

**ENVIRONMENT PROTECTION BILL 1997**

**SUPPLEMENTARY EXPLANATORY MEMORANDUM**

**AMENDMENTS TO BE MOVED BY THE MINISTER FOR THE  
ENVIRONMENT, LAND AND PLANNING**

Circulated by authority of

**Gary Humphries MLA**  
**Minister for the Environment, Land and Planning**

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***Amendment 1.***

**Clause 3**

This amendment gives effect to Recommendation 3 of the Standing Committee on Planning and Environment Report No. 35 to re-draft the objects of the Bill. However, the object of effective integration of economic, social and environmental considerations in decision making has been reinstated by the Government as well as the object of acknowledging environmental needs in economic and social decision making.

***Amendment 2.***

**Clause 3**

This amendment is consequential on Amendment 1 to correct a cross reference.

***Amendment 3.***

**Clause 4**

This amendment has been initiated by the Government to more correctly identify the area defined as 'an area of high conservation value'.

***Amendment 4.***

**Clause 4**

This amendment inserts a definition of 'newspaper' which helps give effect to Recommendations 13, 14, 15, 16, 17, 22 & 42 of the Standing Committee on Planning and Environment Report No. 35 which requires that certain events are publicly notified in the *Gazette* and in a newspaper.

***Amendment 5.***

**Clause 8**

This amendment provides that the Act does not apply to environmental harm resulting from, or alleged to result solely from design and siting of human made structures.

***Amendment 6.***

**Clause 18**

This amendment deletes clause 18 giving effect to Recommendation 10 of the Standing Committee on Planning and Environment Report No. 35 by deleting the legal requirement that authorised officers exercise 'minimum disruption' when exercising entry and search powers.

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***Amendment 7.***

**Clause 19**

This amendment has been initiated by the Government to make clear that the Territory remains vicariously liable for the acts and omissions of its employees even when those employees are protected from personal liability. This amendment is designed to clarify the original policy intention of the clause.

***Amendment 8.***

**Clause 20**

This amendment helps to give effect to Recommendation 18 of the Standing Committee on Planning and Environment Report No. 35 that fees should not be charged to inspect documents. In addition, this amendment makes this clause subject to the protections provided in the new clause 21A (see Amendment 11 below).

***Amendment 9.***

**Clause 20**

This amendment gives part effect to Recommendation 12 of the Standing Committee on Planning and Environment Report No. 35 by including accredited codes of practice in the list of documents available for public inspection. The other aspects of Recommendation 12 are dealt with in the following amendment.

***Amendment 10.***

**Clause 20**

Paragraphs (f) and (fb) of this amendment give effect to the aspects of Recommendation 12 of the Standing Committee on Planning and Environment Report No. 35 not dealt with in the previous amendment - results of reviews of environmental authorisations and environmental audit reports.

Paragraph (fa) is a Government initiated amendment which replaces the previous paragraph (f). This amendment clarifies the drafting of this provision and does not reflect a change in policy.

***Amendment 11.***

**Clause 20**

This amendment is consequential on Amendment 8 above as this clause is no longer necessary as inspection fees will no longer be charged in accordance with Recommendation 18 of the Standing Committee on Planning and Environment Report No. 35.

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***Amendment 12.***

**Proposed Clause 21A**

This amendment gives effect to Recommendation 20 of the Standing Committee on Planning and Environment Report No. 35. The proposed amendment also requires that the person must apply for exclusion of material from public inspection at the time of providing the document to the EMA.

***Amendment 13.***

**Clause 22**

This amendment gives effect to Recommendation 11 of the Standing Committee on Planning and Environment Report No. 35. While the wording is slightly different from that proposed by the Committee, the amendment achieves the effect desired by the Committee that, in determining whether a person has complied with the general environmental duty, primacy is given to consideration of environmental harm.

***Amendment 14.***

**Clause 25**

This amendment gives effect to Recommendation 19 of the Standing Committee on Planning and Environment Report No. 35 that the EMA be bound by the legislation to provide copies of all draft environment protection policies to the Conservation Council of the South East Region and NSW. The same requirement will apply to the Canberra Business Council.

***Amendment 15.***

**Clause 26**

This amendment gives effect to Recommendation 17 of the Standing Committee on Planning and Environment Report No. 35 that draft environment protection policies be notified in the newspaper as well as the *Gazette*.

***Amendment 16.***

**Clause 28**

This Government initiated amendment requires that notices be published both in the *Gazette* and newspaper.

***Amendment 17.***

**Clause 31**

This amendment gives effect to Recommendation 24 of the Standing Committee on Planning and Environment Report No. 35 that public consultation be required in the development of codes of practice.

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***Amendment 18.***

**Proposed Clause 31A**

This amendment gives effect to Recommendation 16 of the Standing Committee on Planning and Environment Report No. 35 that accreditation of codes of practice be notified in the newspaper as well as the *Gazette*.

***Amendment 19.***

**Clause 33**

This amendment gives effect to Recommendation 30 of the Standing Committee on Planning and Environment Report No. 35 that the focus of using economic instruments should be to further the objects of the Act rather than to achieve cost effectiveness.

***Amendment 20.***

**Proposed Clause 39A**

This amendment gives effect to Recommendation 15 of the Standing Committee on Planning and Environment Report No. 35 that finalised environmental protection agreements should be publicly notified in the *Gazette* and newspaper.

***Amendment 21.***

**Clause 43(2)**

This amendment addresses the views of the Committee as expressed in Recommendation 50 of the Standing Committee on Planning and Environment Report No. 35. While this amendment does not omit this clause as proposed by the Recommendation, it broadens the matters to which the Court shall have regard in setting the penalty for offences of the type to which this clause applies. That is, not only will the amount of exceedance be considered as the clause currently stands, but all the circumstances relevant to the commission of the offence, including the conditions of the environmental authorisation, will be considered.

***Amendment 22.***

**Proposed Clause 45A**

This amendment gives effect to Recommendation 22 of the Standing Committee on Planning and Environment Report No. 35, with a minor modification. The Recommendation proposed the addition of an extra step in the process of applying for an environmental authorisation, allowing public input to the development phase as well as scope to make an application for review of a decision by the Environment Management Authority to grant an authorisation.

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This revised process will apply to all applications for environmental authorisations, unless the application relates to an activity identified by the Minister in a disallowable instrument. This provision, which modifies the Recommendation, is intended to allow the Minister to exempt the more routine applications from the more complex process established by clause 45A.

***Amendment 23.***

**Clause 46**

This amendment gives effect to Recommendation 23 of the Standing Committee on Planning and Environment Report No. 35 is consequential on Amendment 22.

***Amendment 24.***

**Clause 47**

This amendment gives effect to Recommendation 13 of the Standing Committee on Planning and Environment Report No. 35 that the granting of environmental authorisations should be publicly notified in the *Gazette* and newspaper.

***Amendment 25.***

**Proposed Clause 52A**

This amendment gives effect to Recommendation 29 of the Standing Committee on Planning and Environment Report No. 35 that refund of fees paid in advance be possible where an environmental authorisation is surrendered voluntarily.

***Amendment 26.***

**Proposed Clause 54A**

This amendment gives effect to Recommendation 14 of the Standing Committee on Planning and Environment Report No. 35 that the results of reviews of environmental authorisations be publicly notified in the *Gazette* and newspaper.

***Amendment 27.***

**Clause 62**

This amendment gives effect to Recommendation 27 of the Standing Committee on Planning and Environment Report No. 35 that the time period for notifying the EMA of ceasing to conduct an activity be extended from 5 to 10 days.

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***Amendment 28.***

**Clause 67**

This amendment, in conjunction with the following two amendments, has been initiated by the Government because paragraph 67(4)(d) is not necessary.

***Amendment 29.***

**Clause 67**

This amendment, in conjunction with the previous and following amendments, has been initiated by the Government because paragraph 67(4)(d) is not necessary.

***Amendment 30.***

**Clause 67**

This amendment, in conjunction with the previous two amendments, has been initiated by the Government because paragraph 67(4)(d) is not necessary.

***Amendment 31.***

**Clause 87**

This amendment gives effect to Recommendation 5 of the Standing Committee on Planning and Environment Report No. 35, and is consequential on amendment 33.

***Amendment 32.***

**Clause 87**

This amendment gives effect to Recommendation 5 of the Standing Committee on Planning and Environment Report No. 35, and is consequential on amendment 33.

***Amendment 33.***

**Proposed Clause 87A**

This amendment gives effect to Recommendation 5 of the Standing Committee on Planning and Environment Report No. 35 that the powers of the Minister to direct the EMA should be more clearly defined, transparent and accountable and that the Minister may not direct the EMA in relation to enforcement or investigation under the Act.

***Amendment 34.***

**Clause 93**

This amendment gives effect to Recommendations 6, 7 & 8 of the Standing Committee on Planning and Environment Report No. 35 to redefine the powers authorised officers have in respect of different types of inspections

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(routine inspections; routine inspections when circumstances of seriousness and urgency arise; and inspections where search warrants have been granted;) with the modification that an authorised officer should also be able to examine, as part of a routine inspection, records of a routine nature directly related to an activity that has the potential to cause environmental harm.

***Amendment 35.***

**Clause 97**

This amendment gives effect to Recommendation 9 of the Standing Committee on Planning and Environment Report No. 35 with the modification that it should not be an absolute requirement for authorised officers to direct an employee to take action before taking the action themselves. This is because an employee or other person connected with the activity may not be immediately available in some situations.

***Amendment 36.***

**Clause 100**

This amendment has been initiated by the Government to correct a minor error.

***Amendment 37.***

**Clause 100**

This amendment has been initiated by the Government to correct a minor error.

***Amendment 38.***

**Clause 101**

This amendment gives effect to Recommendation 42 of the Standing Committee on Planning and Environment Report No. 35 that the EMA must also notify the proposed disposal of a thing seized in relation to an offence in the newspaper inviting submissions from people who have a legal or equitable interest as to why the thing should not be disposed of. This is designed to protect the interests of third parties, such as financiers.

***Amendment 39.***

**Clause 101**

This amendment is consequential on the previous amendment and helps to give effect to Recommendation 43 of the Standing Committee on Planning and Environment Report No. 35.



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***Amendment 40.***

**Clause 101**

This amendment, in conjunction with Amendments 38 & 39, gives effect to Recommendation 43 of the Standing Committee on Planning and Environment Report No. 35. This amendment increases the period between notification of intention to dispose of an item and actual disposal from 2 to 20 working days.

***Amendment 41.***

**Clause 101**

This amendment is consequential on Amendment 38 and helps to give effect to Recommendation 43 of the Standing Committee on Planning and Environment Report No. 35.

***Amendment 42.***

**Clause 116**

This amendment gives effect to Recommendation 46 of the Standing Committee on Planning and Environment Report No. 35 that a breach of the Act or an environmental authorisation should be sufficient grounds for an environment protection order to be issued.

***Amendment 43.***

**Clause 118**

This amendment gives effect to Recommendation 47 of the Standing Committee on Planning and Environment Report No. 35, with a minor modification. The Recommendation proposed that eligibility to bring an application for an injunctive order in the Supreme Court should be broadened. The only test proposed by the Recommendation was that the person seeking to make an application had first requested the Environment Management Authority to do so, and the Authority had failed to do so.

The amendment gives effect to the Recommendation, with the following two modifications:

- the applicant must have requested the Authority to take action and the Authority has failed to advise in writing, within a reasonable time, that it has taken action of any kind within its powers, provided that action is appropriate; and
- the Court must be satisfied that it is in the public interest that the proceeding should be brought.

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***Amendment 44.***

**Proposed clause 120A**

This amendment gives effect to Recommendation 48 of the Standing Committee on Planning and Environment Report No. 35 that, when considering costs, the Court may take into account the nature of the public interest raised by the application.

***Amendment 45.***

**Subclause 125(1)**

This amendment, in conjunction with Amendment 53, has been initiated by the Government to specify who may make application to the Administrative Appeals Tribunal for a review of a decision.

***Amendment 46.***

**Subclause 125(1)(a)**

This amendment gives effect to Recommendation 21 of the Standing Committee on Planning and Environment Report No. 35 and is consequential on Amendment 12. It provides a right of review against a decision by the EMA to exclude or not to exclude certain information from public inspection.

***Amendment 47.***

**Subclause 125(1)(h)**

This amendment gives effect to Recommendation 54 of the Standing Committee on Planning and Environment Report No. 35 to delete this right of review as it is unnecessary as an appeal right is already provided for under section 123(1)(f).

***Amendment 48.***

**Subclause 125(1)(w)**

This amendment gives effect to Recommendation 53 of the Standing Committee on Planning and Environment Report No. 35 to correct a minor error.

***Amendment 49.***

**Subclause 125(1)(ze)**

This amendment gives effect to Recommendation 54 of the Standing Committee on Planning and Environment Report No. 35 to delete this right of review as it is unnecessary as an appeal right is already provided for under section 123(1)(f).

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***Amendment 50.***

**Subclause 125(2)(a)**

This amendment has been initiated by the Government as it is consequential on Amendment 49.

***Amendment 51.***

**Clause 125(2)(b)**

This amendment has been initiated by the Government as it is consequential on Amendment 47.

***Amendment 52.***

**Clause 125(2)(b)**

This amendment has been initiated by the Government as it is consequential on Amendment 49.

***Amendment 53.***

**Subclause 125(5)**

This amendment, in conjunction with Amendment 46, has been initiated by the Government to specify who may make application to the Administrative Appeals Tribunal for a review of a decision.

***Amendment 54.***

**Subclause 136(3)**

This amendment gives effect to a Government initiated change. It deletes the references to due diligence in this clause, as all matters relating to a due diligence defence are dealt with under clause 143.

***Amendment 55.***

**Subclause 137(2)(b)**

This amendment gives effect to Recommendation 52 of the Standing Committee on Planning and Environment Report No. 35. It amends a typographical error, to align with the Government position that each of the defences should be available as stand-alone defences for officers of corporations in this situation.

***Amendment 56.***

**Subclause 137(4)**

This amendment gives effect to Recommendation 41 of the Standing Committee on Planning and Environment Report No. 35, with minor modifications to drafting. It amends the definition of prescribed officer to more closely identify which persons within a company will be deemed liable.

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***Amendment 57.***

**Clause 140(1)**

This amendment, in conjunction with the following amendment, gives effect to Recommendation 36 of the Standing Committee on Planning and Environment Report No. 35. It clarifies that persons, whether individuals or corporations, are required to give information as directed by the Environment Management Authority, even if by doing so they may incriminate themselves.

***Amendment 58.***

**Clause 140(2)**

This amendment, in conjunction with the previous amendment, gives effect to Recommendation 36 of the Standing Committee on Planning and Environment Report No. 35. It amends the provision to give protection from self incrimination to individuals only, and not to corporations.

***Amendment 59.***

**Clause 140(2)**

This amendment gives effect to a Government initiated change. It narrows the protection available to individuals to information specifically required by the Environment Management Authority, and not simply to information which individuals may wish to provide to the Authority.

***Amendment 60.***

**Clause 143(2)**

This amendment gives effect to Recommendation 51 of the Standing Committee on Planning and Environment Report No. 35, and is the result of a review of the due diligence provisions. The main changes to the clause are:

- the Courts now have the discretion to consider the provisions, as they are intended to be illustrative examples rather than mandatory considerations;
- a further category has been added to the list, that is, corporations have been identified separately from directors of corporations. This is to address more clearly the standards of due diligence required of such bodies; and
- the three broad matters in regard to which all persons should show due diligence have been more clearly standardised across all three categories. That is, this Act and other environmental laws, environmental management systems, and appropriate environmental standards, have all been addressed in each of the three categories.

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***Amendment 61.***

**Proposed Clause 157**

This amendment is Government initiated giving effect to the Minister's undertaking that the operation of this legislation be reviewed two years after the date of commencement.

***Amendment 62.***

**Schedule 1, Paragraph 2(c)**

This amendment, in conjunction with the subsequent amendment, gives effect to Recommendation 31 of the Standing Committee on Planning and Environment Report No. 35, by separating crematoriums from commercial incineration activities.

***Amendment 63.***

**Schedule 1, proposed paragraph 2(ca)**

This amendment, in conjunction with the previous amendment, gives effect to Recommendation 31 of the Standing Committee on Planning and Environment Report No. 35 to separate crematoriums from commercial incineration activities.

***Amendment 64.***

**Schedule 1, proposed paragraph 2(da)**

This amendment has been initiated by the Government to include transport of hazardous wastes in the list of Class A activities. A draft National Environment Protection Measure on this activity is currently under preparation.

***Amendment 65.***

**Schedule 1, proposed paragraph 2(t)**

This amendment, in conjunction with the following amendment, gives effect to Recommendation 32 of the Standing Committee on Planning and Environment Report No. 35 that storage and production of petroleum should be a Class A activity rather than a Class B activity.

***Amendment 66.***

**Schedule 1, paragraph 3(h)**

This amendment, in conjunction with the previous amendment, gives effect to Recommendation 32 of the Standing Committee on Planning and Environment Report No. 35 that storage and production of petroleum should be a Class A activity rather than a Class B activity.

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***Amendment 67.***

**Schedule 1, paragraph 3(k)**

This amendment has been initiated by the Government to clarify that 'commercial' collection of waste is a Class B activity .

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**SPECIAL NOTE**

In response to Recommendation 38 of the Standing Committee on Planning and Environment Report No. 35, it is noted that references to 'mental state' in paragraphs 15.2, 15.3, 15.13, 15.13.2 and 15.13.3 of the Explanatory Memorandum for the Environment Protection Bill 1997 should be read as references to 'intent or consciousness'.