

2017

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

RED TAPE REDUCTION LEGISLATION AMENDMENT BILL 2017

EXPLANATORY STATEMENT

**Presented by
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RED TAPE REDUCTION LEGISLATION AMENDMENT BILL 2017

This explanatory statement relates to the Red Tape Reduction Legislation Amendment Bill 2017 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill to understand the policy rationale and the scope of the amendments and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

Background

This Bill is part of a regular series of Red Tape Reduction Legislation Amendment Bills (the Bills) designed to address regulatory requirements that add unnecessary administrative and compliance costs for business, the community and government. The Bills are the means to reform those legislative requirements that are not significant enough in their own right to justify standalone legislation.

The development of the Bill is supported by stakeholder engagement with individual Directorates, agencies and other relevant stakeholders in the ACT community.

Overview

The Bill seeks to amend or repeal the following Acts, Regulations and Instruments:

- *Agents Act 2003*;
- *Associations Incorporation Act 1991*;
- *Charitable Collections Act 2003*;
- *Domestic Animals Act 2000*;
- *Environment Protection Act 1997*;
- *Environment Protection (ACT Firewood) Code of Practice 1999*;
- *Environment Protection Regulation 2005*;
- *Magistrates Court (Environment Protection Infringement Notices) Regulation 2005*;
- *Public Bathing Act 1956*;
- *Security Industry Regulation 2003*;
- *Utilities Act 2000*; and
- *Water Resources Act 2007*

The amendments reduce red tape and provide better regulatory outcomes to ACT businesses and the community.

Human Rights

Offences related to amendments in the Bill include new strict liability offences for:

- current licensed agents who fail to meet the requirement to have trust money audited (Part 2, *Agents Act 2003*); and
- firewood merchants who fail to meet prescribed conditions (Part 8, Environment Regulation 2005).

These may be seen as engaging rights under the *Human Rights Act 2004* (the HRA) in relation to criminal proceedings (presumption of innocence until proven guilty). Section 22(1) of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

A strict liability offence, under section 23 of the *Criminal Code 2002*, means that there are no fault elements for the physical elements of the offence to which strict liability applies. Essentially, this means that conduct alone is sufficient to make the defendant culpable.

Section 28 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 provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- a) the nature of the right affected;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relationship between the limitation and its purpose; and
- e) any less restrictive means reasonable available to achieve the purpose the limitation seeks to achieve.

a) Nature of the rights affected

The strict liability offences arise in the regulatory context where the sanction of criminal penalties is justified by outcomes such as public safety, consumer confidence and ensuring that regulatory schemes are observed. The offences also arise in a context where defendants can reasonably be expected, because of their business operations and regulated nature of their work, to know the requirements of the law. It is incumbent on licensed agents and firewood merchants to know and understand their regulatory requirements under the law.

The rationale is that persons who carry out a business of being a licensed agent or firewood merchant can be expected to be aware of their duties and obligations to the wider public.

b) Importance of the purpose of the limitation

The use of strict liability offences for parties under the Bill can be justified on the basis that offences will apply to people who choose to engage in these regulated activities.

These provisions in the Bill sit within a regulatory context and people and companies who undertake activities will be aware of their responsibilities and obligations in relation to the licence (for agents). Compliance with the provisions of the Bill is important to ensure the integrity of licensing requirements for agents.

c) Nature and extent of the limitation

Applying strict liability to provisions within the Bill can be considered a reasonable limit set by law that will assist in achieving the policy objectives. An individual's rights and freedoms have, in some cases, been slightly fettered on the basis that it is in the wider public interest that the businesses be properly regulated. Any restrictions or impositions applied to individual rights have been chosen on the basis that they are necessary and that they represent the least restrictive approach possible in order to achieve the policy objective.

The penalties for offences are within the normal range for strict liability offences.

The strict liability penalty for an offence under the amended section 115 – Requirement for audit of the *Agents Act 2003* is held at 50 penalty units but extended to current licensed agents for comparable offences by former agents or the personal representatives of agents.

The strict liability penalty for an offence under the amended section 14 – Conditions for sale or supply of firewood of the *Environment Protection Regulation 2005* is consistent with the offence of an unapproved sale or supply of painted firewood under section 14A of the Regulation. The amendment to section 14A of the Regulation maintains the existing penalty level but adjusts the offence to recognise that an Environmental Authorisation is no longer required.

Infringement notice schemes minimise the cost of litigation for the Territory while offering agents and firewood merchants a choice concerning whether to accept a lesser penalty without admitting the offence or to remain liable to prosecution.

Under the Criminal Code, all strict liability offences have a specific defence of mistake of fact. Subclause 23(3) of the Criminal Code makes it clear that other defences may still be available for use in strict liability offence cases. The general common law defences of insanity and automatism still apply, as they go towards whether a person has done something voluntarily, as well as whether they intended to do the act.

d) Relationship between the limitation and its purpose

The Government considers that the strict liability offences contained in this Bill are relevant to the policy objectives of minimising the risk of harm to the community, which is demonstrably justifiable and reasonable. The community expects that, despite what types of business people engage themselves in that they operate in a community acceptable standard.

e) Less restrictive means

It is not considered that there are any less restrictive means to achieve the purpose of the reforms. Similar provisions already exist in the *Agents Act 2003* and *Environment Protection Regulation 2005*.

Summary of amendments

Public Bathing Act 1956

The Bill repeals the *Public Bathing Act 1956*. The provisions contained in the *Public Bathing Act 1956* are duplicated elsewhere in ACT Government legislation, specifically the *Crimes Act 1900*, *Criminal Code 2002*, *Litter Act 2004*, *Domestic Animals Act 2000*, *Trespass on Territory Land Act 1932*, *Nature Conservation Act 2014*, *Lakes Act 1976* and *Public Health Regulation 2000*.

Licensed agents and offences related to non-compliance of trust money audit requirements

The Bill amends the *Agents Act 2003* to introduce an offence provision for current licensed agents who are non-compliant with the requirement for ‘any record relating to any trust money held by the agent during an audit period of the agent to be audited by a qualified auditor within 3 months after the end of the audit period or any longer period allowed by the commissioner for fair trading’.

The intent of the amendment is to bring offence provisions for current licensed agents in line with those for former licensed agents and personal representatives of a licensed agent. Previously, the only option the government regulator had when a breach occurred by a current licensed agent was to pursue an occupational discipline order through the ACT Civil and Administrative Tribunal (ACAT), even for relatively minor offences. This led to substantial time and cost implications for non-compliant agents and government.

In practice, an infringement notice will only be issued once the regulator has undertaken engagement with the non-compliant agent and, based on the evidence available, deems an infringement notice the most suitable mechanism for penalisation. The *Magistrates Court Act 1930* sets out mechanisms for issuing the infringement notice and the process for an application for withdrawal of the infringement notice. The option to pursue serious breaches through ACAT will remain.

Charities registered with the Australian Charities and Not-for-Profits Commission

The Bill amends the *Associations Incorporation Act 1991* and the *Charitable Collections Act 2003* to exempt charities registered with the Australian Charities and Not-for-Profits Commission (ACNC) from certain regulatory requirements in the ACT that are covered by Commonwealth regulation.

These charities are required to meet regulatory requirements under the *Australian Charities and Not-for-Profit Commission Act 2013 (C'th)*, which provides a national regulatory framework for the not-for-profit sector, including the requirement to report to the ACNC.

These amendments address duplication between the Commonwealth and ACT regulation, reduce administrative burden for charities and provide clarity on regulatory responsibilities for both the charities and the community.

The Commonwealth regulatory framework for charities does not have specific provisions related to children and young people's participation in charitable collections. Provisions under the *Children and Young People Act 2008* will be employed to ensure the ACT's requirements in this area are maintained for ACNC-registered charities.

Greyhounds

The Bill amends the *Domestic Animals Act 2000* to remove breed-specific provisions related to greyhounds. The breed-specific provisions do not align with the intent of the Act, which is for keepers and carers of animals to have appropriate animal management practices regardless of which breed they own. Provisions related to greyhounds were based on provisions in the *Dog Control Act 1975 (repealed)*.

Firewood merchants

The Bill amends the *Environment Protection Act 1997* and the *Environment Protection Regulation 2005* to remove the need for firewood merchants to hold an Environmental Authorisation. The conditions placed on the holder of the authorisation to address risks to human health or to the environment are now provided by the Regulation.

An offence provision in the Regulation sets the maximum penalty for non-compliance with the conditions at 10 penalty units. The *Magistrates Court Act 1930* sets out mechanisms for issuing infringement notices and the process for an application for withdrawal of the infringement notice.

The Environment Protection (ACT Firewood) Code of Practice 1999 is repealed as it is redundant.

Security licences

The Bill amends the *Security Industry Regulation 2003* to remove the prescribed training course requirements for applicants of employee security licences in certain subclasses. These subclasses relate mainly to low-risk activities, such as lock smithing, and removing the prescribed training courses brings ACT in line with most other jurisdictions. The Australian Consumer Law will continue to ensure that associated goods and services are fit for purpose.

Energy Industry Levy

The Energy Industry Levy (EIL) is the Territory's mechanism for recovering the cost of regulating the distribution and retail sectors for electricity and gas. These regulatory costs include (but are not limited to) technical regulation of distribution networks, utilities consumer protection through the ACAT, and the ACT's contribution to national energy market regulation, including through the Council of Australian Governments Energy Council.

Under current arrangements, the Levy Administrator determines the overall regulatory costs that should be recovered by the EIL each year. The Commissioner for Revenue determines the amount to be paid by each energy utility based on their market share. As a tax under the *Taxation Administration Act 1999* (TAA), the Commissioner and energy utilities have all the rights and obligations with regard to the EIL as other taxes under the TAA, including in relation to tax assessments and compliance with tax law.

The EIL is being amended to remove ambiguity; correct errors in the yearly adjustment that results from estimation; and improve transparency.

The amended levy charge for an energy utility in a sector will be composed of a *base amount*, an estimated *variable amount* based on the firm's market share in the sector, and an adjustment from the previous year. This removes the potentially ambiguous 'fixed net regulatory cost' that was previously used to calculate levy charges. The previous formula for the EIL had an error in the method of adjusting for estimation, the amendments correct this. Although there is extensive information available to the public on the regulation covered by the EIL, it is not available from a single, transparent source. Under new arrangements the Levy Administrator will be required to publish guidelines and annual accounts.

Waterway works

The Bill amends the *Water Resources Act 2007* to remove duplicative information having to be provided to the regulator for the same waterway work activity. A waterway work licence is no longer required for activities covered under the *Environment Protection Act 1997* through an Environmental Authorisation or environmental protection agreement.

CLAUSE NOTES

PART 1 Preliminary

Clause 1 Name of Act

This Act is the *Red Tape Reduction Legislation Amendment Act 2017*.

Clause 2 Commencement

Provisions in this Act will commence on the days stated in the Act.

Clause 3 Legislation amended

This Act amends the following legislation:

- *Agents Act 2003*;
- *Associations Incorporation Act 1991*;
- *Charitable Collections Act 2003*;
- *Domestic Animals Act 2000*;
- *Environment Protection Act 1997*;
- *Environment Protection Regulation 2005*;
- *Magistrates Court (Environment Protection Infringement Notices) Regulation 2005*;
- *Security Industry Regulation 2003*;
- *Utilities Act 2000*; and
- *Water Resources Act 2007*.

Clause 4 Legislation repealed

The Act repeals the following legislation:

- *Environment Protection (ACT Firewood) Code of Practice 1999*; and
- *Public Bathing Act 1956*.

PART 2 Agents Act 2003

**Clauses 5 – 7 Requirement for audit
Sections 115 (1), (2a) and (3)**

These clauses make it a strict liability offence for current licensed agents who are not compliant with the requirement for any record relating to any trust money held by the agent during an audit period of the agent to be audited by a qualified auditor within 3 months after the end of the audit period or any longer period allowed by the commissioner for fair trading.

The strict liability offence has a maximum penalty of 50 penalty units.

PART 3 Associations Incorporation Act 1991

**Clause 8 Copies of certificates of incorporation
Section 10**

This clause removes the requirement for the ACT regulator to retain copies of incorporation as this is a redundant requirement as copies can be printed as required.

**Clause 9 Inspection of documents
Section 11 (2) (b) (i)**

This clause removes the reference to a copy of a certificate of incorporation kept by the registrar-general under section 10, as clause 8 makes this provision redundant.

**Clause 10 Notice of changes in committee
New section 62 (3)**

This clause removes the requirement for an ACNC registered entity to report to the ACT regulator on changes in committee as the charity has a duty to notify the ACNC if there is a change to its responsible persons.

**Clause 11 Register of members
Section 67 (2)**

This clause removes the specific requirement for the place of register to be published in the annual return to the ACT regulator, while retaining the requirement for the register to be available for inspection by members. This will apply to all incorporated associations.

Clause 12 New Section 70A

This clause exempts charities registered under Commonwealth legislation from the requirements to provide annual reports under part 5 of the Act. These charities are required to report annually to the ACNC and comply with the regulatory requirements of the *Australian Charities and Not-for-Profit Commission Act 2013 (C'th)*.

Clause 13 **Certificates as evidence**
Section 115 (3) (b) (i)

This clause removes the reference to a copy of a certificate of incorporation kept by the registrar-general under section 10, as clause 8 makes this provision redundant.

Clause 14 **New section 119B**

This clause provides for the registrar-general to enter into an arrangement with the Commissioner of the ACNC for the provision of information, where that information is required for the purposes of this Act.

Clause 15 **Registered office of incorporated association**
New section 121 (4)

This clause exempts ACNC registered charities from reporting to the ACT regulator on changes to their registered office as they are required to provide the ACNC with updates to their address for service.

Clause 16 **Service of documents**
New section 122 (1) (d)

This clause provides for the ACT registrar-general to use the *address for service*, which is the address used by the ACNC and which charities are required to keep current with the ACNC under the *Australian Charities and Not-for-Profit Commission Act 2013 (C'th)*.

Clause 17 **Dictionary, new definition of ACNC registered entity**

This clause defines ACNC registered entity as an entity registered under the *Australian Charities and Not-for-Profit Commission Act 2013 (C'th)*.

PART 4 **Charitable Collections Act 2003**

Clause 18 **Unlawfully conducting collections**
Section 14 (2)

Clause 19 **Unlawfully taking part in collections**
Section 15 (1) (b)

These clauses exempt an ACNC registered entity from requiring a licence in the ACT to undertake charitable collections as the ACNC's regulatory framework provides regulatory oversight of the financial, governance and charitable purposes of the registered charities. These amendments remove duplicated regulatory requirements.

Clause 20 **Dictionary, new definition of ACNC registered entity**

This clause defines ACNC registered entity as an entity registered under the *Australian Charities and Not-for-Profit Commission Act 2013 (C'th)*.

PART 5 Domestic Animals Act 2000

Clause 21 Greyhounds

Section 48

**Clause 22 Seizure of dogs—general
Section 56(c)**

The omission of these clauses under the *Domestic Animals Act 2000* removes breed-specific provisions related to greyhounds. The provisions removed concern the muzzling of greyhounds in public places and holding four or more greyhounds by way of a leash or leashes.

PART 6 Environment Protection Act 1997

**Clause 23 Activities requiring environmental authorisation
Schedule 1, table 1.2, items 44 to 46**

This clause amends the *Environment Protection Act 1997* to remove the requirement for firewood merchants to hold an Environmental Authorisation for activities associated with selling, supplying, cutting, storing or seasoning firewood in the ACT.

PART 7 Environment Protection Regulation 2005

Clause 24 Section 14

**Clause 25 Unapproved sale or supply of painted etc firewood—offence
Section 14A (1) (b)**

These clauses amend the *Environment Protection Regulation 2005* to include the conditions that had previously been applied to the Environmental Authorisation for firewood merchants (now removed under Clause 27). Under section 14, an offence provision for non-compliance with the conditions is now set at 10 penalty units.

Section 14A is amended to remove the reference to an Environmental Authorisation.

**PART 8 Magistrates Court (Environment Protection Infringement Notices)
Regulation 2005**

**Clause 26 Environment protection legislation infringement notice offences and
penalties
Schedule 1, pt 1.2, new items 7A to 7C**

This clause amends the Magistrates Court (Environment Protection Infringement Notices) Regulation 2005 to set the offence penalty and amount of the penalty payable for infringement notices issued under sections 14 and 14A of the Environment Protection Regulation 2005.

PART 9 Security Industry Regulation 2003

**Clause 27 Prescribed training courses for employee licences—Act, s 21 (1) (a) (iii)
Table 8, items 8 and 9**

This clause amends the Security Industry Regulation 2003 to remove the prescribed training course requirements for applicants of employee security licences in the following subclasses:

- selling security equipment;
- carrying out surveys and inspections of security equipment;
- giving advice about security equipment; and
- installing, maintaining, monitoring, repairing or servicing security equipment.

PART 10 Utilities Act 2000

Clause 28	Definitions—pt 3A
	Section 54A, new definition of <i>base amount</i>
Clause 29	Section 54A, definition of <i>fixed net regulatory cost</i>
Clause 35	National regulatory obligations and costs
	Section 54E (1) (b)
Clause 36	Section 54E (3) (a)
Clause 37	Section 54E (3) (b)
Clause 38	Section 54E (3) (b)
Clause 39	Section 54E (4) (a) (ii)
Clause 40	Section 54E (4) (a) (iii), (iv) and (v)
Clause 41	Section 54E (5)
Clause 42	Section 54E (7), new definition of <i>COAG EC</i>
Clause 43	Section 54E (7), definition of <i>MCE</i>
Clause 44	Local regulatory costs
	Section 54F (2)
Clause 45	Section 54F (4)
Clause 49	Section 54H (1) (b) (iii)
Clause 52	Section 54I (2), new note
Clause 53	Registration of energy utilities
	Section 54K
Clause 55	Offence—failure to register
	Section 54L (1) (b)
Clause 56	Returns under Taxation Administration Act
	Section 54M (2), new note
Clause 59	Dictionary, new definition of <i>base amount</i>
Clause 60	Dictionary, definition of <i>fixed net regulatory cost</i>

These clauses make minor amendments and clarifications to the EIL legislation. This includes updating references to the Ministerial Council on Energy to the Council of Australian Government's Energy Council, adding notes, providing definitions and improving the drafting of the *Utilities Act 2000*.

Clause 30	Energy industry levy—imposition
	Section 54C (2)
Clause 31	Section 54C (3) (a) and (b)
Clause 32	Section 54C (4) (a) and (b)
Clause 33	Section 54C (5)
Clause 47	New section 54GA

These clauses address the formula and market share. The EIL will continue to be allocated between the four energy sectors in the Territory. Within each energy sector, each firm will be liable for a levy charge. The EIL charge for a single firm is composed of three parts: a *base amount* (*B*), an *estimated variable amount* based on estimates for the coming year and the firm's market share from the previous year (*EV*), and an adjustment to the previous year's variable amount (*AV-EV₋₁*). This adjustment ensures that payments reflect actual market shares and actual regulatory cost from the previous year. (Note that the prefixes *E* and *A* indicate whether the variable is based on estimated or actual figures.)

The Levy Administrator will set the *base amount* for a sector for five years at a time (clause 51). A firm's *estimated variable amount* for a levy year will be its estimated market share of the remaining estimated regulatory cost for the sector. The firm's market share is based on the proportion of energy it sells, and is estimated by the firm's market share in the previous year. Finally, the charge is adjusted by the difference between the actual and estimated variable amounts from the previous year.

The *Utilities Act 2000* does not specify how the Levy Administrator should calculate the values in the formula. Sections 54I and 54J entitle the Administrator to request and receive information from energy utilities; however, values such as the total energy sold in a sector are not required to be determined exclusively from this data.

Clause 35 and 36 update the EIL calculations for utilities entering and exiting energy sectors.

Clause 34	Energy industry sectors etc
	Section 54D (2)

This clause addresses utilities leaving an energy sector. Utilities that do not sell or supply energy in a levy year but did in the previous year may be required to pay or be entitled to receive an adjustment. For this reason, clause 38 amends the definition of an energy utility to include firms that have provided an energy utility service.

Clause 46 **Annual regulatory costs etc**
Section 54G (3)

This clause concerns the *base amount*. The new levy structure replaces the use of *net fixed regulatory costs* with a *base amount* for firms in each sector, set for five years at a time. This amount is based on the minimum additional cost of regulating one more firm in the sector. The *base amount* in the EIL reflects the minimum cost of regulating (including administration of the EIL for) a firm in the current environment, regardless of how much energy the firm sells.

The definition implicitly contrasts the actual situation with a counterfactual situation with one more utility in the sector. This hypothetical firm is assumed to require the least costly regulation possible for the sector. The *base amount* is set at this low level — the minimum marginal cost of regulation. In most cases this will be composed of the cost of administering the EIL for the hypothetical firm.

Clause 48 **Further energy sector determinations**
Section 54H (1) (a)

Clause 50 **Production of distribution and sales information**
Section 54I (1)

Clause 51 **Section 54I (2) (b)**

These clauses concern the lodgement of statements to the Levy Administrator. Section 54I of the *Utilities Act 2000* requires energy utilities to lodge an annual statement with the Levy Administrator. The amendments require this statement be lodged no later than 30 August in the year, to provide the Administrator with sufficient time to make determinations by 1 October. As this submission date has changed, the date used for estimating the number of utilities in the sector for the current levy year has also been moved to 30 August.

Clause 54 **New section 54K (2)**

This clause concerns amendments that require the Commissioner for Revenue to inform the Levy Administrator when an energy utility is registered. As was previously the case, energy utilities are required to register with the Commissioner for Revenue within 90 days of becoming an energy utility.

Both Administrator and Commissioner for Revenue are entitled to collect information from energy utilities to fulfil their roles in administering the EIL. This amendment ensures the Administrator will be aware of any energy utility that has been registered by the Commissioner for Revenue and will be able to obtain information from the utility to administer the EIL.

This does not violate the secrecy provisions under the TAA (Division 9.4), as tax officers are able to disclose information for the administration or execution of a tax law. In the Territory,

a tax officer is any person who has acquired confidential information in order to administer a tax law. Thus, if any information the Levy Administrator receives is confidential, they are considered to be a tax officer under the TAA apply to their conduct and are subject to associated restrictions.

Clause 57 New section 54O

This clause concerns guidelines explaining the purpose and calculation of the EIL, as well as annual information on regulatory costs. The amendments require the Levy Administrator to publish guidelines explaining the purpose and calculation of the EIL, as well as annual information on regulatory costs. This will provide greater transparency to industry and the residents of the Territory.

The Levy Administrator will require cooperation and support from the Territory's regulators to satisfy this obligation, in particular in relation to transparent reporting of regulatory costs incurred in the Territory.

Clause 58 New part 20

This clause concerns the transitional levy year. In the transitional levy year (financial year 2017-18), a firm will be charged with the *base amount* and *estimated variable amount* under the new formula. The adjustment for the previous year will be calculated under the old methodology.

PART 11 Water Resources Act 2007

**Clause 61 Waterway work licence—requirement
Section 42 (1) (b)**
Clause 62 Section 42 (2)

These clauses amend the *Water Resources Act 2007* to reflect that a waterway work licence is not required if authority for the waterway work has already been granted under the *Environment Protection Act 1997* by either an Environmental Authorisation or under an environmental protection agreement.