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

**PLANNING AND ENVIRONMENT
LEGISLATION AMENDMENT BILL 2019**

EXPLANATORY STATEMENT

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PLANNING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2019

Introduction

This explanatory statement relates to the Planning and Environment Legislation Amendment Bill 2019 (the Bill) as presented to the Legislative Assembly. It has been prepared 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.

This explanatory statement must be read in conjunction with the Bill. It is not, and is not intended to be, a comprehensive description of the Bill. What is written 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 forms an important part of maintaining and enhancing the standard of ACT environment, planning and energy law. The Bill is an omnibus bill to enable minor legislative amendments related to the portfolio responsibilities of the Environment, Planning and Sustainable Development Directorate (EPSDD) to be dealt with expediently and to consolidate amendments into one place, making the amendment process more accessible. The omnibus Bill process helps to ensure that the government can be agile and responsive to changing circumstances and to ensure that legislation remains clear, concise and up-to-date.

Overview of the Bill

The purpose of the Bill is to make a range of amendments to improve the operation of six pieces of legislation administered by the EPSDD, namely:

- *Commissioner for Sustainability and the Environment Act 1993*;
- *Environment Protection Act 1997*;
- *Environment Protection Regulation 2005*;
- *Nature Conservation Act 2014*;
- *Planning and Development Act 2007*; and
- *Stock Act 2005*.

Summary of amendments to the *Commissioner for Sustainability and the Environment Act 1993*

Under section 22 of the *Commissioner for Sustainability and the Environment Act 1993* (the CSEA), the Minister for Climate Change and Sustainability (the Minister) is responsible for tabling, among other things, special reports on investigations undertaken by the Commissioner for Sustainability and the Environment (the Commissioner).

Under section 21 of the CSEA, the Minister is also responsible for tabling the government response to special reports. However, there are circumstances

where the content of the special report falls under the responsibility of a different Minister (the responsible Minister). This can create confusion in the Assembly where the Minister tables the government response, as required, but then defers all details to the responsible Minister.

Section 6 of the Bill amends section 21 of the CSEA to provide that the responsible Minister is required to table the government response to a special report from the Commissioner. This amendment removes the Minister for Climate Change and Sustainability from the process of tabling the government response in situations where they are not the responsible Minister.

Summary of amendments to the *Environment Protection Act 1997*

The Bill makes two minor policy amendments to the *Environment Protection Act 1997* (the EP Act) in relation to environmental audits of site assessments of contaminated land conducted under sections 76, 91C or 91D.

In practice, the main purpose of an environmental audit is to determine the suitability of the land for a proposed or current use. The Bill amends the definition of environmental audit at section 91A (2) of the EP Act to include this as a purpose of an environmental audit.

Sections 91C (5) and 91D (5) (within division 9.5) of the EP Act specify what an auditor must have regard to in preparing an audit, however these considerations are restricted to an environmental audit conducted under division 9.5. There is no similar guidance for an environmental audit conducted under section 76 of the EP Act. The Bill corrects this by including the matters an environmental audit must consider for the purposes of division 9.2.

The Bill also makes three editorial amendments to the EP Act to: clarify the difference between assessment and remediation; and to correct that an auditor is commissioned to conduct an environmental audit on the assessment and not conduct the assessment itself.

Summary of amendments to the *Environment Protection Regulation 2005*

Section 66C of the *Environment Protection Regulation 2005* (the regulation) provides an offence for a person in charge of a development site, which is 0.3 hectares or less, for non-compliance with sediment and erosion control measures as approved by a building certifier. This could apply, for example, to a relatively small development proposal that is DA exempt.

If the relevant development is not DA exempt and requires a development application (DA), the DA approval will, in many cases, include a condition requiring sediment and erosion control measures. Section 66C of the regulation refers only to erosion control measures approved by a building

certifier and not to erosion control measures required as a DA approval condition under the *Planning and Development Act 2007* (P&D Act).

Section 66C of the regulation is intended to permit the Environment Protection Authority (EPA) to take quick enforcement action as required where sediment and erosion control requirements are not being met or maintained for a development site.

The Bill amends section 66C of the regulation to clarify that the offence also applies to sediment and erosion control measures required by a DA approval condition. This amendment will ensure that the EPA can take action irrespective of whether the sediment and erosion control requirements originated under building certifier approval or the P&D Act.

This compliance mechanism will supplement the existing ability to take compliance action for a breach of a DA approval condition under the P&D Act. EPA compliance action will be able to be taken relatively quickly potentially through an infringement notice as breach of section 66C of the regulation is a strict liability offence.

Summary of amendment to the *Nature Conservation Act 2014*

The Bill makes one minor policy amendment to the *Nature Conservation Act 2014* (the NC Act). The Parks and Conservation Service uses grazing by livestock in nature reserves as one way to manage fuel loads and biomass for its biodiversity program. This management is undertaken by issuing the owner of the livestock with a licence under section 303 of the P&D Act, with specifications that the agistment of livestock is permitted within a defined area of the nature reserve for a defined period (section 303 licence).

Section 303 licences are also issued to allow owners of livestock to graze their livestock on public unleased land. The multipurpose use of the section 303 licence has the benefit of one application process and fee for owners of livestock.

The Bill amends the NC Act to ensure that the holder of a section 303 licence is not committing any offences under the NC Act by taking the livestock into the reserve. The amendments ensure that the owner of the livestock is only exempt from offences under Chapters 6 and 9 of the NC Act, when their actions are consistent with the purpose of the section 303 licence. There is also a consequential amendment to section 261 of the NC Act to ensure the exemption provisions are consistent.

The Bill also makes two technical amendments to the NC Act:

- a) amending the NC Act to clarify that section 350 (3) (d) (ii) only applies to live animals. Under part 14.2 of the NC Act a conservation officer must issue a receipt that details how a seized animal is to be looked after. This is irrelevant where the animal seized is deceased; and

- b) amending the NC Act to adopt the definition of influential person from the *Public Unleased Land Act 2013* to ensure consistency between those Acts.

Summary of amendments to the *Planning and Development Act 2007*

The Bill makes three minor policy amendments and one technical amendment to the *Planning and Development Act 2007* (the P&D Act).

Draft plan variations

Two amendments are in relation to draft plan variations. Under section 63 of the P&D Act draft plan variations are notified and can take interim effect prior to commencement, while undergoing public consultation. The legislation provides a *defined period* for the interim effect, with the default end date for the period of interim effect being one year after notification day.

Recent amendments to the P&D Act now require draft plan variations to be referred to a committee of the Legislative Assembly. If the committee decides to prepare a report on the draft plan variation, that process may take longer than the current default end date for the period of interim effect. The Bill makes a policy amendment to section 72 (3) (b) (iv) of the P&D Act to extend the default end date for the period of interim effect to 18 months after notification day. The amendments include appropriate transitional provisions.

The Bill also makes a technical amendment to section 76 of the P&D Act to clarify the powers of the Minister in relation to draft plan variations, after referral to the committee of the Legislative Assembly. The Minister has always had the power under section 74 (2) (b) to take action under section 76 after the committee reports on the variation. This amendment inserts a reference to section 74 (2) (b) into section 76 to increase clarity and to ensure consistent treatment with the other powers of the Minister under sections 73A and 75.

ACT Land Rent Scheme

One amendment is in relation to the ACT Land Rent Scheme. The ACT Land Rent Scheme permits people on low incomes to 'rent' land from the Territory and, potentially at a later date 'purchase' or payout the value of the lease and enter into a 'normal' lease.

The Bill amends the P&D Act to provide that a decision to vary the lease by the planning and land authority is revoked, if the amount required to payout a land rent lease has not been paid within 12 months from the date of the decision.

Currently the applicant has unlimited time in which to pay the amount required. As the amount is calculated using the value of the property at the time of the decision, delay in paying the amount required can cause financial loss to the Territory.

The 12-month time limit balances the risk of financial loss to the Territory (the potential increase in value of the property) with providing the low-income homeowner a reasonable chance to gather all necessary finances. The amendments include appropriate transitional provisions.

Planning and Development Act 2007 - other amendment

The Bill also amends the P&D Act in relation to the deconcessionalisation of leases. The amendment is to ensure, in the situation where the quantum of the deconcessionalisation of a lease (a type of lease variation) is being reviewed by the ACT Civil and Administrative Tribunal (ACAT), the relevant development approval does not expire before ACAT makes its determination. This will ensure consistency of expiry provisions across lease variations charges and deconcessionalisation payments within the P&D Act.

Summary of amendment to the *Stock Act 2005*

The Bill corrects a minor policy inconsistency in the *Stock Act 2005*. The Bill amends section 39 (2) of the Stock Act, bringing it into line with section 37, to clarify that the Director-General has a discretion to dispose of impounded stock not claimed within 14 days.

Human rights implications

Strict liability offences

The Bill extends the strict liability offence in section 66C of the *Environment Protection Regulation 2005* (the regulation) to also apply to sediment and erosion control measures required by a development application approval condition.

Strict liability offences engage the right to be presumed innocent under section 22 (1) of the *Human Rights Act 2004* (HRA) as they reverse the onus of proof from the prosecution onto the defendant. While strict liability offences engage the presumption of innocence, they are not inherently incompatible with human rights.

Section 28 (1) of the HRA provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HRA then provides that, in deciding whether a limit on a human right is reasonable, all relevant factors must be considered. Section 28 (2) of the HRA further provides five factors that must be considered when determining whether a limit on human rights is considered justified.

The limit that this Bill places on the right to the presumption of innocence in section 22 (1) of the HRA is considered reasonable and justifiable in a free and democratic society, taking into account the factors enumerated in section 28 (2) of the HRA, namely:

a) The nature of the right affected

The right to presumption of innocence before the law is a very important right that has been recognised by the common law for centuries and is now codified in section 22 (1) of the HRA. The courts have held, however, that the right to presumption of innocence may be subject to limits, particularly where those who might be affected by an offence would be expected to be aware of its existence. The extension of the offence in section 66C of the regulation is regulatory in nature and targets the person in charge of a development site; someone who ought to know the obligations on them to prevent environmental harm.

b) The importance of the purpose of the limitation

The purpose of providing a reverse onus of proof through the proposed strict liability offence is to ensure the effective enforcement of and compliance with section 66C of the regulation. As mentioned above, the strict liability offence is intended to permit the Environment Protection Authority (EPA) to take quick enforcement action as required where sediment and erosion control requirements are not being met or maintained for a development site

c) The nature and extent of the limitation

The extension of the strict liability offence in section 66C of the regulation engages the right to be presumed innocent by reversing the onus of proof from the prosecution onto a defendant. The offence only applies to a person in charge of a development site and is a regulatory offence.

It is noted that the maximum penalty for a prosecution of the offence in section 66C of the regulation is 10 penalty units. This penalty is considered proportionate and not unduly harsh for offences of a regulatory nature.

d) The nature between the limitation and its purpose

The imposition of a burden of proof on the defendant through extending the strict liability offence in section 66C of the regulation enables the offence to operate as an effective deterrent. Those who are affected by the offence—people in charge of a development site—are expected to be aware of their obligations under the law through the Development Application or Building Certifier process. Providing a strict liability offence to enforce the installation and maintenance of sediment and erosion controls will help to minimise any harm to the environment.

e) Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

An evidential onus, rather than a strict liability offence, would be less restrictive on the right to be presumed innocent found in section 22 (1) of the HRA. An evidential onus would not, however, prove to be as effective in prosecuting the extension of the offence in section 66C of the Regulation. This is because strict liability offences provide that the defendant's act alone should dictate the offence, rather than the reasons that the defendant acted, or did not act, in the required way or their intention.

In the context of protecting the environment, a person's alleged actions, resulting in environmental harm, may limit the ability of the community to enjoy

the environment and impose costs on the Government and the community. Regardless of a person's intention, if their action or inaction results in environmental harm, they should be held to account or ordered to remedy the harm caused. The use of strict liability offences as a deterrent is demonstrably justifiable and reasonable in this context.

While the inclusion of strict liability within an offence limits the range of defences that may be available for a person accused of the offence to which it applies, a number of defences remain open to the accused, depending on the particular circumstances of each case. Section 23 (1) (b) of the *Criminal Code 2002* provides a specific defence to strict liability offences of mistake of fact. Section 23 (3) of the Criminal Code provides that other defences may also be available for use for strict liability offences, which includes the defence of intervening conduct or event, as provided by section 39 of the Criminal Code.

OUTLINE OF PROVISIONS OF THE BILL

Part 1 Preliminary

Clause 1 Name of Act

This clause provides that the name of the Act is the *Planning and Environment Legislation Amendment Act 2019*.

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act commences on the day after its notification day.

Clause 3 Legislation amended

This clause lists the legislation that is amended by the Act.

Part 2 Commissioner for Sustainability and the Environment Act 1993

Clause 4 Special reports Section 21 (2)

This clause amends section 21 (2) of the *Commissioner for Sustainability and the Environment Act 1993* to provide that the responsible Minister is required to table the government response to a special report from the Commissioner. This amendment removes the Minister with responsibility for the Commissioner for Sustainability and the Environment Act (currently the Minister for Climate Change and Sustainability) from the process of tabling the government response in situations where he or she is not the responsible Minister.

Part 3 Environment Protection Act 1997

Clause 5 Conduct of audits New section 74 (2)

This clause inserts into division 9.2 of the *Environment Protection Act 1997*, a new section detailing the matters that an environment audit must consider. This new provision reflects the requirements of environment audits that are conducted under division 9.5 (sections 91C or 91D).

Clause 6 Definitions for div 9.5 New section 91A (2) (b) (iia)

This clause amends the definition of *environmental audit* in section 91A (2) of the Environment Protection Act to include an additional purpose of an environmental audit. In practice, the main purpose of an environmental audit is to determine the suitability of the land for a proposed or current use.

**Clause 7 Order to assess whether land contaminated
Section 91C (5)**

This clause amends section 91C (5) of the Environment Protection Act to clarify that an auditor conducts the audit of the assessment, and not the assessment itself.

**Clause 8 Order to remediate land
Section 91D (5)**

This clause amends section 91D (5) of the Environment Protection Act to clarify that an auditor conducts the audit of the remediation, and not the remediation itself.

Clause 9 Section 91D (5) (b)

This clause amends section 91D (5) (b) of the Environment Protection Act to correct that the audit under this provision is in relation to the remediation of the land, and not the assessment of the land.

Part 4 Environment Protection Regulation 2005

Clause 10 Section 66C

This clause substitutes section 66C of the *Environment Protection Regulation 2005* to clarify that the offence applies whether the sediment and erosion control measures are required by a development approval condition under the *Planning and Development Act 2007* or by approval by a building certifier. This permits compliance action irrespective of the origin of the sediment/erosion control requirements.

Part 5 Nature Conservation Act 2014

**Clause 11 Chapter 6 exceptions
New section 153 (b) (iii)**

This clause inserts a new exception into chapter 6 of the *Nature Conservation Act 2014* to clarify that the grazing of stock under a licence granted under section 303 of the *Planning and Development Act 2007* is not an offence under the Nature Conservation Act.

**Clause 12 Chapter 9 exceptions
New section 252 (b) (v)**

This clause inserts a new exception into chapter 9 of the Nature Conservation Act to clarify that the grazing of stock under a licence granted under section 303 of the *Planning and Development Act 2007* is not an offence under the Nature Conservation Act.

**Clause 13 Part 10.2 exceptions
Section 261 (2) (a) (ii)**

This clause amends section 261 to align the wording of the exception in part 10.2 with the exceptions inserted into chapters 6 and 9.

Clause 14 New section 262A

This clause inserts a new provision into the Nature Conservation Act to adopt the definition of *influential person* from the *Public Unleased Land Act 2013* to ensure consistency between those Acts.

**Clause 15 Receipt for things seized
Section 350 (3) (d) (ii)**

This clause amends the Nature Conservation Act to clarify that section 350 (3) (d) (ii) only applies to live animals. Under part 14.2 a conservation officer must issue a receipt that details how a seized animal is to be looked after. This is irrelevant where the animal seized is deceased.

Clause 16 Dictionary, new definition of *influential person*

This clause inserts a signpost definition of *influential person* into the dictionary of the Nature Conservation Act.

Part 6 Planning and Development Act 2007

**Clause 17 Effect of draft plan variations given to Minister
Section 72 (3), definition of *defined period*,
paragraph (b) (iv)**

This clause amends section 72 (3) (b) (iv) of the *Planning and Development Act 2007* to extend the default end date of the defined period of interim effect for a draft plan variation from one year to 18 months after notification day.

**Clause 18 Minister's powers in relation to draft plan variations
Section 76 (1) (a)**

This clause amends section 76 (1) (a) of the Planning and Development Act to insert a reference to section 74 (2) (b) to clarify that a Minister may take action under section 76 if the committee of the Legislative Assembly reports on the draft plan variation. This amendment also ensures consistency of Minister's powers provisions in relation to draft plan variations.

**Clause 19 End of development approvals for lease variations
New section 185 (2) (b) (ia)**

This clause inserts a new provision into the Planning and Development Act to ensure, in the situation where the quantum of the deconcessionalisation of a lease (a type of lease variation) is being reviewed by ACAT, the relevant development approval does not expire before ACAT makes its determination. This will ensure consistency of expiry provisions across lease variations charges and deconcessionalisation payments within the Planning and Development Act.

**Clause 20 Decision on rent payout lease variation application
New section 272B (3A)**

This clause inserts a new provision into the Planning and Development Act to provide that a decision to vary the lease by the planning and land authority is

revoked, if the amount required to payout a land rent lease has not been paid within 12 months from the date of the decision.

Clause 21 New chapter 25

This clause inserts a new chapter into the Planning and Development Act to provide two transitional provisions.

The first transitional provision ensures that the extended default period of interim effect of 2 years from notification, applies to any draft plan variation that has been notified, if the period of interim effect applies (under section 72).

The second transitional provision ensures that any current decision by the planning and land authority on a rent payout lease variation application expires within 1 year from the commencement of the Bill.

Part 7 Stock Act 2005

**Clause 22 Disposing of impounded stock
 Section 39 (2)**

This clause amends section 39 (2) of the *Stock Act 2005*, bringing it into line with section 37, to clarify that the Director-General has a discretion to dispose of impounded stock not claimed within 14 days.