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LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

Nature Conservation (Minor Public Works) Amendment Bill 2017

EXPLANATORY STATEMENT

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EXPLANATORY STATEMENT

This explanatory statement relates to the *Nature Conservation (Minor Public Works) Amendment Bill 2017* (the bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Background

The bill amends the *Nature Conservation Act 2014* (NC Act), the *Planning and Development Act 2007* (P&D Act) and its associated regulation, the *Planning and Development Regulation 2008* (the P&D Reg).

The bill proposes amendments to processes to obtain planning approvals involving minor public works undertaken by, or on behalf of, the Territory in reserves. The bill removes red-tape and streamlines the planning approvals process, while maintaining environmental impact safeguards through a code of practice made by the conservator of flora and fauna (the conservator).

Currently, to comply with the requirements of the P&D Act, the Parks and Conservation Service (PCS) of the ACT Government (the land custodian of wilderness areas, national parks and nature reserves) must submit a development application (DA) to the planning and land authority whenever it needs to undertake minor works in reserves. Under s 138AA of the P&D Act, PCS must request that the conservator prepare an Environmental Significance Opinion (ESO) stating that the minor works will not have a significant adverse environmental impact. If appropriate, the conservator will then prepare an ESO, which may include conditions on how the works are to be undertaken. The granting of an ESO removes a development proposal from the impact track to be assessed in the merit track on the grounds that it is not likely to have a significant adverse environmental impact. Once out of the impact track, PCS' works proposal may have the benefit of the public works exemption from requiring development approval in s 1.90 of schedule 1 of the P&D Reg.

It has become apparent that this planning approvals process is unnecessarily lengthy and costly compared to the minor nature of the public works that are being considered. The requirement to apply for, and have the conservator prepare, an ESO, is a costly exercise in both administrative and financial aspects.

The public works in reserves undertaken by PCS are part of their daily core business and the requirement to lodge a DA and have the conservator prepare an ESO is an administrative barrier to efficient operations. Some examples of the type of minor public works that fall into this category are maintenance of a road or car park, maintenance of fire trails and the installation or maintenance of park furniture. The delay and expense of the DA impact assessment track is not justified because of the minor nature of the works that are being carried out and the low likelihood of causing a significant adverse environmental impact.

Overview

The bill proposes a more streamlined approach for Territory entities, such as PCS, or groups working on behalf of the Territory, to carry out minor works in reserves.

Nature Conservation Act Amendments

Specifically, clause 5 of the bill amends the Nature Conservation Act to allow the conservator to prepare a *minor public works code* (the code) for works carried out by or for the Territory in a reserve. The code will, in effect, be a 'standing ESO' and will set out the standards and practices for carrying out minor public works in a reserve to ensure the works are not likely to have a significant adverse environmental impact. The code may also provide a set of circumstances in which works will not have a significant impact, as well as provide conditions to apply to works to ensure that they do not have a significant impact. The code is a disallowable instrument, reflecting the desire to have Assembly scrutiny of the environmental impact assessment process and the need to ensure certainty and transparency around the types of works covered, and the standards, practices, circumstances and conditions that must be met.

Clause 4 of the bill inserts a new general exception to offences into Chapter 9 of the NC Act which contains offences for actions in reserves. Clause 4 makes it an exception to an offence in a reserve where the conduct constituting the offence is minor public works carried out in accordance with the code.

Planning and Development Act and Regulation Amendments

The P&D Act and P&D Reg are amended to remove minor public works covered by the code from the impact track and to make this type of work exempt from requiring development approval.

Works in public reserves are currently in the impact track. Section 123 of the P&D Act provides that the impact track applies to a development proposal if it is of a kind mentioned in Schedule 4. Item 3 of Part 4.3 of Schedule 4 of the P&D Act lists a 'proposal for development on land reserved under s 315 of the P&D Act for the purpose of a wilderness area, national park, nature reserve or special purpose

reserve, unless the conservator produces an ESO that the proposal is not likely to have a significant adverse environmental impact.'

Specifically, clause 1.2 of schedule 1 of the bill amends item 3 of part 4.3 of schedule 4. This clause has the effect that where works are undertaken in accordance with the code, they will be removed from being assessable in the impact track and will not need to complete an environmental impact statement or ESO. These minor public works will no longer trigger s 123 of the P&D Act due to the exception inserted into schedule 4 of the Act by this clause.

The code will be a 'standing ESO' to the effect that works completed in accordance with it will be deemed to be not likely to have a significant adverse environmental impact. The amendments will remove the need to obtain an ESO for every particular instance of works being carried out, hence streamlining the planning approvals process.

Section 133 of the P&D Act defines 'exempt development' as development that is exempt from requiring approval under a regulation. Section 1.90 of schedule 1 of the P&D Reg provides that a designated development for public works carried out by or for the Territory that meets specific criteria is exempt development.

However, section 133(2)(a) of the P&D Act explicitly states that developments ostensibly exempt under the P&D Reg are not exempt if the development application for the proposal is assessable in the impact track. This is why PCS cannot currently access the DA exemption in s 1.90 of schedule 1 of the P&D Reg for its minor public works undertaken in reserves.

Clause 1.4 of schedule 1 of the bill amends exempt development types in schedule 1 of the P&D Reg. The clause has the effect that where works comply with the code, they will also be considered as exempt development under s 133 of the P&D Act and not require development approval.

The restriction in s 133(2)(a) of the P&D Act outlined above is no longer applicable in these circumstances as a consequence of this type of work no longer being assessable in the impact track.

The code is limited in its application to minor public works carried out by or for the Territory in a reserve. Works that are not minor, not undertaken by the Territory, or are inconsistent with the code, will continue to be assessed in the impact track under the P&D Act, including the need for an environmental impact assessment or an ESO prepared by the conservator.

Consequential amendments are also made to definitions in the P&D Act and P&D Reg to support the amendments outlined above. Specifically, a new definition of

minor public works is inserted into schedule 4 of the P&D Act. The new definition of *minor public works* in clause 1.1 of schedule 1 of the bill has been inserted specifically to set a threshold of works that may be completed under the code. These elements reflect the current core business of PCS and are considered to be minor works that have a low likelihood for causing a significant environmental impact by their very nature.

Human Rights

It could be argued that the bill engages the right to a fair trial (s 21 of the *Human Rights Act 2004*) and participation in public life (s 17). It could also be argued that the bill engages the cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities in s 27 of the Human Rights Act.

The engagement with the Human Rights Act is on the basis that the proposed changes relate to the determination of whether the impact track or other provisions of the P&D Act apply to proposed works. In particular, the proposed code will determine whether works are exempt from requiring development approval and therefore not subject to development application public notification or third party ACT Civil and Administrative Tribunal merit review of any approval or rejection decision.

To the extent that the bill does engage human rights, it is suggested that the proposals are justified and proportionate in the circumstances, consistent with s 28 of the Human Rights Act.

The proposals are a more efficient approach compared to, rather than a departure from, current requirements. Currently, minor public works in nature reserves are subject to a case by case assessment by the conservator, and if the circumstances warrant, an ESO is issued to the effect that the proposal will not have a significant environmental impact. This has the result that the proposal is removed from impact track assessment. The proposal will also be exempt from requiring development approval through the public works exemption in the P&D Reg.

Development proposals involving minor public works in a reserve that comply with the code will have the same treatment as development proposals now that receive an ESO from the conservator and fall under the public works development approval exemption. That is, they will not be assessable in the impact track nor require development approval.

It follows that the bill does not impose a material change to the right to a fair trial and participation in public life as activities will continue to be treated the same and have the same planning mechanisms apply to them. The only change is that rather than an ESO being prepared for each circumstance, a ‘standing ESO’ in the form of a code will be made to pre-define the circumstances where minor public works will be considered to not have a significant adverse environmental impact.

Further, it could be seen as an increase to scrutiny and transparency in planning decision-making and environmental impact assessment as the requirements that minor public works must meet in order to fall under the code (i.e. the works will not cause a significant adverse environmental impact) are made public and subject to Assembly Scrutiny through a disallowable instrument.

In relation to appeal rights, the introduction of the code-making power reflects the current position for the issuing of an ESO under the P&D Act. As with an ESO, there are no ACAT merits review appeal rights associated with the approval of the code by the conservator because the code will not directly impact the rights of, or impose obligations on, an individual. However, there may be appeal rights available under the *Administrative Decisions (Judicial Review) Act 1989* and under the inherent jurisdiction of the Supreme Court.

Finally, the bill has the potential to engage the cultural rights of Aboriginal and Torres Strait Islander people by having works impact on cultural sites (see s 27 of the Human Rights Act).

It is important to note here that the provisions of the bill do not override the important protections of Aboriginal places and objects in the *Heritage Act 2004*. The offence of damaging an Aboriginal place or object and a requirement to report the discovery of an Aboriginal place or object will continue to apply. Where an Aboriginal place or object is reported, there is a requirement under s 53 of the Heritage Act for the Heritage Council to consult with each representative Aboriginal organisation (RAO) in assessing whether the place or object has heritage significance.

Development that may impact on Aboriginal heritage sites that are on the ACT Heritage Register will continue to be required to be separately referred to the Heritage Council for an ESO under schedule 4 of the P&D Act. As a matter of policy, the Heritage Council require an applicant for works that may impact on a registered or recorded Aboriginal place or object to consult with RAOs on the potential impacts of the works prior to obtaining Heritage Act approvals.

Works that are in contravention of the Heritage Act could not be consistent with the proposed code and as a result will be assessable in the impact track.

PCS also has protocols in place for the reporting and management of unanticipated discovery of Aboriginal places and objects to ensure that appropriate measures are taken so as not to interfere with these sites.

Scrutiny of Bills Committee Principles
The following addresses the Scrutiny of Bills Committee principles.

(a) unduly trespass on personal rights and liberties;

No rights, liberties or obligations are directly impacted by the proposed changes to legislation in this bill. The amendments interact with offence provisions in both the NC Act and the P&D Act. However, these offence provisions remain unchanged. The bill does insert an exception to an offence in the NC Act that positively protects a person who undertakes an activity that falls under a minor public works code approved by the conservator under the NC Act.

The amendments in this bill do not substantively change decision-making powers that may impact on rights or liberties. The amendments do not change the types of activities that could receive development approval or could be removed from the approvals process. While the amendments in the bill will remove certain minor public works from development assessment in the impact track and make them exempt from requiring development approval, these exemptions are already applicable to these types of activities under the current framework in the P&D Act.

The amendments in the bill merely streamline the processes for a proposal to be removed from the impact track and for becoming a type of exempt development. Under the current environmental impact assessment process in the P&D Act, a proposal can be removed from the impact track where the conservator issues an ESO stating that it will not have a significant adverse environmental impact. Under the amendments proposed in the bill, the code has the effect of a being a 'standing ESO' for minor public works in reserves that are not likely to have a significant adverse environmental impact. In this respect, only those types of activities that would have received an ESO under the current process will be covered by the code, because they are unlikely to have a significant adverse environmental impact.

In this sense, the bill does not expand the category of exempt development and does not reduce scrutiny of environmental impacts. Therefore, it does not make any substantive changes to rights or liberties and does not impose or trespass upon any person.

It is recognised that removing a development proposal from the impact track and making it exempt development will make that proposal not subject to a development assessment and approval process. It follows then that it will not be a reviewable decision and will not attract appeal rights. However, the argument is made that the amendments in the bill do not substantively change the treatment of minor public works activities that will be the subject of the code as these works already have the benefit of the development exemptions under the current planning framework.

(b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

No rights, liberties or obligations are directly impacted by the proposed changes to legislation in this bill. The bill inserts a power in the NC Act for the conservator to

make a code of practice for minor public works in reserves. The amendment provides that a new provision (s 318A) of the NC Act sets out what the code must contain and lists other matters that it may provide for. These matters are clearly set out in the NC Act in new s 318A (inserted by clause 5 of the bill). Further, the code is a disallowable instrument, ensuring scrutiny and transparency of the content of the code and the standards and conditions that it may require to be followed.

Having the broad content of the code defined in the NC Act and the code itself being a disallowable instrument ensures that legislative and administrative powers are clearly defined.

(c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

The amendments in this bill do not substantively change decision-making powers and the types of activities that could receive development approval or could be removed from the approvals process. While the amendments in the bill will remove certain minor public works from development assessment in the impact track and make them exempt from requiring development approval, these exemptions are already applicable to these types of activities under the current framework in the P&D Act.

The amendments in the bill merely streamline the processes for a proposal to be removed from the impact track and for becoming a type of exempt development. Under the current environmental impact assessment process in the P&D Act, a proposal can be removed from the impact track where the conservator issues an ESO stating that it will not have a significant adverse environmental impact. Under the amendments proposed in the bill, the code has the effect of a being a ‘standing ESO’ for minor public works in reserves that are not likely to have a significant adverse environmental impact. In this respect, only those types of activities that would have received an ESO under the current process will be covered by the code, because they are unlikely to have a significant adverse environmental impact.

In this sense, the bill does not expand the category of exempt development and does not reduce scrutiny of environmental impacts. Therefore, it does not make any substantive changes to rights, impacts or obligations based on non-reviewable decisions.

It is recognised that removing a development proposal from the impact track and making it exempt development will make that proposal not subject to a development assessment and approval process. It follows then that it will not be a reviewable decision and will not attract appeal rights. However, the argument is made that the amendments in the bill do not substantively change the treatment of minor public works activities that will be the subject of the code as these works already have the benefit of the development exemptions under the current planning framework.

(d) inappropriately delegate legislative powers; or

The amendments in the bill do not inappropriately delegate legislative powers. The amendments give the conservator the power to make a code of practice for minor public works in a reserve that has the effect of removing the proposal from the impact track and making it exempt development.

It is appropriate for the conservator to be given this legislative power as the conservator already has a similar power in a different form under the P&D Act, and the power to make the code relates only to minor public works.

The power to make the code is in effect the conservator issuing a standing ESO for certain activities and is a more efficient way of considering minor development applications than preparing an ESO for each individual activity. The conservator currently has the power to issue ESOs on a case by case basis, and the amendments will allow the conservator to prepare a code that is in effect a standing ESO for a class of activities that are all considered to not be likely to cause a significant adverse environmental impact.

The power to make a code that exempts proposals based on a set of pre-determined criteria is substantively the same as determining those proposals on an individual basis on the same criteria. The outcome in all circumstances is that the proposal can only be undertaken as long as it does not have a significant adverse environmental impact.

(e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

The amendments do not insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The amendments change the process for minor public works being allowed to take place in a reserve where it does not have a significant adverse environmental impact.

Under the current framework, an ESO is issued by the conservator which is a notifiable instrument. The ESO would be placed on the Legislation Register for the public to see the conservator's assessment of the proposal and any conditions on the approval.

Under the provisions of the bill, the code is made a disallowable instrument to ensure that there is appropriate Assembly scrutiny of its content and application. This increases the level of parliamentary scrutiny compared to the ESO process. The conservator's assessment of the environmental impacts of works in reserves is now open to increased public scrutiny than under the current regulatory framework.

This level of scrutiny is appropriate to the scope of works that can be performed under the code. The code is by definition a minor public works code, dealing with

minor public works that themselves have a low likelihood of causing a significant adverse environmental impact.

Costs and benefits

The amendments are not likely to impose appreciable costs on the community. The amendments do not operate to the disadvantage of anyone by adversely affecting the person's rights, or imposing liabilities on the person.

There are no significant financial implications involved in implementing the amendments in the bill. The amendments in fact have a regulatory benefit for Territory entities, such as the Parks and Conservation Service, as it will reduce red-tape and streamline the development approvals process. This will lead to cost savings and reduce the administrative resources burden for both PCS and the conservator.

The efficiencies gained through the introduction of a code for minor public works in reserves does not mean a reduction in the assessment of environmental impacts. The environmental impacts of a proposal must be assessed against a pre-determined set of standards outlined in the code. If the proposal falls within the scope of the code, then it is because the conservator has determined that that type of activity, undertaken in accordance with the requirements of the code, is not likely to have a significant adverse environmental impact. Therefore, the assessment of environmental impacts is entrenched in the process implemented by the amendments. Offence provisions under the NC Act and the P&D Act will act as a deterrent to parties seeking to undertake activities that do not fall under the scope of the code.

There is a final benefit of improved scrutiny transparency around the circumstances and conditions in which minor public works will fall under the code and become exempt development and removed from impact track assessment. Having these circumstances and conditions in a disallowable instrument that is subject to Assembly scrutiny and disallowance opens the conservator's assessment of the environmental impacts of works in reserves to increased public scrutiny.

Outline of Provisions

Clause 1 Name of Act

This clause names the Act as the *Nature Conservation (Minor Public Works) Amendment Act 2017*.

Clause 2 Commencement

This clause provides that the Act commences on the day after its notification day.

Clause 3 Legislation amended

This clause lists the Acts and Regulation amended by the Act as the *Nature Conservation Act 2014,* the *Planning and Development Act 2007* and the *Planning and Development Regulation 2008.*

Clause 4 Chapter 9 exceptions New section 252 (2) (a) (iv)

This clause creates an additional exception to an offence listed in chapter 9 of the NC Act. Chapter 9 contains offences related to reserves and chapter 9 exceptions provide that these offences do not apply to a person in certain circumstances, such as if the conduct was undertaken in accordance with a nature conservation licence or development approval.

This amendment makes it an exception to a Chapter 9 offence if the conduct constituting the offence was undertaken in the course of carrying out minor public works in accordance with an approved minor public works code (made under clause 5 below).

Clause 5 New chapter 13A

This clause inserts the new chapter 13A into the NC Act. Chapter 13A consists of new s 318A, which gives the conservator of flora and fauna the power to approve a minor public works code of practice. This code must set out the standards and practices for carrying out minor public works to ensure that the works are not likely to have a significant adverse environmental impact.

A code may also include circumstances where works are not likely to have a significant adverse environmental impact or conditions to apply to stated public works to ensure that they do not have a significant adverse environmental impact.

Minor public works is defined as having the same meaning as in schedule 4, section 4.1 of the P&D Act. This definition is inserted by clause [1.1] of schedule 1 of the bill below.

Section 318A also provides that a minor public works code is a disallowable instrument, and that it can apply, adopt or incorporate a law or instrument from time to time.

A code must be reviewed at least once every 5 years after it is made.

The purpose of inserting the ability to make minor public works codes is so that if minor public works are carried out in accordance with a code then they are removed from the impact track under the P&D Act and are exempt from requiring development approval, as a result of clauses 1.2 and 1.4 of schedule 1 of the bill.

It also means that the conduct constituting the works is not captured by the offences related to reserves if it is done in accordance with the code, as a result of clause 4 above.

Schedule 1 Other amendments

Part 1.1 Planning and Development Act 2007

[1.1] Schedule 4, section 4.1, new definitions

This clause inserts a definition of 'minor public works' into schedule 4 of the P&D Act. The definition is inserted specifically for the purposes of the code and acts as a threshold for types of works considered to be minor. The works by their very nature are unlikely to have a significant adverse environmental impact. The types of works included in the definition are the maintenance of existing roads and carparks, maintenance of existing fire trails and the installation and maintenance of park furniture and fencing. These minor public works form the core business of PCS operations.

[1.2] Schedule 4, part 4.3, item 3, column 2

This clause amends one of the types of development listed in schedule 4, part 4.3 of the P&D Act so that minor public works in compliance with a code do not require an EIS and do not trigger an assessment in the impact track under s 123 of the P&D Act.

Types of development that are in the impact track because they require an EIS are listed in part 4.3 of schedule 4 of the P&D Act. This currently includes development in a reserve unless the conservator has issued an ESO that the works are unlikely to have a significant adverse environmental impact. This amendment substitutes a new item 3 into part 4.3 of schedule 4 to the effect an EIS is required for development in a reserve unless the conservator has issued an ESO or the proposal is for minor public

works undertaken in accordance with a minor public works code approved by the conservator under the NC Act.

[1.3] Dictionary, new definitions

This clause inserts definitions of *minor public works* and *reserve* into the dictionary of the P&D Act.

Minor public works is defined as having the same meaning as in schedule 4, section 4.1, as inserted by clause [1.1] above.

Reserve is defined as having the same meaning as in section 169 of the NC Act.

Part 1.2 Planning and Development Regulation 2008

[1.4] Schedule 1, new section 1.90 (1) (a) (iii)

This clause adds minor public works carried out in accordance with a minor public works code to schedule 1, section 1.90 of the P&D Reg. The effect of this addition is that these works are considered as exempt development for the purposes of the P&D Act (see s 133 P&D Act). Section 1.90 of the P&D Ref contains existing exemptions from requiring development approval for public works carried out by or on behalf of the Territory.

This amendment means that development approval is not required for minor public works carried out in a reserve in accordance with a minor public works code approved by the conservator under the NC Act.

[1.5] Schedule 1, section 1.90 (2), new definition of *minor public works*

This clause defines *minor public works* as having the same meaning as section 4.1 of schedule 4 of the P&D Act, as inserted by clause [1.1] above.

[1.6] Schedule 1, section 1.90 (2), new definition of *reserve*

This clause inserts a definition of *reserve* into section 1.90 of schedule 1 of the P&D Reg. It is defined as having the same meaning as in s 169 of the NC Act. This is required because this term is now used in the P&D Reg as a result of clause 1.4 above.