Please see *8.11 - What conditions can environmental authorisations require?* above for more information on this point.)

Under clause 77, emergency plans can also be required if the EMA has reasonable grounds for believing that environmental emergencies could occur during the conduct of the activity.

9.10.1 Decision reviewable

Clause 125 provides that a decision by the EMA to require an emergency plan is reviewable by the AAT.

9.11 How are draft emergency plans processed? (clause 79)

In line with the process for assessing applications for environmental authorisations, clause 79 imposes a timing discipline on the EMA.

9.11.1 EMA's response to draft plans

Within 20 working days of receiving the draft emergency plant, the EMA must:

- approve the draft plan; or
- reject the draft plan and require the person to resubmit the plan after making specified amendments.

9.11.2 What happens if amendments are required?

When an amended draft emergency plan is resubmitted, the EMA must either approve or reject the resubmitted plan within 10 working days of receiving it.

9.11.3 Decisions reviewable

Clause 125 provides that decisions by the EMA to:

- reject a draft emergency plan and require the plan to be amended and resubmitted; or

- reject a draft plan

are reviewable by the AAT.

9.12 Cost of emergency plans (clause 78)

Draft emergency plans must be submitted with the determined fee.

9.13 How are these provisions enforced? (clauses 77 & 79)

People who do not:

- submit an emergency plan when required to do so by the EMA;
- implement an approved emergency plan; or
- resubmit a draft plan with amendments required by the EMA

commit an offence under clause 77 or 79.

Division 4 - Financial assurances

9.14 What is a financial assurance? (clauses 80 - 86)

A financial assurance is a type of bond or surety. Financial assurances are held by the EMA and are only claimed in circumstances where the EMA has incurred certain costs.

9.14.1 When can financial assurances be required? (clause 80)

The EMA can require a financial assurance as a condition of an environmental authorisation after assessing the likelihood of the activity causing serious or material environmental harm. (Please see *8.11 - What conditions can environmental authorisations require?* above for more information on this point.) The EMA will also take the authorisation holder's environmental record into account in deciding whether to require an assurance.

9.14.2 Applicant invited to show cause (clause 81)

If the EMA proposes to impose a financial assurance as a condition of an environmental authorisation, the EMA must give the applicant notice and invite them to provide a submission showing reasons why a financial assurance should not be required.

The EMA then has 20 working days in which to notify the applicant of its decision, and, if that decision is to impose a financial assurance, the EMA must provide its reasons for doing so to the applicant.

9.14.2.1 Decision reviewable

Clause 125 provides that a decision by the EMA to require an assurance as a condition of an authorisation is reviewable by the AAT.

9.14.3 How much will assurances be? (clause 80)

The amount of the financial assurance is dependent on the EMA's assessment of the likelihood of environmental harm, but in any case, the assurance cannot be greater than the estimated clean-up costs of that harm.

9.14.4 Non-payment of assurance (clause 82)

If an assurance is not paid by the specified date, the EMA must cancel the authorisation.

9.14.5 When can the EMA claim on an assurance? (clauses 83-84)

Clause 83 provides that the EMA can claim on a financial assurance if the EMA incurs costs through remedying serious or material environmental harm caused by the activity to which the assurance relates. The EMA must notify the authorisation holder before claiming the assurance, and give them at least 20 days to make a case as to why the EMA should not claim the assurance.

9.14.6 What if the clean-up costs more than the assurance? (clause 85)

If the clean-up costs are greater than the original assurance, the EMA can claim for extra costs under clause 85. This clause also provides that if the extra costs are not paid on time, they become a debt payable to the Territory, and the person is liable for interest on that amount.

9.14.7 Interest accrued on an assurance (clause 86)

Money held by the Territory as a financial assurance accrues interest at a rate determined under clause 155. (Please see *16.6 - Fees and charges to be determined* below for more information on this point.) This interest is considered part of the assurance if the EMA claims against the assurance, but is also paid to the authorisation holder each year.

Part X Functions of the Minister

10.1 Decisions by the Minister (clause 87)

Clause 87 provides that the Minister can make a decision under this Bill that otherwise the EMA would have made. This allows the Government, rather than an officer, to make and account for decisions of Territory significance or which involve balancing competing considerations at a high level.

If the Minister elects to make such a decision, the EMA is notified and the decision is notified in the *Gazette*.

10.2 Environmental Assessments and Inquiries (clause 88)

If an application for an environmental authorisation is pending, the Minister may direct that a further assessment should be made of the activity, involving Part IV (Environmental Assessments and Inquiries) of the Land Act. The Minister can either do this on their own initiative, or at the request of the EMA. (Please see *8.10.2 - Action on receipt of application* above for more information on this point.)

This further assessment can either be an Assessment or an Inquiry (both these procedures are contained in the Land Act).

Part XI Authorised officers' powers

Division 1 - Preliminary

11.1 Interpretation (clause 89)

This clause gives definitions used only in this Part.

Division 2 - Entry and inspection generally

11.2 Entry provisions (clauses 90, 91 & 92)

Given the need to monitor compliance with this Bill and to investigate possible breaches of it, the Bill gives certain powers of access and information gathering to authorised officers. These powers are subject to both common law and statutory limitations and conditions. For example, under clause 92, authorised officers cannot remain on any premises they enter if they do not produce their identity card when asked to do so by the occupier.

11.2.1 Entry: routine inspections (clause 90)

Clause 90 provides that authorised officers can enter non-residential premises at any reasonable time. If the occupier gives consent, authorised officers can enter any premises, whether residential or not, at any time. (Please see *11.4 - Consent to entry* below for more information on this point.)

11.2.2 Entry: search warrants (clause 91)

Search warrants give authorised officers power to enter premises without the constraints provided by clause 90. Warrants can only be obtained if authorised officers have reasonable grounds for believing there is something on the premises connected with an offence. (Please see *11.5 - Search warrants* below for more information on this point.)

If a search warrant is granted, authorised officers can enter any premises at any time, and can use necessary and reasonable force to do so. In addition, police officers may be called to assist in the execution of a search warrant.

11.3 Information gathering (clause 93)

While on the premises, authorised officers can gather information through a variety of means including taking photographs, making observations and taking materials or samples. Samples must be taken in the way set out in subclause 93(3) to ensure the integrity of the evidence is preserved.

Authorised officers can also require people on the premises to answer questions and to give them reasonable assistance in carrying out their duties.

11.4 Consent to entry (clause 94)

This clause sets out the procedure authorised officers must follow in obtaining consent from an occupier to enter premises.

11.5 Search warrants (clause 95)

Search warrants are issued by magistrates if there are reasonable grounds for suspecting a contravention of the Act. Under clause 95, search warrants give authorised officers powers to enter premises (whether residential or commercial) without the constraints provided in clause 90.

Division 3 - Emergency powers

11.6 Emergency situations (clauses 96, 97 & 98)

In emergency situations which threaten or cause serious or material environmental harm, authorised officers are empowered under clause 97 to take necessary action or direct others to do so. This provision reflects the serious nature of environmental emergencies, and the need for quick and direct action. This power is supported by the provisions of clause 98, which allow authorised officers unrestricted entry to non-residential premises in an emergency.

Division 4 - Seizure, retention and disposal of things

11.7 Seizing items (clause 99)

Authorised officers have the power to seize items if the officers have reasonable grounds for believing the items are connected with an offence under this Act, and that the item should be seized to secure it, to prevent an offence being committed or obtain evidence from it.

Officers must issue a receipt for any item seized.

11.8 What happens to items after they are seized? (clauses 100 & 101)

Unless its release to its owner is authorised by the EMA, seized items are held as pieces of potential evidence. The EMA then has 6 months in which to begin a prosecution for an offence.

11.8.1 If not prosecuted, or prosecuted and found not guilty (clauses 100 & 101)

If the EMA does not prosecute for an offence, or a prosecution occurs but the defendant is found not guilty, the EMA decides whether disposing of the thing is necessary to prevent or minimise environmental harm. If the EMA decides it is not necessary, the seized item is returned to its owner.

If the EMA believes that disposing of the thing is necessary to prevent or minimise environmental harm, the EMA must notify the owner of the reasons for believing that it is necessary to dispose of the thing. Unless the owner can satisfy the EMA that it should not proceed, the EMA will dispose of the seized item, subject to any appeal. If the item is disposed of, the Territory must compensate the owner.

11.8.2 If prosecuted and found guilty (clauses 100 & 101)

If the person is found guilty, the court can order either that:

- the thing be forfeited to the EMA; or
- the defendant buy back the thing from the EMA at the price determined by the court.

Division 5 - Other powers

11.9 Power to require name and address (clause 102)

Authorised officers can require people who are committing, or who they reasonably believe have committed, an offence under this Act to provide their name and address. Officers must:

- inform the person of the reasons they are being required to give this information; and
- record those reasons as soon as practicable.

This power to require name and address supports the power of authorised officers to deal with offences on-the-spot.

Part XII Analysts' powers

12.1 Entry of premises (clause 103)

Providing they produce their identity card, analysts are empowered to enter premises in company with authorised officers, to conduct tests and gather information.

12.2 Analysts' evidence (clause 104)

This clause provides that results given by analysts in a certificate to the court are prima facie evidence of the matters stated.

Part XIII Enforcement

Division 1 - On-the-spot fines

13.1 Interpretation (clause 105)

This clause gives definitions used only in this Part.

13.2 What are infringement notices? (clauses 106 - 115)

Infringement notices are on-the-spot penalties issued under clause 106 by authorised officers for offences against either the Act or Regulations made under the Act. (Please see *16.7 - Regulation-making powers* for more information on this point.)

13.2.1 When will they be used?

On-the-spot fines will be used for minor offences. These fines are useful in raising community awareness and enforcing standards without the expense and delay of court proceedings.

13.3 Process for on-the-spot fines (clauses 106, 107 & 108)

The on-the-spot fine process is as follows:

- under clause 107, the authorised officer issues an infringement notice (the first notice);
- the person to whom the notice was issued can then:
  - pay the fine within 28 days; or
  - apply for the withdrawal of the notice under clause 110;
- if the fine has not been paid or if the notice has not been withdrawn under clause 110, the authorised officer issues a final notice which requires payment not only of the initial fine, but also an extra administration fee.

Both first and final notices must comply with the requirements in clause 106, and must be served as outlined in clause 114.

13.3.1 Withdrawal of infringement notices (clauses 110 & 111)

Within certain time limits, a person issued with an infringement notice can apply to have the notice withdrawn. The EMA can withdraw the notice if satisfied that:

- the applicant did not commit the offence;

- the applicant had a reasonable excuse for the action which led to the notice; or
- it would be unreasonable in the circumstances to prosecute for the offence.

If the notice is withdrawn, any fines paid are refunded.

13.4 No further legal implications of on-the-spot fines (clause 109, 112 & 113)

In line with the position of using infringement notices as an alternative to legal processes, on-the-spot fines do not lead to further legal action. Specifically, under clauses 109 and 112, payment of an on-the-spot fine:

- finalises the matter completely;
- does not constitute a conviction;
- acts as a bar to further legal action on the matter;
- is not to be taken as an admission of liability; and
- does not affect legal rights on claims arising.

Clause 113 also provides that on-the-spot fines cannot be considered in imposing a sentence in relation to a prosecution for other matters.

13.5 Evidence (clause 115)

This clause deals with situations where minor environmental offences are prosecuted. In these cases, certification from the EMA on matters such as the serving of notices is taken as evidence of those matters.

Division 2 - Environment protection orders

13.6 What are environment protection orders? (clause 116)

Environment protection orders are instruments issued by the EMA requiring people to do, or not do, certain things.

13.6.1 What are the grounds for environment protection orders? (clause 116)

The EMA can issue an environment protection order on the grounds that a person has contravened this Act or an environmental authorisation and is causing environmental harm or an environmental nuisance.

In this context, contravening the Act includes failing to comply with the general environmental duty. (Please see *3.1.1 - What is the general environmental duty?* for more information on this point.)

13.6.2 Decisions reviewable

Clause 125 provides that a decision by the EMA to serve an environment protection order, or to serve an order imposing a specified requirement, is reviewable by the AAT.

13.6.3 What can environment protection orders require? (clause 116)

Environment protection orders can impose a variety of requirements on people, as long as they are reasonably necessary for the purposes for which the order is served. For example, orders can require people to:

- stop or not commence certain action;
- provide information; and
- undertake environmental restoration of a public place.

13.6.4 How are environment protection orders enforced? (clause 117)

Clause 117 makes it an offence to contravene an environment protection order. The penalty varies according to the breach on which the order was based.

Division 3 - Injunctive orders

13.7 What are injunctive orders? (clause 119)

Injunctive orders are orders made by the Supreme Court to prevent, stop or remedy contraventions of the Act. They are made against people (known in this Division as respondents) who are contravening, or are about to contravene, the Act.

13.7.1 What are the grounds for injunctive orders? (clause 119)

The Supreme Court may make an order if it is satisfied that the respondent has, is or is likely to contravene the Bill (or an instrument under the Bill) and that serious or material environmental harm has, is or is likely to occur as a result.

13.8 What is the difference between injunctive orders and environment protection orders?

Injunctive orders are similar to environment protection orders in that they are both designed to stop contraventions of the Act. (Please see *13.6 - What are environment protection orders?* above for more information on this point.)

However, unlike environment protection orders, injunctive orders made by the Supreme Court provide:

- judicial consideration of the issue; and
- a mechanism for certain people other than the EMA to seek to halt contraventions of the Act.

In addition, different grounds apply to environment protection orders and injunctive orders. (Please see *13.6.1 - What are the grounds for environment protection orders?* and *13.7.1 - What are the grounds for injunctive orders?* above for more information on this point.)

13.9 Who can apply for an injunctive order? (clause 118)

People who can apply to the Supreme Court for an injunctive order are referred to in this Division as applicants. Clause 118 sets out the following as applicants:

- the EMA;
- people who have standing (common law establishes parameters for meeting the test of whether certain people have standing or not); and
- others granted leave by the Supreme Court (subclause 118(2) sets out grounds on which the Court will grant leave to people in this group).

13.9.1 Security for costs (clause 121)

The Supreme Court can order applicants to provide security for payment of costs that they may incur if:

- the application is dismissed; or
- if compensation to the respondent is decided upon under clause 122.

13.9.2 Compensation (clause 122)

If the respondent is found not to have contravened the Act, and has suffered loss or damage as a result of the proceedings, the Court may decide it is appropriate to require the applicant to pay compensation to the respondent.

13.10 Interim orders (clause 120)

The Supreme Court can also make interim orders. Interim orders can be used where an application for an injunctive order has been made but has not yet been determined, and the Court is satisfied that there is a real or significant likelihood of serious or material environmental harm occurring before the application is determined.

Interim orders can address the same matters as injunctive orders, but are in force either:

- for not more than 14 days if a copy of the application has not been served on the respondent; or
- if a copy of the application has been served on the respondent, until the Court orders otherwise or determines the application, whichever occurs first.

Division 4 - Power to require information

13.11 What are information discovery orders? (clause 123)

Information discovery orders are a means through which the EMA can obtain information it would otherwise not be able to.

13.12 When can they be used? (clause 123)

The EMA can issue an information discovery order where it believes that a person has information which is reasonably required for the administration or enforcement of the Act.

13.13 How are information discovery orders enforced? (clause 124)

This clause makes it an offence to fail to provide information in accordance with an information discovery order.

Part XIV Administrative review

14.1 Review of decisions (clause 125)

The effect of the section is to create comprehensive rights of review. Decisions made under this Bill, pursuant to the sections listed in clause 125, are subject to review by the Administrative Appeals

Tribunal. This explanatory memorandum indicates which clauses give rise to appeal rights in the notes accompanying the respective clauses.

14.1.1 Review of decisions (clause 126)

If, under the provisions of clause 87, the Minister elects to make a decision under the Bill which would ordinarily be made by the EMA, that decision is subject to review in the Administrative Appeals Tribunal. (Please see *10.1 - Decisions by the Minister* above for more information on this point.)

Part XV Offences

Division 1 - Environmental offences

15.1 Overview of offences dealt with in this Part

There are three types of general offences under the Bill; that of polluting the environment causing serious, material or lesser environmental harm (clauses 127, 128 & 129 respectively). These three types of offences are broadly consistent with national trends in environmental offence structures.

Other offences dealt with in this Part are:

- causing an environmental nuisance (clause 131); and
- placing a pollutant where it could cause environmental harm (clause 132).

15.2 Levels of each offence

Each of the types of offences of causing environmental harm by polluting has three tiers within it; each tier corresponding to a different legally recognised level of culpability;

- acting knowingly (that is, deliberately) or recklessly;
- acting negligently; and
- causing harm by polluting without reference to the person's mental state; that is, offences of strict liability.

15.3 May be found guilty of lesser charge (subclauses 127(4) & (5), 128(4) &(5) & 129(4) & (5))

Charges in respect of each of the three types of offence (that is, polluting the environment causing serious, material or lesser environmental harm) can result in a conviction for a lesser offence. For example, if a person is found not guilty of acting knowingly or recklessly, the Court can, in the alternative, find them guilty of either of the two lesser levels of culpability (that is, acting negligently, or simply causing the harm by polluting without reference to their mental state).

15.4 May be found guilty of lesser charge (clause 130)

This clause provides a mechanism similar to that described in 15.3 above. That mechanism works between the tiers of an offence but in the case of clause 130, the mechanism applies between types of offences. For example, a person found not guilty of the most serious type of offence (that is, polluting the environment causing serious environmental harm) may also be assessed against the two lesser offences (polluting the environment causing material or lesser environmental harm).

15.5 Level of penalties

The Bill provides for a broad range of penalties for these offences.

15.5.1 Highest maximum penalty

The offence of knowingly or recklessly polluting the environment causing serious environmental harm has the highest maximum penalty. The penalty for this offence for an individual is a maximum of 2,000 penalty units, which is currently equivalent to $200,000, or 5 years gaol. The corresponding penalty for a body corporate is 10,000 penalty units, which is currently equivalent to $1,000,000.

15.5.2 Lowest maximum penalty

The offence of causing an environmental nuisance has the lowest maximum penalty. The penalty for this offence is 50 penalty units for an individual (currently $5,000) and 250 penalty units for a body corporate (currently $25,000).

15.6 No offence committed (clause 133)

All people pollute or cause environmental harm in one way or another. This provision ensures that there is no

criminal liability where a person is causing environmental harm by polluting that is either:

- expressly permitted by or under the Bill; or
- otherwise lawful, provided the person was complying with the general environmental duty.

15.7 Liability limited to harm caused by excess pollutants (clause 134)

This clause recognises that people should not be able to be prosecuted for offences involving, in part, environmental harm which is permitted under the Bill. If someone exceeds the limits of pollutants which they are authorised to release, they can only be prosecuted for an offence involving the environmental harm caused by the excess.

15.8 Causing serious environmental harm (clause 127)

Causing serious environmental harm is the most grave offence under the Bill.

15.8.1 What is serious environmental harm?

As defined in clause 4 of the Bill, serious environmental harm is harm that:

- is very significant, including environmental harm that becomes very significant -
  - over time;
  - due to its frequent recurrence; or
  - due to its cumulative effect with other relevant events;
- is to an area of high conservation value and is significant, including environmental harm that becomes significant
  - over time;
  - due to its frequent recurrence; or
  - due to its cumulative effect with other relevant events;
- results in loss or damage to property to the value of more than $50,000; or
- results in remedial action costing more than $50,000.

15.9 Causing material environmental harm (clause 128)

Causing material environmental harm is the mid-point of the three tier system.

15.9.1 What is material environmental harm?

As defined in clause 4 of the Bill, material environmental harm is harm that:

- is significant, including environmental harm that becomes very significant -
  - over time;
  - due to its frequent recurrence; or
  - due to its cumulative effect with other relevant events;
- is to an area of high conservation value, other than temporary harm;
- results in loss or damage to property to the value of more than $5,000; or
- results in remedial action costing more than $5,000.

15.10 Causing environmental harm (clause 129)

The amount of environmental harm caused by the lowest tier of the general environmental offences has not been specified. This ensures that offences involving all levels of environmental harm are potentially subject to prosecution, even where there is some uncertainty as to the exact level of harm resulting.

15.11 More specific offences

As well as the three tiers of general offences, this Part also deals with two types of more specific offences as set out below in 15.11.1 and 15.11.2.

15.11.1 Causing an environmental nuisance (clause 131)

As defined in clause 4 of the Bill, environmental nuisance is an unreasonable interference with people's enjoyment of an area. This kind of interference could be caused, for example, by a smoky wood-burning heater, or loud music from a sound system.

The concept of "environmental nuisance" is designed specifically to deal with activities that interfere with enjoyment of the environment but do not cause lasting or significant environmental harm. However, there are things that will cause environmental harm in addition to interfering with enjoyment.

15.11.2 Placing a pollutant where it could cause harm (clause 132)

People who have responsibility for pollutants which could cause environmental harm are obliged to ensure

they are properly secured. Placing or storing pollutants where they could reasonably be expected to cause environmental harm is an offence under this provision. For example, placing paint containers where they could tip or leak into a stormwater drain is a foreseeable and easily prevented action which would be an offence under this provision.

15.12 Specific offences in Schedule 2 (clause 135)

Clause 135 refers to Schedule 2 to the Bill, which re-enacts a number of specific offences currently found in some of the laws to be repealed by the Environment Protection (Consequential Provisions) Bill 1997. (Please see *18.2 - 18.5* below for more information on this point.)

Division 2 - Liability etc. of corporate officers

15.13 Conduct of directors, servants and agents (clause 136)

This clause contains provisions concerning the mental state of people involved in a prosecution of an offence under this Act, and related provisions as described below in 15.13.1 - 15.13.3.

15.13.1 Subclauses 136(1) & (5)

Subclause (1) attributes the state of mind of directors, servants and agents to their company or principal for conduct within the scope of their actual or apparent authority. For these purposes, Government corporations are included in the term 'company' through subclause (5).

15.13.2 Subclauses 136(2) & (3)

Subclause (2) explains what matters are part of a person's mental state, while subclause (3) provides that any conduct by a Director, servant or agent of a person or body (the Principal), within their authority (real or apparent), is attributed to the Principal unless the Principal can establish a "due diligence" defence.

15.13.3 Subclause 136(4)

Subclause (4) prohibits prison terms for convictions which rely on this clause, because the conduct or mental state may be imputed rather than real.

15.14 Criminal liability of officers of body corporate (clause 137)

This clause provides that prescribed officers (defined in the clause) of a body corporate which is convicted of an offence are all taken to be guilty of the offence

individually, provided they were in a position to influence the conduct concerned.

The clause is designed to force directors and other decision-makers in a company to take all available steps to ensure their company does not commit offences under the Bill. This clause reflects similar clauses in other States.

Division 3 - Other offences

15.15 Notice to transferee on transfer of activity or place (clause 138)

This clause requires people selling or transferring a business to inform the new owner of any instruments under this Bill which apply to the business. This ensures that the new owner is aware of their statutory obligations.

15.16 Notice to EMA of alterations (clause 139)

This clause requires environmental authorisation holders to notify the EMA of proposed changes to works on the premises where the activity is conducted. A copy of a development application is sufficient for this purpose.

15.17 Self-incrimination (clause 140)

This clause requires people to provide information required by this Bill, even if doing so could incriminate them.

However, recognising that this provision overrides a common law privilege and could otherwise trespass unduly on a person's rights, the information provided is not admissible in evidence against the person in any proceedings under this Bill. The only exceptions to this protection are proceedings relating to the offences of:

- obstructing or hindering an authorised officer (clause 141); and
- providing false or misleading information (clause 142).

15.18 Obstructing authorised officers (clause 141)

This clause provides it is an offence to obstruct or hinder the work of authorised officers, or to refuse to comply with their lawful directions. The work of authorised officers is central to the administration of

the Bill, and this clause reflects the gravity of interfering with those duties.

15.19 False or misleading statements (clause 142)

This clause makes the giving of false or misleading information on matters under this Bill an offence.

Division 4 - Defences

15.20 Due diligence (clause 143)

Clause 143 provides for a defence of due diligence in respect of strict liability offences.

Subclause 143(2) provides examples of the circumstances which should be considered in determining whether someone has acted with due diligence.

15.21 Defences (clause 144)

This clause provides the defence to prosecutions for certain offences under this Bill - namely, that the action was necessary in an emergency situation and the defendant had taken all reasonable and practicable measures to prevent or deal with the emergency.

Division 5 - General

15.22 Strict liability offences (clause 145)

Clause 145 provides that certain offences are strict liability offences (subject to clauses 143 and 144).

Strict liability offences are offences which do not require a fault element but to which a common law defence of honest and reasonable mistake of fact is allowed. A person is not criminally responsible for the offence if at the time when he or she did the acts constituting that physical element of the offence he or she was under a mistaken but reasonable belief about facts which, had they existed, would have meant that the conduct would not have constituted the offence.

In addition, clause 145 is drafted to ensure that the defences provided in clauses 143 and 144 (that is, due diligence and the defence of emergency) are available in addition to the common law defences.

15.23 Continuing offences (clause 146)

If a person has committed an offence under this Act, and the person continues the same behavior, this clause provides that extra penalties of up to 20% of the maximum penalty may be imposed by the Court for each day the alleged offence continues. The clause is intended to maximise the discouragement of continuing illegal activity in circumstances where the offender knew or should have known that the offence had been committed but failed to take steps to cease the illegal activity.

15.24 Additional court orders (clause 147)

This clause applies in situations where a person has been found guilty of an offence under this Act involving environmental harm. As well as imposing penalties under this Act, a court can make additional orders to help rectify the damage done. Possible additional orders include requiring the convicted person to:

- remedy the harm caused, or improve the environment elsewhere;
- publicise their wrongdoing and its consequences to raise community awareness; or
- pay compensation to the Territory or another party.

15.25 Matters to be considered in imposing penalty (clause 148)

This clause provides guidance to the courts in imposing penalties for offences under this Act.

Part XVI Miscellaneous

16.1 Authorised acts and omissions (clauses 149)

This provision makes it clear that things authorised by or under this Bill cannot be considered to contravene it.

16.2 Recovery of clean-up costs (clauses 150)

The EMA can claim reasonable costs and expenses for clean-ups where:

- a person has not complied with an environment protection order containing clean-up provisions; or

- a person has breached the general environmental duty and caused environmental harm, but it is not practicable for the EMA to issue an environment protection order (for example, in emergency situations).

If the person does not pay the amount within the specified time, it accrues interest and becomes a debt due to the Territory by that person.

16.2.1 Reasonable costs and expenses (clause 151)

Reasonable costs and expenses are defined in clause 151. In line with the principles of "user pays" and "polluter pays", this definition is intended to enable the EMA to claim all expenditure associated with taking certain action including clean-up costs as well as administrative expenses. Reasonable costs and expenses are those that would apply to engage an independent contractor to take the action, together with administrative expenses.

16.3 Statutory declarations (clause 152)

The EMA has the power under this clause to require that information is given in the form of a statutory declaration.

16.4 Environmental record of directors, servants and agents (clause 153)

This clause provides that the environmental record of individuals, or people associated with a corporation, may be assessed when considering the environmental record of that individual or corporation.

16.5 Evidentiary matters (clause 154)

For the purposes of court proceedings, a certificate from the EMA about formal matters listed in this clause is taken as evidence. The information listed here relates to matters primarily within the knowledge of the EMA.

Similar provisions apply to certificates from the ACT Planning Authority relating to the Territory Plan and the Heritage Places Register.

16.6 Fees and charges to be determined (clause 155)

The Minister can determine fees and administrative charges under the Bill. It is important to note that fees can be determined through a formula. Formulae could vary the fee applicable by reference to such matters as the amount of pollutant authorised to be discharged or

the variable cost of considering an application. This will allow both "polluter pays" and "user pays" charging, to which the Territory is committed under the Intergovernmental Agreement on the Environment.

16.7 Regulation-making powers (clause 156)

Under clause 156, Regulations may be made for the purposes of this Bill, including those prescribing penalties for offences where the penalty is currently $1000 or less for an individual. This power will be used, for example, to establish offences punishable by on-the-spot fines. (Please see *13.2 - What are infringement notices?* above for more information on this point.)

Regulations may also be made for other matters, including:

- the sale of petrol;
- specified pollutants, articles or things; and
- ambient environmental standards.

In addition, this clause allows for Regulations to add or remove an activity from Schedule 1 to the Bill. This power has been included to enable activities to be added to or removed from this list in a timely manner where they emerge as, or diminish in, posing significant environmental risks.

Public scrutiny of the exercise of this power has not been compromised as Regulations amending the Schedule are disallowable instruments which will be tabled in the Legislative Assembly.

Schedule 1 Activities requiring an environmental authorisation

17.1 Interpretation

Terms used only in this Schedule are defined here.

17.2 What are scheduled activities?

Scheduled activities are activities which, due to their potential to cause significant environmental harm, should be subject to authorisations or environmental protection agreements. Some activities in the Schedule are not currently performed in the ACT, however, it is reasonably foreseeable they could be established here. Therefore, in order to provide certainty to business, they have been included in the Schedule.

17.2.1 Class A activities

Activities included in this list must have environmental authorisations. (Please see *8.3 - When are environmental authorisations required?* for more information on this point.)

17.2.2 Class B activities

Activities listed here must have an environmental authorisation unless an environmental protection agreement is in place. (Please see *8.3 - When are environmental authorisations required?* for more information on this point.)

Schedule 2 Specific offences

18.1 Interpretation

Terms used only in this Schedule are defined here.

18.2 Offences relating to articles that emit noise (Part II)

This Part makes it an offence to sell certain articles which do not comply with relevant noise levels. These provisions re-enact section 9 of the *Noise Control Act 1988*. This Act is to be repealed by the Environment Protection (Consequential Provisions) Bill.

18.3 Offences relating to fuel-burning equipment (Part III)

This Part establishes offences designed to ensure that slow combustion heaters and other solid fuel-burning equipment comply with relevant guidelines on emissions and other environmental matters. These provisions re-enact sections 24A and 24B of the *Air Pollution Act 1984*. This Act is to be repealed by the Environment Protection (Consequential Provisions) Bill.

18.4 Offences relating to petrol (Part IV)

This Part establishes offences designed to ensure that unleaded petrol is correctly identified, stored, sold and used. These provisions re-enact sections 42A to 42EA inclusive of the *Air Pollution Act 1984*. This Act is to be repealed by the Environment Protection (Consequential Provisions) Bill.

18.5 Summary proceedings for indictable offences (Part V)

This Part provides that all offences under this Schedule are to be dealt with in the Magistrates Court, reflecting the relatively low level of penalties applying.