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

TENTH ASSEMBLY

ENVIRONMENT PROTECTION LEGISLATION AMENDMENT BILL 2024

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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Minister for the Environment, Parks and Land Management
May 2024**

ENVIRONMENT PROTECTION LEGISLATION AMENDMENT BILL 2024

This explanatory statement relates to the **Environment Protection Legislation Amendment Bill 2024** (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

The statement must 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.

The Bill is not a Significant Bill. It has been assessed as not likely to have significant engagement of human rights and therefore does not require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The Bill addresses a range of minor issues identified during an initial strategic review of the *Environment Protection Act 1997*, along with the policy, regulation and administration by the Environment Protection Authority (the Authority). That review also identified similar issues in the *Water Resources Act 2007* (WR Act), that the Authority also administers. The Bill amends both Acts to ensure consistency in protection of the environment and our water resources.

The Bill also adds an offence for installing a wood heater that does not comply with current emissions standards for sale of a wood heater. This complements the existing offence of selling a non-compliant wood heater.

CONSULTATION ON THE PROPOSED APPROACH

The Authority was closely consulted as the regulator administering both acts. Most amendments are technical in nature, do not constitute a policy change of the Government, and/or do not change rights and obligations.

Wider community and industry consultation was through the release and implementation of the ACT Government's *Bushfire Smoke and Air Quality Strategy 2021-2025* which included the first action plan. The wood heater clauses of the Bill are consistent with that strategy.

CLIMATE IMPACT

Consideration of *ecologically sustainable development* in decision making will contribute to reducing environmental footprints and impacts on the environment, including impacts relating to climate change.

The reduction of emissions from preventing installation of non-compliant wood heaters will reduce climate change impacts by reducing emissions including carbon black and other pollutants that contribute to climate change.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The Bill engages Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities (section 27 of the *Human Rights Act 2004*), the Right to Privacy and Reputation (section 12 of the *Human Rights Act 2004*), and the Right to Freedom of Expression (section 16 of the *Human Rights Act 2004*).

The Bill also engages Rights in criminal proceedings (section 22) in that an offence is added for the installation of a non-compliant wood heater and updates the drafting of offence provisions to be compliant with the *Criminal Code 2002*. The engagement of this right relates to the disapplication of section 47 of the Legislation Act which requires the publication of relevant instruments on the ACT Legislation Register

Rights Promoted

Cultural rights

The amendments in this Bill will support cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities by making ‘culture’ an explicit consideration for decision makers under the EP Act. Cultural considerations of environment protection authorities are an increasing expectation of effective and independent environment protection agencies in Australia. For example, the Environmental Defenders Office published a report in 2022 about implementing effective independent environmental protection agencies in Australia.¹ Recommendation 1 of that report is a *Duty to develop and act in conformity with Cultural Protocols based on First Nations Lore and to uphold internationally recognised First Nations rights of free, prior and informed consent and self determination*.²

The Human Rights Act states that Aboriginal and Torres Strait Islander peoples must not be denied specific cultural rights (to maintain, control, protect and develop cultural heritage, spiritual practices, beliefs and teachings, languages and knowledge). This amendment will augment the human right by providing for a positive consideration of cultural impacts in environment protection.

The Bill does this through clauses 5 and 31 by inserting the word “cultural” after economic and social in the EP Act sections 3C (1) (d) (objects) and 61 (d) (matters to be taken into account for decisions). The effect will be that when making decisions

¹ Environmental Defenders Office (2022) *Implementing Effective Independent Environmental Protection Agencies in Australia* ,

² Ibid, pages 8, 11 to 14, 17, and 18 to 22.

the Authority must consider the environmental, economic, social and the cultural impacts involved in each decision.

Prior to this amendment cultural considerations were implied as part of social considerations. This amendment makes that consideration explicit and therefore makes it more prominent in the mind of the decision maker.

Freedom of Expression

The Right to Freedom of Expression as expressed in section 16 (2) of the Human Rights Act includes the freedom to seek, receive and impart information. Sections 19 to 21 of the existing EP Act contain a process for the Authority to provide environmental information and documents to the public, and for affected persons to apply to exclude some information from publication.

The amended section 19 promotes the Right to Freedom of Expression because the provisions make it clear on the face of the EP Act that the documents can be published online or be available for a person to access via attending the office of the Authority during business hours. The language in the amended provisions promotes the Freedom of Expression by strengthening the requirement and presumption of publication of documents. It says ‘the authority must make the following documents available to the public ‘(amended section 19(1)). The amendments better facilitate public access to documents under the EP Act, including confirming that documents can be accessible on an ACT government website or shared by email.

Rights Limited

Privacy and Reputation

1. Nature of the right and the limitation (s28(a) and (c))

The Right to Privacy and Reputation articulated in Section 12 of the Human Rights Act includes the right not to have your home interfered with unlawfully or arbitrarily.

The amendment in clause 40 amending section 2.4 in schedule 2 of the EP Act prohibits the installation of non-compliant wood heaters. While this will to some degree limit people’s choice of the types of heaters they can install in their homes in the future, heaters that don’t meet these standards are illegal to sell in the ACT. They will remain able to install compliant wood heaters or another heating system.

2. Legitimate purpose (s28(b))

Addressing and preventing the health and environmental impacts of woodfire smoke is a legitimate purpose. These impacts are well documented including through the Report from the ACT Commissioner for Sustainability and Environment’s Investigation into Wood Heater Policy in the ACT, and the ACT Government’s *Bushfire Smoke and Air Quality Strategy 2021-2025*.

Rational connection between the limitation and the purpose (s28(d))

The existing offence prevents the sale of non-compliant wood heaters. This amendment prevents installation of non-compliant wood heaters that have been gifted or reinstalled from a previous location. Over time this will further reduce the use of non-compliant wood heaters which contribute proportionately more to poor air quality.

The limitation would further be consistent with the Human Rights Act because it will be provided in legislation, is a clear prohibition on the activity by anyone, and would apply to all installations, rather than arbitrarily.

3. Proportionality (s28 (e))

This measure is proportionate because community members will be permitted to purchase and install in their homes wood heaters that do comply with emissions standards or other types of heaters. Further, people will not have to remove existing wood heater systems.

Restricting non-complaint installations closes off a loophole in the existing scheme which would have allowed old non-compliant wood heaters to be reinstalled. This measure contributes to the improvement of air quality by taking non-compliant wood heaters out of circulation. There are no less restrictive means of lawfully preventing the installation of older non-compliant wood heaters.

Freedom of Expression

4. Nature of the right and the limitation (s28(a) and (c))

As mentioned above in rights promoted, the Right to Freedom of Expression as expressed in section 16 (2) of the Human Rights Act includes the freedom to seek, receive and impart information. Sections 19 to 21 of the existing EP Act contain a process for the Authority to provide environmental information and documents to the public, and for affected persons to apply to exclude some information from publication.

The existing section 21 includes a process for a person providing a document, or a person whose interests are affected by the provision of the document, to apply to the Authority to exclude from publication material that would reveal a trade secret or whose disclosure would reasonably be expected to adversely affect the person in relation to the lawful business affairs of that person. For exclusion to occur the Authority must decide, after the application, that it would not be in the public interest for that part to be published. The *Freedom of Information Act 2016* also still applies to a decision whether to release a document under that legislative scheme. The Bill retains the same mechanism for application to exclude a document or part of a document, with some updated expression in drafting.

5. Legitimate purpose (s28(b))

The purpose of the exclusion is to ensure that people's legitimate intellectual property and lawful business affairs are not unreasonably interfered with by the publication of documents under the EP Act. This protects property rights under the common law, which includes intellectual property.³

6. Rational connection between the limitation and the purpose (s28(d))

The limitation of freedom of expression through the exclusion of the material provides a clear mechanism for someone whose property rights are potentially impacted to make an application. The grounds for the application and exclusion are targeted to this purpose. They are limited to where it 'reveals a trade secret' and/or 'advers[ly] affects [...] lawful business affairs'. The second part of the test is that it would not be in the public interest to publish the material.

7. Proportionality (s28 (e))

This measure is proportionate because it is targeted, and the presumption of section 21 is that the material is published. It is only not published if the applicant can show that it would not be in the public interest and either it reveals their trade secret or adversely interferes with their lawful business affairs. This requires a decision of the Authority who is necessarily independent from the proponent.

Rights in Criminal Proceedings

The Bill also engages Rights in criminal proceedings (section 22). The new section 164B in the EP Act and amended section 100 in the WR Act disapply section 47 (6) and (7) of the Legislation Act. Further, an offence is added for the installation of a non-compliant wood heater and updates the drafting of offence provisions to be compliant with the *Criminal Code 2002*.

These criminal rights could potentially be limited through the disapplication of section 47 of the Legislation Act which requires the publication of instruments relating to the offence. Australian Standards and laws of other jurisdictions will not be published on the ACT Legislation Register.

However, both legislative regimes have mechanisms for people to understand their legal obligations. Laws of other jurisdictions are published on their respective registers and Standards will be available through standards agencies, who will be referenced as a note in the Act. In the case of licenses under the WR Act, the amendment only disapplies for laws of other jurisdictions and for standards. All other instruments referenced will continue to be notified in accordance with the Legislation Act.

Wood heater sellers and installers do not need to access Standards directly as the offence provisions relate only to the sale or installation of wood heaters without a

³ *UWA v Gray* [2008] FCA 498 [89] cited in Australian Law Reform Commission (2014) *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws* (ALRC, Canberra), page 48
<<https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/6-property-rights/a-common-law-right-5/>>.

certificate of compliance and compliance plate, so sellers and installers will be able to look at the certificate of compliance and the compliance plate to determine whether the wood heater meets relevant standards prior to sale or installation. Further the ACT Government regularly provides public education about wood heaters, as is general practice for regulation. This will continue to make it clear that only compliant wood heaters can be sold and installed in the ACT, and how to work out whether a wood heater complies.

For this reason, any potential limitation on the rights in criminal proceedings including the certainty of the criminal offence is reasonable and justifiable, as in practice people affected by these laws will be able to fully understand their obligations and the scope of the criminal offence.

ENVIRONMENT PROTECTION LEGISLATION AMENDMENT BILL 2024

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the Environment Protection Legislation Amendment Bill 2024. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

Clause 1 of the Bill says that the amendment Bill will be called the *Environment Protection Legislation Amendment Act 2024* once enacted.

Clause 2 Commencement

Clause 2 separates the commencement for different sections of the amendment Bill. Clauses 4, 40 and 42 to 44 will be delayed for 6 months to allow implementation processes to occur including information to wood heater stakeholders.

The other clauses will commence on the day after the notification of the Act.

Clause 3 Legislation amended

The Bill amends the *Environment Protection Act 1997* (EP Act), the *Environment Protection Regulation 2005* (EP Reg), and the *Water Resources Act 2007* (WR Act).

Part 2 Environment Protection Act 1997

Clause 4 Offences against Act—application of Criminal Code etc

Section 3B, note 1, new dot points

Clause 4 amends note 1 in section 3B of the EP Act to make it clear that the Criminal Code applies to schedule 2, section 2.4 (Sale and installation of solid fuel-burning equipment without a certification or compliance plate).

Section 2.4 (2) includes the new offence of installing non-compliant solid fuel-burning equipment and Section 2.4 (1) contains the re-drafted offence of sale of non-compliant solid fuel-burning equipment. The substantive detail of section 2.4 is addressed in clause 40 below.

Clause 5 Objects of Act

Section 3C (1) (d)

Clause 5 amends the objects of the EP Act to add ‘culture’ as an explicit element requiring integration with environmental, economic and social considerations in decision-making processes.

The effect will be that when making decisions the Authority must consider the environmental, economic, social and cultural impacts involved in each decision. Prior to this amendment cultural considerations were addressed as part of social considerations. This amendment makes that consideration explicit and therefore makes it more prominent in the mind of the decision maker. Further detail about this inclusion is outlined above under the heading ‘consistency with human rights’.

Clause 6 Principles applying to Act

New section 3D (1) (f)

Clause 6 inserts ‘the principle of ecologically sustainable development’ as an explicit consideration in the principles applying to the EP Act that a person administering the EP Act must have regard to.

Clause 7 Section 3D (2), new definition of *ecologically sustainable development*

Clause 7 amends Section 3D (2) by adding a definition of ecologically sustainable development into the EP Act to provide the detail for the substantive amendment to add ecologically sustainable development as a principle (clause 6).

Clause 8 Criminal liability of the Territory

Section 10, new note

Clause 8 adds a new note to section 10 to make it clear on the face of the EP Act to people administering the Act, and those subject to the EP Act, that the Commonwealth Government is bound by the Act.

This reflects the 2021 updated *Australian Capital Territory (Self-Government) Regulations 2021* (Cwlth) which added the *Environment Protection Act 1997* (ACT) as an Act that the Commonwealth Government is bound by. It retains the limit, like other Territory Acts mentioned in those regulations, that the Commonwealth cannot be prosecuted for an offence under the EP Act.

Clause 9 and 10 Division 2.2 heading

Clauses 9 and 10 amends the headings for Division 2.2 and section 19 of the EP Act.

Clauses 11 to 19 Public access to documents

Clauses 11 to 19 update the EP Act to modernise the process of accessing documents created under the EP Act.

These amendments do not alter the operation of the *Freedom of Information Act 2016* to these documents. The *Freedom of Information Act 2016* continues to apply separately and in addition to the access to documents regime in the EP Act.

These amendments make it clear that these documents will also be accessible electronically, rather than only through a person attending the office of the Authority, reviewing a physical register, and requesting hard copies.

Clause 17 says that the Authority must make the document available for inspection without charge at an ACT government office or on an ACT government website. The person may also request a copy of the document. This provides the authority with relevant discretion about the methods that it chooses to publish the documents and provides a requirement that the document is available. This provides a discretion for the Authority to charge a reasonable copying cost if a person requests a hard copy of a document. This is because some documents covered can be quite lengthy.

Clause 19 updates section 21 about the exclusion of material from public access. The existing section 21 includes a process for a person providing a document, or a person whose interests are affected by the provision of the document, to apply to the Authority to exclude from publication material that would reveal a trade secret or whose disclosure would reasonably be expected to adversely affect the person in relation to the lawful business affairs of that person. The updated section 21 retains the same mechanism for application to exclude a document or part of a document, with some updated expression in drafting. Further detail about this provision is outlined above under the heading ‘consistency with human rights’.

Where a person has applied to exclude material from publication, and the Authority decides to publish (i.e. to reject the application) then the applicant has 28 days to appeal that decision to the Authority or the ACT Civil and Administrative Tribunal (clause 19 which includes making amended section 21 (5)).

Clauses 20 to 22 Notification of making of certain entries in register

Clauses 20 to 22 make similar amendments for the contaminated sites register as clauses 11 to 19 (Public access to documents), to make sure it is clear under section 21B that contaminated sites register documents are available to the public to access under the amended section 19.

Clauses 23 to 24 Consultation on draft environment protection policy

Section 25

Clauses 23 to 24 make similar amendments for the availability of draft environment protection policies under section 25.

Clause 25 Notification of environment protection policies etc

Section 28 (2) (c), except note

Clause 25 makes a similar amendment for the availability of environment protection policies under section 28 so that it cross refers to section 19 (Public access to documents).

Clause 26 Inspection

Section 29

Clause 26 omits the provision for the inspection of environment protection policies. The amendments to section 19, that include broader provisions about public access to documents, are extended to apply to environment protection policies.

Clause 27 Public notice of accredited codes of practice

Section 32 (2)

Clauses 27 updates section 32(2) of the EP Act to reflect the changes to section 19. The amendment clarifies that an accredited code of practice is accessible by means other than the document being made available for public inspection.

Clause 28 Notification of environmental protection agreements

Section 41 (1) (b)

Clauses 28 updates section 41 of the EP Act so that it correctly cross refers to amended section 19 (Public access to documents).

Clause 29 Notification of grant

Section 50 (3) (b)

Clauses 29 updates section 50 for notification of the granting of an environmental authorisation under the EP Act so that it correctly cross refers to amended section 19 (Public access to documents).

Clause 30 Notification of review of environmental authorisation

Section 59 (1) (b)

Clauses 30 updates section 59(1)(b) of the EP Act to reflect the changes to section 19 of the EP Act. The amendment clarifies that an environmental authorisation is accessible by means other than the document being made available for public inspection.

Clause 31 Matters required to be taken into account for certain decisions under div 8.2

Section 61(d)

Clauses 31 makes the “cultural” benefits of an activity an explicit matter to be considered for decisions under division 8.2 These are decisions to:

- grant environmental authorisation (section 49 (1)),
- impose conditions on the grant or variation of an environmental authorisation (section 51),
- review environmental authorisation (section 57), and
- vary an environmental authorisation (section 60 (1)).

This adds to the Authority’s explicit requirement to consider the economic and social benefits from the activity. Previously the Authority impliedly considered the cultural benefits under “social” benefits. This is outlined in more detail above in the human rights section of this explanatory statement.

Clauses 32 to 33 Notification of certain people about orders for assessment or remediation

Section 91E (2) (b) and Section 91F

Clauses 32 and 33 make similar amendments as clauses 11 to 19 (Public access to documents) but for the notification of orders for assessment or remediation under section 91E (2) (b). This makes it clear that documents about orders for assessment or remediation are to be made available to the public in a similar manner to the documents in amended section 19. This includes being made accessible on an ACT government website, or by a link on an ACT government website; or making it available for inspection by anyone during ordinary business hours at an ACT government office and

that a copy may be provided on request. Under section 91F the documents must be made available free of charge.

Clause 34 Directions of Minister

Section 93(2)

Clause 34 amends section 93(2) of the EP Act on the matters that the Minister must not direct the Authority. It adds part 14A (enforceable undertakings). This means that the Minister cannot lawfully direct the authority about matters in relation to enforceable undertakings. This is consistent with the other matters that the Minister cannot direct the Authority about where the Authority is making enforcement decisions under the EP Act.

Clause 35 New section 164B

Clause 35 inserts a new section 164B and gives the Authority wider discretion to incorporate Australian Standards and other instruments such as policies, directly into statutory instruments which includes Environmental Authorisations and Environmental Protection Agreements made under the EP Act. This allows the Authority to utilise best practice regulation standards and instruments that other relevant bodies develop, such as Standards Australia, or environment protection authorities from other jurisdictions with more significant resourcing compared with the Territory. This supports consistent regulation across Australia and acknowledges the significant work already undertaken by those bodies.

The Legislation Act, section 47 (5) and (6) provide that an incorporated document, and, for section 47 (6), any amendment or replacement of such a document, are taken to be notifiable instruments. A notifiable instrument must be notified on the ACT legislation register under the Legislation Act. However, the Legislation Act, section 47 (5) or (6) may be displaced by the authorising law or the incorporating instrument (see s 47 (7)).

The new section 164B (2) disapplies the *Legislation Act 2001*, section 47 (5) and (6) for a law or instrument applied, adopted or incorporated under a statutory instrument made under the EP Act. This means that the laws and instruments incorporated under the EP Act do not need to be notified in the same way. The reason for this is that many of the documents are lengthy and made in other jurisdictions, which makes their notification impractical.

The amendments go on to require that incorporate laws and instruments are made available. This has the biggest impact on the holders of Environmental Authorisations and Environmental Protection Agreements made under the EP Act.

Section 164B (3) creates an alternative mode to ensure that the people subject to statutory instruments are aware of their obligations that are contained in the incorporated law or instruments. This is by ensuring incorporated laws or instruments are on the ACT legislation register, made available for inspection at an ACT Government Office, or accessible on an ACT Government website. This will support transparency and certainty for the holders of Environmental Authorisations and Environmental Protection Agreements. These locations are likely to be more accessible to license holders compared with finding them on the legislation register. This availability is made a legal requirement through section 164B (4) which says an instrument that is incorporated,

applied or adopted is not enforceable unless it has been made accessible in accordance with section 164 (3).

Section 164B (5) says that laws of other jurisdictions, as well as Australian Standards and Australian/New Zealand Standards do not need to be made available in those ways. This is because:

- laws of other jurisdiction are readily accessible over the internet on legislation registers of those jurisdictions; and
- incorporated standards are subject to copyright and may be purchased over the internet. Copies of the standard is a reasonable cost of doing an activity that requires an Environmental Authorisation or Environmental Protection Agreement.

Standards likely to be incorporated in statutory instruments under the EP Act are available for purchase from <https://www.standards.org.au>. As mentioned above, there are challenges relating to the ability to provide public access to Australian Standards due to copyright issues.

Standards Australia has recently released an initiative (Reader Room) that provides limited, no-fee access to the entire catalogue of Australian Standards for non-commercial purposes, that is for personal, domestic or household use. This initiative provides access for free to a maximum of three standards every 12 months, with access for 24 hours at a time. The Reader Room is available at <https://readerroom.standards.org.au/>.

Unfortunately, the Reader Room pilot does not apply to Australian and New Zealand Standards (International Standards), Standards Australia is looking to expand the standards available via the Reader Room in the future.

The reader is informed of where to access the laws and standards through a note after section 164B (5).

Clause 36 Regulation-making power

Section 166 (2) and notes

Clause 36 simplifies the regulation making power (section 166 (2)) as a consequence of the broader discretion in the new section 164B (Incorporation of documents).

Clause 37 Section 166(3)

Clause 37 increases the number of penalty units (from 10 to 20) that may be attached to offences that are contained in the *Environment Protection Regulation 2005*. This aligns with current ACT Government policy to allow more significant penalties in regulations as outlined in the 2010 *Guide for framing offences* (the Guide). The Guide was updated since section 166(3) was first enacted, and the penalties were inserted in the regulation. A significant proportion of offences in the legislative scheme are contained in the regulations. There are a range of different offending behaviours that are picked up by those offences. Increasing the range up to 20 penalty units allows the regulations to better set the appropriate penalty for each offence and that will in turn ensure that there is effective deterrence for each offending behaviour. Additionally, a review of similar offences in other jurisdictions in 2019 found the penalty units applied to similar offences were significantly lower whereas the value of a penalty unit was generally comparable. This seeks to strike a balance by increasing the possible maximum penalty to the recommended 20 penalty units, and not the 30 penalty units outlined on page 30 of the Guide.

This Bill does not directly change the penalty units for each offence in the regulation. Any changes would be subject to review, including a current jurisdictional comparison, to assess the suitability of the penalties in each offence in regulations and make recommendations to the Government accordingly. That review may then recommend regulation updates including changes to the penalty units for each offence in the regulations. That amendment would involve a regulatory impact assessment, consultation with relevant stakeholders and scrutiny processes. That process would also apply detailed analysis about factors from the Guide for setting the penalties including: the seriousness of the behaviour, the prevalence of the behaviour, the seriousness of each offence compared with offences of a similar nature, relative seriousness of each particular offence compared with others in the legislative scheme, the level of responsibility carried by the people that would be likely subject to the offences, and the possible consequences of failing to comply with the provision. It would also consider the adequacy of the maximum penalty to deter and punish a worst-case offence, including repeat offenders including any incentives to commit the offence, or the damage the offending behaviour does. It will consider the fault element of each offence.

Clause 38 Class A activities

Schedule 1, table 1.2, item 35

Clause 38 amends the amount of alcoholic production that triggers the need for an Environmental Authorisation. This amendment is to align the ACT trigger with that in New South Wales. It increases the volume from 100kL per year to 10,000kL per year or 30kL per day. This harmonisation will support businesses that operate in both jurisdictions.

Clauses 39 Schedule 2, section 2.1 (2) and note

Clause 39 omits section 2.1 (2) and note as a consequence of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35. Section 2.1 (2) was more specific to the disapplication of the Legislation Act section 47 (6) for AS/NZS 4012 and AS/NZS 4013.

Clause 40 Schedule 2, section 2.4

Clauses 40 schedule 2 section 2.4 (1) maintains the existing offence to sell a non-complaint wood heaters and updates the provisions to align with the criminal code. This ensures that it aligns with the conventions of offences under the *Criminal Code 2002*. This includes setting the maximum penalty for the offence of sale at 30 penalty units. 30 penalty units currently corresponds to a maximum penalty of \$4800 for an individual or \$24,300 for a corporation because of the operation of section 133 of the Legislation Act. This amount reflects the seriousness of the behaviour of selling a piece of non-compliant equipment. Non-compliant equipment has a significant impact on human health because it emits more particulates. This has a significant impact on people with respiratory illness, particularly through repeated exposure when it is nearby to their home. This maximum penalty amount is also designed to deter repeat offences. This updated selling offence will continue to apply to retailers who sell this equipment, as well as to private sales. This is because the non-compliant equipment has the same impact on human health no matter who sells it.

Clause 40 section 2.4(2) inserts a new offence of installing non-compliant wood heaters. Restricting non-complaint installations closes off a loophole in the existing scheme which would have potentially allowed old now non-compliant equipment to be reinstalled in another residential premise. This measure contributes to the improvement of air quality by taking non-compliant equipment out of circulation.

This offence applies to a person installing a system themselves as well as an installation as part of a new build or renovation. As with the sale offence, this offence has the same penalty as the sale offence for non-compliant equipment has the same impact on human health no matter who installs it.

The offences of sale and installation of non-compliant equipment in section 2.4 of the EP Act compliment (and do not displace) other forms of regulation of wood heaters including:

1. All installations require a building approval to cover that item; and
2. Crown Leases and development conditions restrict the installation of wood heaters in Dunlop, East O'Malley and Molonglo (except Wright).

These regulatory mechanisms continue to apply in addition to the offences of sale and installation of non-compliant equipment.

Clause 40 section 2.4(3) details the requirements that apply to a wood heater sold or installed on residential premises in relation to the efficiency and emission testing required for the wood heater to be certified in accordance with AS4012 (efficient) and AS 4013 (emissions) and the efficient and emission standards detailed in the AS4012 and AS 4013.

Section 2.4 (4)(a) provides that a regulation can exempt some equipment that would otherwise be subject to the sale and install offences.

Section 2.4 (4)(b) maintains the exception of reasonable excuse as defences to the sale and install offences. This is to ensure, as was the existing case, that if an unexpected or unforeseen circumstances was to arise a person may not be liable. Considering the wide range of circumstance which could apply in both selling or installing a wood heater including the condition of the wood heater the defence is deemed appropriate as is difficult to anticipate the justifiable excuses that may arise, and it is impractical to attempt to specify them.

Clause 40 section 2.4(5) provides that the Authority may declare an entity to be a certified entity. This could be the person that undertakes the testing of the wood heaters in accordance with AS 4012 and AS4013 and issues a certificate of compliance which details the efficiency and emissions for a particular wood heater model.

Clause 40 section 2.4(6) provides that a declaration under section 2.4(5) is a disallowable instrument.

Clause 40 section 2.4(7) inserts a definition for a certifying entity.

Clause 41 Reviewable decisions

Schedule 3, item 1

Clause 41 updates the drafting of the reviewable decision listed in schedule 3 to align with the re-drafted section 21(4) (as provided in clause 19).

Part 3 Environment Protection Regulation 2005

Clause 42 Section 14B heading

Clause 42 substitutes the heading for section 14B with 'Minimum overall average efficiency—Act, sch 2, s 2.4 (3) (a) (ii)' to cross reference the updated provisions in the EP Act that relate to the efficiency for a wood heater.

Clause 43 Section 14B

Clause 43 corrects the definition in AS4012 for efficiency by including the word average after overall as AS4012 refers to a minimum overall average efficiency.

Clause 44 Section 14C heading

Clause 44 substitutes the heading for section 14C with 'Maximum appliance particulate emission factor—Act, sch 2, s 2.4 (3) (b) (ii)' to cross reference the updated provisions in the EP Act that relate to the emission standard for a wood heater.

Clause 45 Definitions for pt 3 Section 21, definition of *affected person*, paragraph (b), note

Clause 45 omits the Part 3 section 21 note for the definition of an affected person because of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35.

Clause 46 Sale and hiring of things

Section 40 (1), new note 2

Clause 46 inserts a new note to detail that notification of the NSW legislation referenced does not need to be notified under the Legislation Act as a consequence of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35.

Clauses 47 to 48 Section 40 (3), note and Definitions—pt 6 Section 53, definition of *agvet code*, note 2

Clauses 47 and 48 update note 2 under the definition of the agvet code to provide that notification of the Commonwealth legislation referenced does not need to be notified under the Legislation Act as a consequence of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35.

Clause 49 Definitions—div 6.4

Section 55C, definition of *registered training organisation*, new note

Clause 49 inserts a new note detailing that the Commonwealth legislation referenced does not need to be notified under the Legislation Act as a consequence of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35.

Clause 50 Definitions for pt 7

Section 56, definition of *NEPM*, notes 2 and 3

Clause 50 updates notes 2 and 3 for the definition of a National Environment Protection Measure (NEPM) that it does not need to be notified under the Legislation Act as a consequence of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35.

The substituted note also informs the reader that NEPMs are accessible at www.legislation.gov.au/F2007B01119/latest/versions. It updates the website for accessing a NEPM to the Commonwealth Federal Register of Legislation. This is the authoritative source of a NEPM because it is a Commonwealth legislative instrument.

Clause 51 Application of div 7.2

Section 57 (b), note

Clause 51 details that the Commonwealth legislation referenced does not need to be notified under the Legislation Act as a consequence of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35.

Clauses 52 to 54 Procedures and protocols

Section 65

Clauses 52 to 54 omit the existing notes for sections 65(a), notes 2 and 3 and the section 65 (d) and substitutes a new note for section 65 detailing that a law or instrument applied by section 65 does not need to be notified under the Legislation Act as a consequence of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35.

Clauses 55 to 56 Sections 67 to 69 and Definitions for pt 2.1 Schedule 2, section 2.1, definition of *Central National Area (City Hill Precinct)*, note

Clauses 55 and 56 omit the note for sections 67 to 69 for the definition of the Central National Area (City Hill Precinct) and include a new note detailing that the reference to the national capital plan does not need to be notified under the Legislation Act as a consequence of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35. It also informs the reader that the national capital plan is accessible at www.legislation.gov.au (which is the Federal Legislation Register).

Clause 57 Schedule 2, section 2.1, definition of *Queanbeyan city business zone*, note

Clause 57 omits the note in section 2.1 to the definition of Queanbeyan city business zone. This is as a consequence of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35.

Prior to this amendment this note told the reader to see section 67 of the EP Regulation that displaced Legislation Act, s 47 (5) and (6).

Clause 58 Dictionary, definition of *Poisons Standard*, note

Clause 58 substitutes the note under the definition of Poisons Standard located in the dictionary of the EP Regulation.

The note informs the reader that the Poisons Standard does not need to be notified under the Legislation Act because section 47 (6) does not apply. This is as a consequence of the insertion of new section 164B (Incorporation of documents), outlined above in clause 35. It informs the reader that the Poisons Standard is accessible at www.legislation.gov.au (the Federal Legislation Register).

Prior to the amendment the note referred to the operation of section 67 of the regulation which was also removed by clause 55 above.

Part 4 Water Resources Act 2007

Clauses 59 to 60 ACT water resource plan

Section 11A (2) and (3) and Section 11a (3), note

Clauses 59 and 60 add the words ‘a law or’ before the word instrument in the WR Act, section 11A (2), (3) and the note.

This provides a wide discretion for an ACT water resource plan to incorporate a law or an instrument. Previously it was only an instrument.

Clause 61 Section 100 (Incorporation of documents)

Clause 61 amends the existing section 100 on the incorporation of documents into statutory instruments under the WR Act to provide a wider discretion to incorporate laws and standards, including from other jurisdictions.

The *Legislation Act 2001*, section 47 (5) and (6) provide that an incorporated document, and, for section 47 (6), any amendment or replacement of such a document, are taken to be notifiable instruments. A notifiable instrument must be notified on the ACT Legislation Register under the Legislation Act. However, the Legislation Act, section 47 (5) or (6) may be displaced by the authorising law or the incorporating instrument (see s 47 (7)).

Clause 61 adds a subsection 100 (2) which disapplies the *Legislation Act 2001*, section 47 (5) and (6) for laws of other jurisdictions, Australian Standards and Australian/New Zealand Standards. This means that the laws of other jurisdictions, as well as Australian Standards and Australian/New Zealand Standards do not need to be notified on the legislation register under Legislation Act, section 47 (7) for the purposes of incorporation into statutory instruments under the WR Act.

The Legislation Act, section 47 (5) and (6) are displaced here under the WR Act because:

- laws of other jurisdiction are readily accessible over the internet on legislation registers of those jurisdictions; and

- incorporated standards are subject to copyright and may be purchased over the internet. Copies of the standard is a reasonable cost of doing an activity that requires a license under the WR Act.

Standards likely to be incorporated in statutory instruments under the WR Act are available for purchase from <https://www.standards.org.au>. As mentioned above, there are challenges relating to the ability to provide public access to Australian Standards due to copyright issues.

Standards Australia has recently released an initiative (Reader Room) that provides limited, no-fee access to the entire catalogue of Australian Standards for non-commercial purposes, that is for personal, domestic or household use. This initiative provides access for free to a maximum of three standards every 12 months, with access for 24 hours at a time. The Reader Room is available at <https://readerroom.standards.org.au/>.

Unfortunately, the Reader Room pilot does not apply to Australian and New Zealand Standards (International Standards), Standards Australia is looking to expand the standards available via the Reader Room in the future.

The reader is informed of where to access the laws and standards through a note after section 164B (5).

Licenses under the WR Act incorporate standards and instruments. It is an offence under section 77F (1) and 77G to contravene the condition of a license. The conditions in the licenses themselves will make it clear to the license holder what they are required to do to comply with the license. The standards will be referred to because of the rigour that underpins their development. The license holders will also be provided with a policy written by ACT Government that provides further guidance on how to meet their obligations under their license.

Licenses can be held by individual persons and the human rights implications of this are dealt with above under the heading 'Consistency with Human Rights'.

Clause 62 Regulation-making power

Section 109 (2) and notes

Clause 62 simplifies the regulation making power under the WR Act (section 109 (2)) as a consequence of the broader discretion in the amended section 100 (Incorporation of documents), outlined in clause 61.

Clause 63 Section 109(3)

Clause 63 increases the number of penalty units (from 10 to 20) that may be attached to offences that are contained in the Water Resources Regulation. This aligns with current ACT Government policy to allow more significant penalties in regulations as outlined in the 2010 Guide for framing offences (the Guide). That Guide was updated since section 109(3) was first enacted, and the penalties were inserted in the regulation. There are a range of different offending behaviours that are picked up by those offences. Increasing the range up to 20 penalty units allows the regulations to

better set the appropriate penalty for each offence and that will in turn ensure that there is effective deterrence for each offending behaviour. This seeks to strike a balance by increasing the maximum penalty to the recommended 20 penalty units, and not the 30 penalty units outlined on page 30 of the Guide.

This Bill does not directly change the penalty units for each offence in the regulation. Any changes would be subject to review, including a current jurisdictional comparison, to assess the suitability of the penalties in each offence in regulations and make recommendations to the Government accordingly. That review may then recommend regulation updates including changes to the penalty units for each offence in the regulations. That amendment would involve a regulatory impact assessment, consultation with relevant stakeholders and scrutiny processes. That would apply detailed analysis about factors from the Guide for setting the penalties including: the seriousness of the behaviour, the prevalence of the behaviour, the seriousness of each offence compared with offences of a similar nature, relative seriousness of each particular offence compared with others in the legislative scheme, the level of responsibility carried by the people that would be likely subject to the offences, and the possible consequences of failing to comply with the provision. It would also consider the adequacy of the maximum penalty to deter and punish a worst-case offence, including repeat offenders including any incentives to commit the offence, or the damage the offending behaviour does. It will consider the fault element of each offence.