LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

REPORT ON THE INQUIRY INTO THE ENVIRONMENT PROTECTION BILL 1997
AND THE
ENVIRONMENT PROTECTION (CONSEQUENTIAL PROVISIONS) BILL 1997

REPORT NO. 35

OF THE

STANDING COMMITTEE ON PLANNING AND ENVIRONMENT

OCTOBER 1997

RESOLUTION OF APPOINTMENT

[that] a Standing Committee on Planning and Environment [be established] to examine matters related to planning, land management, transport, commercial development, industrial and residential development, infrastructure and capital works, science and technology, the environment, conservation, heritage, energy and resources...

[and that the Committee] inquire into and report on matters referred to [it] by the Assembly or matters that are considered by the Committee to be of concern to the community.

Minutes of Proceedings (Third Assembly) No. 1, 9 March 1995, amended 22 June 1995

COMMITTEE MEMBERSHIP

Mr Michael Moore MLA (Chair)

Ms Roberta McRae OAM MLA (Deputy Chair)
(until 28 August 1997)

Ms Lucy Horodny MLA

Ms Louise Littlewood MLA

Mr Simon Corbell MLA
(from 28 August 1997)

Inquiry Secretary: Ms Sandra MacDonald

PREFACE

The Standing Committee on Planning and Environment is pleased to present its report on the *Environment Protection Bill 1997* and the *Environment Protection (Consequential Provisions) Bill 1997*.

The Committee believes that this legislation represents one of the most significant advances in environmental protection since self-government.

On behalf of all Members of the Committee, I would like to thank the members of the public and government officials who appeared before the Committee and submitted papers to the inquiry.

I would also like to thank the Minister for the Environment, Land and Planning for making available a seconded officer, Ms Sandra MacDonald, to conduct this inquiry. Sandy's valuable contribution to the Committee process has assisted the Committee in finalising this inquiry in a very short time frame while simultaneously pursuing other inquiries.

The Committee appreciates the work done by the Government to bring the legislation to its current form including consultation with interested parties.

As always, it is the Legislative Assembly of the ACT which will determine the final form of the legislation.

However, the Committee's consideration of the Bills has enabled Members to examine many of the issues in detail in a way that could not occur on the floor of the Assembly. The Committee expects that this report will assist all Members in their consideration of the issues covered by the Bill and the subsequent debate in the Assembly.

I look forward to the Government's response to this report, the ensuing debate in the Assembly and the passage of comprehensive environment protection legislation before the end of the term of this Third Assembly.

Michael Moore MLA
Chair

27 October 1997

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SUMMARY OF RECOMMENDATIONS

The following summary of recommendations is drawn from the text of this report. References relate to the paragraph numbers of the recommendations in the body of the report.

Recommendation 1
4.12. The Committee recommends that the Environment Protection Bill be amended to include cross references between sections including, but not limited to, references to the appeal provisions. The Committee's preferred system is set out as Style C in Appendix C.

Recommendation 2
4.22. The Committee recommends that the objects of the Environment Protection Bill be re-drafted along the lines proposed by the Conservation Council but that:

- paragraph (f) be amended to read "to provide for the monitoring and reporting of environmental quality on a regular basis in conjunction with the Commissioner for the Environment;
- paragraph (i) be taken from the Environmental Defender's Office proposal rather than the Conservation Council proposal; and
- the object of promoting the principle of ecologically sustainable development should also be included.

Recommendation 3
4.34. The Committee recommends that the Government take advantage of clause 2 of the Bill and delay the commencement of all provisions of the Act, except sections 1 & 2, until six months from the initial notification of the Act in the Gazette.

Recommendation 4
4.39. The Committee further recommends that, during the six month period proposed in Recommendation 3, the Government conduct extensive public education and awareness campaigns. The Committee considers it likely that this task will require additional resources and, if this turns out to be the case, would expect the Government to devote appropriate resources.

Recommendation 5
4.55. The Committee recommends that section 87 of the Environment Protection Bill be modified to provide the following outcome:

- that the Minister may direct the Authority in relation to the performance or exercise of his or her functions or powers;
- such directions must be in writing and notified in the Gazette;
- the Minister must not direct the Authority in relation to investigation or enforcement under the Act; and

- where the Minister makes a decision under section 87, that decision is a disallowable instrument.

Recommendation 6
4.70. The Committee recommends that the following section 92A be included in the Bill:

Inspection of premises - routine inspections

92A(1) An authorised officer who enters premises under subsection 90(1) may do any of the following in respect of the premises or anything on the premises:

(a) inspect or examine;

(b) take measurements or conduct tests;

(c) take samples for analysis.

92A(2) An authorised officer who enters premises under subsection 90(1) may, where the officer believes on reasonable grounds that the circumstances are of such seriousness and urgency as to require the immediate exercise of those powers without the authority of a warrant, take photographs, films, or audio, video or other recordings.

92A(3) An authorised officer who enters premises under subsection 90(1) may, where the officer believes on reasonable grounds that the circumstances are of such seriousness and urgency as to require the immediate exercise of those powers without the authority of a warrant, require the occupier or a person on the premises to do any of the following:

(a) answer questions or furnish information;

(b) make available any record or other document kept on the premises;

(c) provide reasonable assistance to the officer in relation to the exercise of his or her powers under subsection (1) or (2).

Recommendation 7
4.71. The Committee recommends that:

- the heading of section 93 should be changed to read "Inspection of premises - search warrants";
- the words "90(1) or" be deleted from subsection 93(1); and
- delete subsection 93(3).

Recommendation 8
4.72. The Committee recommends that the following section 93A be inserted to replace subsection 93(3):

Taking of samples

93A Where an authorised officer takes a sample under subsection 92A(1)(c) or 93(1)(c), the officer shall-

(a) divide the sample into 3 parts;

(b) place each of those parts in a separate container and seal each container;

(c) attach to each container a label bearing the signature of the authorised officer and particulars of the date and time when, and the place at which, the sample was taken; and

(d) deliver 1 of the 3 containers to each of the following persons:

(i) the occupier or the person apparently in charge of the premises;

(ii) an analyst;

(iii) the Authority.

Recommendation 9
4.74. The Committee recommends that subsection 97(1) be amended so that paragraph (a) is subject to paragraph (b) occurring first.

Recommendation 10
4.78. The Committee recommends that section 18 of the Bill be deleted due to the potential for unintended litigation against the Environment Management Authority, Authorised Officers and Analysts and that administrative arrangements be put in place to achieve the outcome of minimum disruption to business or premises by Authorised Officers and Analysts while exercising powers under Part XI or XII of the Bill.

Recommendation 11
4.80. The Committee agrees with the Conservation Council's proposal and recommends that subsection 22(2) be deleted and replaced with the following:

22(2)(a) In determining whether a person has complied with the general environmental duty, regard shall be had first and foremost to the nature of the harm or nuisance or potential harm or nuisance.

22(2)(b) Regard shall also be had to-

(i) the nature and sensitivity of the receiving environment;

(ii) the current state of technical knowledge for the activity;

(iii) the financial implications of taking each of those measures; and

(iv) the likelihood and degree of success in preventing or minimising the harm of nuisance of each of the measures that might be taken.

Recommendation 12
4.93. The Committee recommends that section 20 of the Bill be amended to include:

- accredited codes of practice;
- the results of any review of an environmental authorisation; and
- environmental audit reports.

Recommendation 13
4.97. The Committee recommends that the following subsections be inserted:

47(3) Within 10 working days of the Authority notifying the applicant of its decision under section 47(1), the Authority shall give notice of the grant of the

> authorisation in the Gazette and a daily newspaper printed and circulating in the Territory.
>
> 47(4) A notice under subsection (3) shall state that a copy of the authorisation is available for public inspection under section 20.

Recommendation 14
4.99. The Committee recommends that the following clause be included in the Environment Protection Bill:

> 54A(1) Within 10 working days of the Authority completing a review of an environmental authorisation under section 53(1) or 54(1), the Authority shall give notice of the results of the review in the Gazette and a daily newspaper printed and circulating in the Territory.
>
> 54A(2) A notice under subsection (1) shall state that a copy of the results of the review is available for public inspection under section 20.

Recommendation 15
4.101. The Committee recommends that the following public notification clause be included in the Environment Protection Bill:

> 39A(1) Within 10 working days of the Authority entering into an environmental protection agreement with a person under section 37, the Authority shall give notice of the finalised agreement in the Gazette and a daily newspaper printed and circulating in the Territory.
>
> 39A(2) A notice under subsection (1) shall state that a copy of the environmental protection agreement is available for public inspection under section 20.

Recommendation 16
4.103. The Committee recommends that the following clause be included in the Environment Protection Bill:

> 31(4) Within 10 working days of the Minister publishing a notice in the Gazette under subsection (1) accrediting a code of practice, the Authority shall give notice of the accreditation in a daily newspaper printed and circulating in the Territory.
>
> 31(5) A notice under subsection (4) shall state that a copy of the accredited code of practice is available for public inspection under section 20.

Recommendation 17
4.105. The Committee recommends that subsection 26(1) should be amended by adding the words “and in a daily newspaper printed and circulating in the Territory” after the word “Gazette”.

Recommendation 18
4.108. The Committee recommends that section 20 be amended to provide that fees not be charged for inspection of documents and that fees for copying documents should be minimal so as to encourage public access and participation.

Recommendation 19
4.112. The Committee recommends that the Environment Protection Bill be amended to provide that a copy of every draft environment protection policy be provided to the Conservation Council along similar lines to section 27 of the Land (Planning and Environment) (Amendment) Act (No. 3) 1996.

Recommendation 20
4.119. The Committee recommends that the following section 20A be included in the Environment Protection Bill:

> Documents relating to business affairs etc.
>
> 20A(1) A person may apply in writing to the Authority for the Authority to exclude the whole or part of documents from public inspection by reason of the confidential nature of any of the matters contained in those documents.
>
> 20A(2) Where a request is made under subsection (1) and in the opinion of the Authority the information:
>
> (a) contains a trade secret; or
>
> (b) the disclosure of which would, or would reasonably be expected to, adversely affect a person in respect of the lawful business affairs of that person; and
>
> (c) it would not be in the public interest to disclose that information;
>
> the Authority shall exclude that information from public inspection.
>
> 20A(3) The Authority must respond in writing to a request under subsection (1) within 10 working days.
>
> 20A(4) Where a request is made under subsection (1), the Authority shall refrain from keeping a public record of that information until the Authority has dealt with the request.
>
> 20A(5) Where a part of a document is excluded from the copies made available for public inspection, each copy shall include a statement to the effect that an unspecified part of the document has been excluded for the purpose of protecting confidentiality of information.

Recommendation 21
4.120. The Committee also recommends that the following paragraph be added to subsection 125(1):

> under subsection 20A(2) excluding or not excluding certain information from public inspection;

Recommendation 22
4.125. The Committee recommends that the following section 45A be inserted after section 45:

> 45A Within 10 working days of receiving an application under section 45, the Authority shall publish in the Gazette and in a daily newspaper printed and circulating in the Territory a notice-

(a) containing a brief description of the prescribed activity and its location to which the application relates;

(b) indicating where copies of the application may be obtained; and

(c) inviting any person to lodge a submission in relation to the application with the Authority by the date specified in the notice, being a day not less than 15 working days after the date of the notice.

Recommendation 23
4.126. In conjunction with Recommendation 22, the Committee recommends that the words “receipt of an application under section 45” in section 46(1) be deleted and replaced with the following “date specified in a notice published under section 45A and taking into account any submissions received in response to that notice”.

Recommendation 24
4.138. The Committee recommends that the Bill be amended to require public consultation in the development of codes of practice.

Recommendation 25
4.146. The Committee recommends that section 125(1) should be amended to provide for a right of review against a decision by the EMA not to impose a condition on an environmental authorisation.

Recommendation 26
4.157. The Committee recommends that the existing legislation be repealed except in so far as it applies to the Commonwealth until such time as the Commonwealth agrees to be bound by the new ACT legislation.

Recommendation 27
4.191. The Committee recommends that the time period of 5 working days specified in section 62 be increased to 10 working days.

Recommendation 28
4.194. The Committee recommends that:

- the word “shall” in subsection 52(2) be deleted and the word “may” be inserted instead; and
- section 125(1) be amended to include a right of appeal against a decision under section 52(2) to cancel an authorisation.

Recommendation 29
4.196. The Committee recommends that the Government consider the possibility of refunding fees paid in advance (less administrative costs) where an environmental authorisation is surrendered voluntarily by the holder.

Recommendation 30
4.205. The Committee recommends that the words “cost effective environmental regulation” be deleted in clause 33 and replaced by “the objects of this Act”.

Recommendation 31
4.216. The Committee recommends that:

- cremation be identified as a separate Class A activity under Schedule 1 to the Bill;
- references to cremation be deleted from Class A activities item (c); and
- the following definition of 'cremator' be inserted at item 1 of Schedule 1 to the Bill: 'cremator' means an incinerator used only for the reduction by means of thermal oxidation of human bodies (ie. corpses) to cremated remains.

Recommendation 32
4.227. The Committee recommends that item (h) of Class B activities relating to storage and production of petroleum products be reclassified as a Class A activity in Schedule 1 to the Bill.

Recommendation 33
4.239. The Committee recommends that:

- paragraph (b) of Regulation 24 be changed to read "all measurements shall be made and all adjustments for the nature of the noise shall be determined using the procedures set out in the NSW Noise Control Manual"; and
- the heading for Regulation 39 be changed to "Sampling and Analysis of Pollutants Other Than Noise".

Recommendation 34
4.246. The Committee recommends that the words "Subject to subsection (4)," be inserted at the beginning of Regulation 27(3) and that the following Regulation 27(4) be inserted:

> 27(4) Where the boundary of a noise zone abuts a residential area, the noise zone standard at the boundary is the lower of the zone noise standards for the adjoining noise zones in respect of the period during which it is emitted.

Recommendation 35
4.260. The Committee recommends that the Government revise its policy on noise from motor sports at Fairbairn Park to 5 dB(A) above background noise at the Ridgeway and Oaks Estate.

Recommendation 36
4.269. The Committee recommends that section 140 be amended to remove protection against self incrimination for corporations.

Recommendation 37
4.272. The Committee recommends that section 125(1) be amended to include appeal rights against the following decisions:

- a decision by the EMA under subsection 84(2)(a) whether or not to make a claim on or realise a financial assurance; and

- a decision under subsection 85(1) where the EMA requires the holder of an environmental authorisation to pay a specified amount in relation to recovery of extra costs.

Recommendation 38
4.274. The Committee recommends that the wording of paragraphs 15.2, 15.3, 15.13, 15.13.2 and 15.13.3 of the explanatory memorandum be amended to replace references to 'mental state' with references to 'intent or consciousness'.

Recommendation 39
4.277. The Committee recommends that the Environment Protection Bill be amended to set time limits of 12 months for prosecution of offences causing serious or material environmental harm and 3 years for other offences in line with the draft NSW Protection of the Environment Operations Bill 1997.

Recommendation 40
4.280. The Committee recommends that:

- the words "(the proof of which shall lie on the holder of the authorisation)" be inserted after the word "excuse" in clause 62 of the Bill;
- the words "(the proof of which shall lie on the transferor)" be inserted after the word "excuse" in subclause 138(1) of the Bill;
- the words "(the proof of which shall lie on the person)" be inserted after the word "excuse" in subclause 23(4); subclause 102(3); subclause 103(2); subclause 141(1); and subclause 141(2) of the Bill; and
- the words "(the proof of which shall lie on the person)" be inserted after the word "excuse" in subclause 4(2); subclause 5(4); and subparagraph 12(1)(b) of Schedule 2 to the Bill.

Recommendation 41
4.290. The Committee recommends that subsection 137(4) of the Bill be deleted and replaced with the following:

> 137(4) In this section-
>
> "prescribed officer" in relation to an offence committed by a body corporate, means an officer or employee of the Corporation whose duties include the direction, management or control of the Corporation and/or who has duties with respect to the matters giving rise to the offence.

Recommendation 42
4.295. The Committee recommends that the following subsection 101(1A) be added to the Bill:

> 101(1A) At the same time as giving notice under subsection (1), the Authority shall give notice in a daily newspaper printed and circulating in the Territory inviting any interested party to show why the thing should not be disposed of.

Recommendation 43
4.296. The Committee also recommends that:

- the words “under subsection (1) or (1A)” be added after the words “a notice” in subsection 101(2);
- the period between notification and disposal should be increased to 20 working days under paragraph 101(2)(b); and
- the words “or (1A)” be inserted after the words “subsection 1” in paragraph 101(3)(b).

Recommendation 44
4.302. The Committee recommends that Item 6 of Schedule 5 to the Regulations be amended to achieve the following outcome:

> 6(a) Subject to paragraph 6(b), a person shall not allow runoff from the washing down of vehicles, equipment or other things to enter the stormwater system.
>
> 6(b) Where a person does not have access to a grassed area or a purpose built wash down area on which they could wash any vehicles, equipment or other things belonging to their household, that person must take all reasonable steps to reduce the impact on the stormwater system of runoff.

Recommendation 45
4.305. The Committee recommends that section 132 be amended by adding the words “or environmental nuisance” after the words “environmental harm".

Recommendation 46
4.312. The Committee recommends that subsection 116(1) be deleted and replaced by the following:

> 116(1) Where the Authority has reasonable grounds for believing that a person has contravened or is contravening an environmental authorisation or a provision of this Act the Authority may serve an environment protection order on that person.

Recommendation 47
4.321. The Committee recommends that section 118 be deleted and replaced by the following:

> 118 An application for an order under section 119 may be made to the Supreme Court by-
>
> (a) the Authority; or
>
> (b) any other person who has requested the Authority in writing to make an application for an order under this section and the Authority has failed to do so within a time that is reasonable in the circumstances.

Recommendation 48
4.323. The Committee endorses the recommendation made by the EDO that the following clause be inserted after section 119 of the Bill:

> 119A Where a person (other than the Authority) brings proceedings pursuant to section 118 and an application for costs is made against that person the

Supreme Court may take into account the fact that the person brought the proceedings not for private benefit but in the public interest.

Recommendation 49
4.327. The Committee considers that sections 121 & 122 are unnecessary and recommends that they should be deleted.

Recommendation 50
4.331. The Committee recommends that clauses 43(2) and 134 of the Environment Protection Bill be deleted.

Recommendation 51
4.337. The Committee recommends that the Government reconsider the due diligence defence (section 143) in the light of the comments made by the Law Society, the EDO and Mr Osborne.

Recommendation 52
4.342. The Committee recommends that the word "and" be replaced by the word "or" in paragraph (b) of subsection 137(2).

Recommendation 53
4.344. The Committee recommends that, in paragraph 125(1)(w), the reference to subsection 70(2) be replaced by reference to subsection 70(1).

Recommendation 54
4.347. The Committee recommends that paragraphs 125(1)(h) and 125(1)(ze) be deleted as a right of review against a decision to impose a condition on an environmental authorisation is already provided for under paragraph 125(1)(f).

Recommendation 55
4.349. The Committee recommends that Regulation 17(a) be deleted and replaced with the following:

(a) the sale, purchase, storage, supply, use or disposal of-

(i) a substance; or

(ii) a thing that contains a substance

merely because the substance includes an insignificant quantity or proportion of an ozone depleting substance.

Recommendation 56
4.351. The Committee recommends that Period 5 be deleted from Table 3 - Time Periods at Schedule 2 to the Regulations as no associated noise condition is identified for that time period.

CHAPTER 1 - INTRODUCTION

Background to the Inquiry

1.1. The Government tabled the *Environment Protection Bill 1997*, the *Environment Protection (Consequential Provisions) Bill 1997* and the exposure draft of the *Environment Protection Regulations,* as well as the supporting explanatory material, in the Legislative Assembly on 15 May 1997.

1.2. The Standing Committee on Planning and Environment resolved on 25 July 1997 to inquire into and report on the *Environment Protection Bill 1997*.

1.3. On 28 August 1997, on the motion of Mr Moore, the Legislative Assembly formally referred the *Environment Protection Bill 1997* and the *Environment Protection (Consequential Provisions) Bill 1997* to the Standing Committee on Planning and Environment for report by 6 November 1997. The Assembly resolution also discharged Ms Roberta McRae and appointed Mr Simon Corbell in her place for this particular inquiry.

Conduct of the Inquiry

1.4. The Committee advertised the inquiry in *The Canberra Times, The Chronicle* and *The Valley View* calling for submissions on the detail of the Bill to be lodged by 1 September 1997. Environment ACT also placed the Committee's advertisement on its internet homepage.

1.5. Members of the Committee were briefed by Government officials at an informal meeting on 4 August 1997.

1.6. At the outset of the inquiry, the Committee arranged a public hearing on 11 August 1997 at which Government officials outlined the key features of the Bill and provided opportunity for both Committee Members and members of the public to ask questions. The purpose of holding such a public forum early in the inquiry process was to assist interested parties in preparing their submissions. Approximately 50 people attended the public hearing.

1.7. Twenty submissions were received by the Committee, all of which were authorised for publication. The Committee accepted some late submissions as well as four supplementary submissions. A list of submissions is at Appendix A.

1.8. Following receipt of submissions, the Committee held a public hearing on 7 October 1997. This public hearing was the first time that proceedings of a Committee were publicly broadcast under the *Legislative Assembly (Broadcasting of Proceedings) Act 1997.*

1.9. The Committee also held a public hearing on 19 September 1997 to accommodate a witness who would not be available in October. A list of persons who appeared as witnesses at the public hearings is at Appendix B.

Layout of this Report

1.10. The following chapter presents an overview and brief history of the Bill as well as its associated and subordinate legislation.

1.11. Chapter 3 provides brief summaries of each submission received by the Committee while Chapter 4 deals with specific issues considered by the Committee.

Terminology

1.12. Throughout this report the following terminology will be adopted:

- the *Environment Protection Bill 1997* will be referred to as the 'Environment Protection Bill' or, simply, 'the Bill';
- the *Environment Protection (Consequential Provisions) Bill 1997* will be referred to as the 'Consequential Provisions Bill';
- the Exposure Draft of the *Environment Protection Regulations* will be referred to as 'the Regulations'; and
- the *Land (Planning and Environment) Act 1991* will be referred to as the 'Land Act'.

CHAPTER 2 - OVERVIEW OF THE ENVIRONMENT PROTECTION BILL

History of the Environment Protection Bill[1]

2.1. The need to update environment protection legislation in the ACT was identified at the time of self-government. Under the *Australian Capital Territory Self-Government (Citation of Laws) Act 1989,* Ordinances covering air pollution, water pollution and noise control became known as the *Air Pollution Act 1984*, the *Water Pollution Act 1984* and the *Noise Control Act 1988* respectively. Shortly afterward, the ACT passed the *Pesticides Act 1989* and, in 1991, in line with developments nationally and in the States the *Ozone Protection Act 1991* was enacted.

2.2. In October 1993, the then Government released a discussion paper on the proposed integrated environment protection legislation. Approximately 18 submissions were received in response to the paper and an 'expert' Reference Group including business, community, legal and public health representatives was formed in early 1994.

2.3. A second discussion paper was released in December 1994 which generated a further 20 submissions in relation to the proposed legislation.

2.4. The incoming government agreed to the development of an Environment Protection Bill in 1995 and work commenced on drafting in 1996.

2.5. The Reference Group reconvened in September 1996 to consider a draft Bill.

2.6. Following refinement of the Bill in the light of issues raised by members of the Reference Group, the Environment Protection Bill was tabled in the Legislative Assembly on 15 May 1997.

Key Objectives of the Environment Protection Bill

2.7. In introducing the Environment Protection Bill into the Legislative Assembly, Mr Humphries summarised the Bill's key objectives, set out at clause 3 of the Bill, as follows:

> *First, to protect the environment; secondly, to achieve an appropriate balance between economic, social and environmental factors in decision-making, consistent with the principle of ecologically sustainable development; thirdly, to establish a single and integrated regulatory framework for environment protection; and finally, to encourage the community at large to accept responsibility for their actions in relation to the environment.*[2]

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[1] Environment ACT, *Presentation on the Environment Protection Bill*, 11 August 1997, Slide 3
[2] ACT Legislative Assembly Hansard, 15 May 1997, p 1450

2.8. He also commented that "the Bill will provide a mechanism for the ACT to meet several of its national obligations under the Inter-Governmental Agreement on the Environment"[3].

Environment Management Authority

2.9. The Environment Protection Bill sets up an Environment Management Authority (EMA) to administer the Bill (sections 11-19). The EMA is a statutory office held by a public servant who has the power to delegate authority to Authorised Officers.

2.10. The Bill also provides that the Minister may call-in the power to make a particular decision in the case of high level, political decisions (section 87).

Comparison of the Bill with Existing Pollution Control Legislation

2.11. At the Committee's public hearing on 11 August 1997, Ms Janine Cullen from Environment ACT compared the new legislation with the old.

> *The Bill is based on minimising and preventing environmental harm. It seeks to be proactive. It factors in environmental considerations in decision-making and this reflects the ACT's commitment to the Inter-Governmental Agreement on the Environment. It provides a range of management tools. It allows different treatment for different activities. As we have said a number of times, it allows for penalties up to $1m for corporations. The reason for this is to reflect what we believe is changing community expectations. It certainly brings the ACT into line with the rest of the eastern States.*
>
> *In the existing legislation we have got five separate pollution control Acts dealing with air, water, noise, pesticides and ozone. Responsibility for environmental management lies almost exclusively with the polluter. It is based on controlling emissions and discharges to the environment. It is known as end-of-pipe type legislation. It is reactive rather than proactive. It provides for a command and control approach. The two options you have got are 'do nothing' or 'sledge hammer', which is prosecution, and it has a maximum penalty of $50 000 for corporations, which does not provide an effective stick in today's terms.*[4]

2.12. Ms Cullen went on to provide a more detailed explanation of the key elements of the Bill and how they compare with existing legislation.

General Environmental Duty

2.13. The Environment Protection Bill contains a general environmental duty (section 22) which is a statement of the duty of all citizens to do all that they can that is reasonable and practicable to minimise environmental harm. This principle also applies to small and large business and government. The general environmental duty

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3 *ibid*
4 Transcript of Proceedings, 11 August 1997, pp 6-7

recognises the responsibility of all citizens whereas the current legislation is mainly aimed at industry or other people conducting significant activities.

Environmental Authorisations

2.14. Environmental Authorisations (sections 40-62 of the Bill) are licensing-type arrangements under the Bill. Environmental Authorisations will be required for activities which have a significant impact or potential impact on the environment. Activities for which an environmental authorisation is required (Class A activities) are listed at Schedule 1 to the Bill.

2.15. The Bill provides for three classes of environmental authorisations:

- standard environmental authorisations;
- special environmental authorisations; and
- accredited environmental authorisations.

2.16. Standard environmental authorisations are expected to be the most common form of authorisation and may be granted for an unlimited period or a specified period not longer than 3 years and are subject to annual review.

2.17. Special environmental authorisations may be granted in respect of an activity that is being conducted for the purposes of research and development or the trialing of new technologies or equipment. Special authorisations may be granted for a period not longer than three years and are reviewed annually.

2.18. Accredited environmental authorisations are designed to recognise good environmental performers. Accredited authorisations may be granted for either an unlimited period or a specified period not longer than 3 years and are subject to a less onerous monitoring regime. They are subject to review once every three years and attract lower fees than standard authorisations. Applications for accredited authorisations will be assessed by the EMA having regard to environmental improvement initiatives.

2.19. Under section 125 of the Bill, decisions by the EMA in relation to grant, variation, suspension and cancellation of environmental authorisations are subject to review by the Administrative Appeals Tribunal.

2.20. Under the existing legislation there are licences for both water and ozone and there are exemptions for noise. There are no similar provisions under the air or pesticides legislation. The maximum term of a licence is one year.

Environmental Protection Agreements

2.21. Environmental Protection Agreements (EPAs) (sections 37-39 of the Bill) are negotiated agreements between the regulator and the regulated. There is no equivalent to an EPA in the existing regime. EPAs apply to 'Class B' activities which are listed at Schedule 1 to the Bill. Class B activities have a lesser risk of environmental harm than Class A activities but nevertheless warrant some form of regulation due to their potential to cause environmental harm.

2.22. Unlike environmental authorisations, environmental protection agreements do not incur a fee. There is a strong incentive for a person who conducts a Class B activity to enter into an environmental protection agreement with the EMA because otherwise an environmental authorisation is required for that activity.

Environment Protection Policies

2.23. Environment Protection Policies (EPPs) (sections 24-30) describe the matters the EMA takes into consideration when making decisions under the Bill. An important function of EPPs is to provide guidelines for both industry and the community and public consultation is a formal requirement for all EPPs in the draft stage.

2.24. While EPPs are an important feature of the new framework they will be administrative, rather than legal, in nature. Some State equivalents to the ACT's proposed EPPs are subordinate legislation. However, in those States the detail of the policies occurs in local government by-laws. The single level of Government in the ACT has largely influenced the choice to make EPPs administrative in nature.

2.25. While there are certain policies in place under the existing laws, such as the Noise Control Manual as well as Erosion and Sediment Control Guidelines, these are based on technical scientific requirements. In addition, many of the existing policies are not documented.

Enforcement

2.26. In terms of enforcement, the Environment Protection Bill is a significant improvement over the existing legislation. The Environment Protection Bill provides a broader range of enforcement options to cover the spectrum of offences. It also allows third parties to apply to the Supreme Court under Supreme Court rules for an injunctive order whereas under the existing legislation there is no formal role for third parties in enforcement.

2.27. Enforcement options under the Environment Protection Bill are:

- on-the-spot fines (sections 105-115);
- environment protection orders (a requirement to do or not do something within a specified time) (sections 116–117); and
- injunctive orders (prosecution) (sections 118–122).

2.28. The only enforcement options under the existing legislation are pollution abatement notices (which only apply for air and water offences), noise direction notices and prosecution.

On-the-spot Fines

2.29. On-the-spot fines may only be issued for offences that involve fairly black and white factual issues. They may not be used for offences that involve an officer reaching a conclusion, judgement or opinion which are more appropriately dealt with by the Courts.

2.30. Intent may be a consideration in issuing an on-the-spot fine. At the public hearing on 11 August 1997, Mr Burnett referred to two examples: one for which intent could be a consideration (item 6 of Schedule 5 to the Regulations) and one more of a strict liability nature which did not make specific reference to intent (item 2 of Schedule 5 to the Regulations).[5]

2.31. Appeal processes in relation to on-the-spot fines are modelled on the provisions of the *Nature Conservation Act 1980.*

Offence Provisions

2.32. Offence provisions in the Environment Protection Bill closely follow a national three-tiered approach: serious, material and minor.

2.33. Offences may or may not involve an element of intent or consciousness. Offences that involve an element of intent mean that the gravity of the offence depends on a person's conscious state. The three levels of offences within the three types of environmental harm described above are: acting knowingly or recklessly; acting negligently; and offences of a strict liability nature where the simple act of doing something causes the offence.

2.34. Defences available to both individuals and bodies corporate are those of due diligence (section 143) and emergency (section 144).

2.35. Under the existing legislation, there are a range of specific offences relating to actions, omissions and the nature of discharges. These are all strict liability offences and the defence of due diligence is available to individuals and bodies corporate.

Other New Environmental Management Tools

2.36. A new range of environmental management tools is available under the Environment Protection Bill including Environmental Improvement Plans, environmental audits, emergency plans and codes of practice. These management options can apply to non-regulated activities as well as regulated ones.

Environmental Improvement Plans

2.37. Environmental Improvement Plans (sections 63-67) are formal plans to rectify problems, minimise environmental impacts and to achieve best environmental practice over time. Under certain circumstances the EMA can require the preparation of an environmental improvement plan or, alternatively, environmental improvement plans may be prepared on a voluntary basis.

Environmental Audits

2.38. Environmental Audits are a key tool for monitoring environmental performance of business under the Environment Protection Bill (sections 68-74).

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5 *ibid*, p 19

These may be required by the EMA or may be undertaken voluntarily. Certain legal protection may apply to information contained in voluntary audits.

Emergency Plans

2.39. Emergency Plans (sections 75-79) are designed to encourage business to consider foreseeable emergencies, their likely environmental impacts and how best to cope with them. The EMA may require preparation of an emergency plan as a condition of an environmental authorisation or if the EMA has reasonable grounds for believing that environmental emergencies could occur during the conduct of the activity.

Accredited Codes of Practice

2.40. Accreditation of Codes of Practice by the Minister provides a mechanism to recognise codes of practice which set out ways of minimising environmental harm in a particular industry or sector (sections 31-32). Codes of Practice may be specific to the particular activity or activities to which they relate or may apply across an industry. Compliance with an accredited code of practice is deemed to be compliance with the general environmental duty under section 32.

2.41. The accreditation of a code of practice by the Minister is tabled in the Legislative Assembly and is a disallowable instrument.

Economic Measures

2.42. The Environment Protection Bill includes facilitative provisions (sections 33-36) for schemes involving economic measures to be set up under the Regulations. The types of schemes proposed in the Bill are 'bubble licences' and 'tradeable permits'. While it is unlikely that economic schemes will become a major feature of environmental regulation in the ACT, these types of measures are emerging as an important regulatory tool in various places around the world. Examples of these types of schemes in place in Australia are the Hunter River Salinity Trading Scheme and the South Creek Bubble Licence (Reducing Nutrients in the Hawkesbury-Nepean) - both of which are in NSW.

Financial Assurances

2.43. The Bill also provides for Financial Assurances (sections 80–86), a type of bond or surety which may be required by the EMA as a condition of an environmental authorisation. The EMA may only require a financial assurance after an assessment of the likelihood of the activity causing serious or material environmental harm. The EMA will also take into account the environmental record of the authorisation holder in deciding whether to require a financial assurance.

Integration with the Land Act

2.44. Another important feature of the Environment Protection Bill is its integration with the Land Act. Two way links are created between the development approval

processes of the Land Act and the grant of environmental authorisations under the Environment Protection Bill.

2.45. Clauses 5 and 6 of the Consequential Provisions Bill amend the Land Act to require that the EMA must be notified of development applications in respect of activities which:

- are listed in Schedule 1 to the Environment Protection Bill, that is, those activities for which either an environmental authorisation or an environmental protection agreement are mandatory; or
- have the potential to cause serious or material environmental harm.

2.46. Section 46(6) of the Environment Protection Bill provides that the EMA may not grant an environmental authorisation in respect of a development unless the development has been approved under Part VI of the Land Act.

2.47. In addition, there is scope under the Environment Protection Bill for the EMA to grant an environmental authorisation subject to conditions. Mr Burnett gave the following example at the Committee's public hearing on 11 August 1997. In the case of a factory being built on a 'greenfield' site, an environmental authorisation may be issued up front to give certainty to the developer, subject to the condition that the activity cannot commence until the factory is built and everything is passed and approved.[6]

Implications for the Commissioner for the Environment

2.48. The Commissioner for the Environment operates under the *Commissioner for the Environment Act 1993* (the Commissioner for the Environment Act). As such, the Environment Protection Bill makes no specific mention of the Commissioner.

2.49. The Environment Protection Bill would be unlikely to impact on the Commissioner's Annual Reports and State of Environment Reports, however, there is potential for an increased range of Special Reports, which may be initiated by either the Minister or the Commissioner.

2.50. There may also be more opportunity for the Environmental Ombudsman role to come into place in relation to decisions or actions taken by the EMA. The Environment Protection Bill provides third party appeal rights to the Administrative Appeals Tribunal and, where other avenues for seeking review are provided for, the Environmental Ombudsman function of the Commissioner has some limitations.[7] In situations where the Environment Protection Bill does not provide a right of review, a complaint or request for investigation may be made to the Commissioner.

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6 *ibid*, p 5
7 *Commissioner for the Environment Act 1993*, section 14

Public Access to Documents

2.51. Section 20 of the Environment Protection Bill provides a list of documents that are to be available for public inspection. The final dot point makes it possible for other documents to also be publicly available if they are prescribed. Documents listed at section 20 are:

- environmental authorisations including any conditions;
- environmental improvement plans;
- approved emergency plans;
- environmental protection agreements;
- environment protection orders;
- documents which set out the results of certain testing or monitoring;
- the list of authorised officers; and
- any prescribed document.

2.52. Environment Protection Policies must also be available for inspection by a person under Section 29 of the Bill.

2.53. In addition, the *Freedom of Information Act 1989* applies so that other information is also available to the public under the requirements of that Act.

Commencement and Transitional Arrangements

2.54. Section 2 of the Bill allows for different provisions of the Bill to commence on different days. Sections 1 and 2, the formal requirements of the Bill, commence on the day the Act is notified in the Gazette. Other provisions take effect from the date or dates the Minister notifies in the Gazette and there is a 'catch-all' for any provisions that have not already commenced to commence automatically 6 months after the initial notification of the Act in the Gazette.

2.55. Transitional arrangements are contained in the Consequential Provisions Bill to preserve the effect of licences and other instruments issued under legislation that is to be repealed, until the instrument either expires or ceases to have effect in some other way, for example, by being cancelled. The net effect is that the transition to the new regulatory framework will be completed substantially within twelve months.

CHAPTER 3 - SUMMARY OF SUBMISSIONS

Introduction

3.1. This chapter provides an indication of the key points raised in each of the submissions received by the Committee. The summaries are not exhaustive, however, all submissions are public and anyone interested in the detail of submissions should read the submissions which are available through the Legislative Assembly Committee Office.

3.2. The Committee has carefully considered all material provided to it both in submissions and at public hearings, however, the substantive issues on which the Committee focussed are discussed in more depth in Chapter 4.

3.3. The summaries are provided in alphabetical order by author and quotes are taken from the relevant submission unless otherwise stated.

ACTEW Corporation

3.4. ACTEW Corporation made two submissions to the Committee. The first submission was quite extensive and the second one provided responses to issues raised in the Environmental Defender's Office submission as well as reiterating concerns raised at the public hearing on 7 October 1997.

Definitions

3.5. ACTEW commented that the definitions of 'environmental harm', 'environmental nuisance' and 'environment' include visual aspects of the environment. They suggested that the subjectivity associated with judging whether a particular activity degrades the aesthetic conditions of a human made structure or quality of a place creates uncertainty.

Public Inspection of Documents

3.6. ACTEW was concerned that, unlike section 23 of Tasmania's *Environmental Management and Pollution Control Act 1994*, there is no provision to exempt confidential information or trade secrets from public inspection under section 20 of the Environment Protection Bill and suggested changes accordingly.

3.7. In their supplementary submission, ACTEW proposed that documents containing results of monitoring or testing or findings of reviews of authorisations should not be publicly available. They requested that paragraph 20(1)(f) of the Bill be deleted.

Powers of Authorised Officers

3.8. ACTEW is concerned at the breadth of the entry and inspection powers of Authorised Officers. They contend that consent should be obtained on every occasion

of seeking entry and that there should be provision for the occupier of the premises to claim privilege or confidentiality for documents or other things.

3.9. They are also concerned that authorised officers, who would not have the skills to operate highly sophisticated and complex technology, may take emergency action under Division 3 of Part XI. They suggest that section 97 be amended so that "direct emergency action should not be taken [by an authorised officer] until a direction by the EMA has been given and not followed."

Third Party Appeals

3.10. ACTEW does not believe that third party merits appeals are appropriate in the environmental context and believe that third party involvement should not go beyond the right to seek an injunctive order from the Supreme Court. They also believe that merit review should only be available to third parties who can show that they are substantially and adversely affected by the decision.

General Defence

3.11. ACTEW considers that an act or omission permitted under an environmental protection agreement or environmental improvement plan should constitute an exception to an offence under clause 133 as well as an act or omission authorised by or under the Act.

Deemed Liability for Company Officers

3.12. In relation to deemed liability for officers of bodies corporate (section 137), ACTEW believes the definition of 'prescribed officer' is too broad in that it includes officers who have no control over the activities involved in the offence and employees who merely carry out instructions received from more senior officers.

3.13. In relation to the defence offered to prescribed officers (subsection 137(2)), ACTEW believes that prescribed officers should not be required to prove that they had no knowledge of the contravention by the corporation and establish a defence for the corporation as well as proving due diligence. They suggest that the defence should be limited to due diligence.

Strict Liability Offences

3.14. ACTEW is concerned at the introduction of strict liability for a number of offences. They state that "strict liability offences do not require a person to be at fault although the defence of honest and reasonable mistake is allowed". They suggest that it should be made clear that the general environmental duty exception to offences in clause 133(b) would constitute an exception to strict liability.

Collection of Commercial Waste

3.15. ACTEW considers that it seems unnecessarily broad to require environmental regulation for collection of waste on a small scale which a particular industry may perform on a regular basis. They therefore recommend that the collection of waste

referred to in Schedule 1 to the Bill, which is a Class B Activity, be limited to commercial collection of waste.

Authorisations for Current Activities

3.16. ACTEW is concerned that authorisations will be required under the Bill for activities that are unregulated at present. They believe that it is important that the Bill be administered in a realistic way so that industries within the ACT are not required to implement new practices and obtain authorisations within an unacceptable time frame and over an unrealistic spectrum of activities. They recommend that clause 56 be amended to require the EMA to have regard to considerations of cost or convenience of complying with the Act.

Response to Issues Raised by the Environmental Defender's Office

3.17. In its supplementary submission, ACTEW refuted several proposals put forward by the EDO. ACTEW's position is that:

- section 18 relating to minimum disruption should not be deleted;
- section 41 relating to the circumstances under which the EMA can require an environmental authorisation should not be amended;
- section 122 which deals with compensation in relation to injunctive orders should not be deleted; and
- section 140 which affords protection against self incrimination to both natural and corporate persons should not be amended.

Australian Acoustical Society

3.18. The Australian Acoustical Society's submission concentrated on the noise-related parts of the Regulations.

3.19. They have no major objections to the noise zone standard approach adopted under the Regulations which are somewhat in agreement with the zoning levels that are listed in the Australian Standard on Environmental Noise Assessment. However, they suggest that consideration be given to including an evening period in Table 1 of the Regulations. They also believe it is important that the standards prescribed in Table 1 can be changed quickly should it be shown that the acoustic environment for the ACT is being degraded.

3.20. The Acoustical Society was concerned that there are a number of aspects other than the noise level such as tonal character and impulsiveness that will increase annoyance which should be adjusted for. They suggest changing Regulation 24(b) to include reference to adjustments for the nature of noise.

3.21. In relation to Table 3 - Time Periods, the Society commented that there does not seem to be a noise condition applicable to Period 5. In relation to Table 2 - Noise Conditions, the Society suggested that item 8 be changed to allow for testing during the appropriate time period. The Society also recommended that the heading for Regulation 39 should be changed to 'Sampling and Analysis of Pollutants Other Than

Noise' as the method for measurement of noise has been specified in Regulation 24 and the procedures under Regulation 39 relate to laboratory analysis and are too restrictive for noise measurement.

Australian Finance Conference

3.22. The submission provided by the Australian Finance Conference (AFC) focussed on the seizure and disposal provisions for things used in the commission of an offence (Part XI Division 4 of the Bill). The AFC is the national finance industry association and a major part of the assets held by AFC members relates to provision of finance for the acquisition of plant and equipment.

3.23. AFC members are concerned that financiers, who may be the owner or equitable owner of the goods seized, would not have opportunity under the Bill to make representations to the EMA as to why the goods should not be disposed of. They claim that the Bill does not protect the interests of innocent third parties and suggest all interested parties should have opportunity to make representations about the disposal. Specific suggestions made by AFC are discussed under the heading Seizure and Disposal of Things Used in the Commission of an Offence on page 97.

The Australian Gas Light Company

3.24. The Australian Gas Light Company (AGL) supports the move to consolidate and streamline the environmental regulatory regimes in the ACT under a single Act as well as the proposed integration with the development and building application processes of the Land Act. AGL also supports the concepts of requiring environmental authorisations and environmental protection agreements for activities which have the potential to cause environmental harm.

Conservation Council of the South-East Region and Canberra

Objects

3.25. The Conservation Council of the South-East Region and Canberra (the Conservation Council), considers that the objects of the Bill place too great an emphasis on economic and practicality considerations and suggested that the objects be re-drafted along the lines of Tasmania's *Environmental Management and Pollution Control Act 1994*.

Definitions - Serious and Material Environmental Harm

3.26. The Conservation Council queried the usefulness of having the two categories of 'material' and 'serious' environmental harm. They suggested that examples of each type of harm should be given in the explanatory memorandum as it is difficult to know in advance of a judicial determination what kind of damage is covered by these terms.

3.27. They suggested that the monetary value of damage caused should be assessed over a period of time as the nature and full extent of environmental damage is rarely immediately apparent.

3.28. The Conservation Council proposed that a financial assurance should be required for any activity likely to cause either serious or material environmental harm.

Administration of the Act

3.29. The Conservation Council believes that the EMA should be an independent entity rather than a public servant.

3.30. However, in the event that the functions of the EMA are carried out by a public servant, the Conservation Council requests that all Ministerial directives to the EMA should be general rather than specific and should be gazetted.

3.31. The Conservation Council suggests that clause 87, which allows the Minister to make decisions instead of the EMA, should be deleted.

3.32. In addition, the Conservation Council proposes that clause 18 should be deleted as it is unnecessary and puts fetters on the powers of Authorised Officers and Analysts.

Environmental Duties

3.33. The Conservation Council considers that the general environmental duty imposed by clause 22 is essentially declaratory in character and does not give rise to any specific obligations. They suggest that the clause be reworded to place stronger emphasis on 'the nature of the harm or nuisance or potential harm or nuisance'.

3.34. In relation to the duty to notify actual or threatened environmental harm (clause 23), the Conservation Council believes that this duty should be extended to third parties and not limited to the person conducting the activity that has caused or is likely to cause harm.

Environment Protection Policies

3.35. The Conservation Council would like to see the added obligation for the EMA to provide a copy of any draft EPP to the Conservation Council in the same way as the Government is bound to provide copies of each Preliminary Assessment under the Land Act to the Conservation Council.

State of the Environment Report

3.36. The Conservation Council believes that the State of the Environment Report is "probably the most valuable instrument available in the ACT to assist policy development". They suggest that there should be a requirement in the Bill for regular consultation between the EMA and the Commissioner for the Environment.

Accredited Codes of Practice

3.37. There should be public consultation in relation to draft codes of practice, which should also be gazetted and advertised when in their final form, according to

the Conservation Council. They also request that copies of codes should be provided to them.

Economic Measures

3.38. The Conservation Council believes that economic measures should be used as a way to achieve the objects of the Act, not as a means of achieving cost effective environmental regulation.

Environmental Trust Fund

3.39. The Conservation Council suggests that, while the Bill has both protecting and enhancing the environment as objects, the focus of the legislation is on protection. They suggest that a trust fund such as the one set up in NSW by the *Environmental Restoration and Rehabilitation Trust Act 1990* be established. Money raised from measures under the Bill would go to the trust account rather than consolidated revenue and part of those revenues should go to peak environmental groups, such as themselves, who have the objectives of protecting the environment and fostering public awareness on environmental issues.

Environmental Protection Agreements/Environmental Authorisations

3.40. The Conservation Council believes that there should be public consultation in relation to both environmental protection agreements and environmental authorisations including a requirement to gazette and advertise finalised agreements and authorisations.

Public Inspection of Documents

3.41. Generally, the Conservation Council believes that fees should not be charged for inspection of documents.

Environmental Authorisations

3.42. The Conservation Council requested that there be public notice of applications for authorisations, opportunity for public comment on those applications as well as public notice of the granting of authorisations. Variations to authorisations should be subject to a similar public process.

3.43. The Conservation Council believes that documents relating to annual reviews of authorisations should be accessible to the public, there should be provision for public consultation and the outcome of the review should be gazetted.

3.44. The Conservation Council proposes that clause 41(b) be deleted as it considers that it is not necessary that there must be serious or material environmental harm as well as a breach of the Act before an environmental authorisation is required.

3.45. The Conservation Council believes that the liability for contravening an environmental authorisation should be proportional to the degree of harm caused by the release of the excess pollutant.

Environment Protection Orders

3.46. The Conservation Council contends that it is sufficient for there to be a contravention of the Act or an environmental authorisation for an environment protection order to be issued. They see the additional requirement that 'environmental harm or an environmental nuisance has occurred or is occurring' as weakening the power of the EMA.

Injunctive Orders

3.47. The Conservation Council also believes that there should be no restrictions on the type of person who may apply for an injunctive order, that is, they recommend that the ACT adopt an open standing provision as is the case in NSW.

Environmental Defender's Office (ACT)

3.48. The main object of the submission made by the Environmental Defender's Office (the EDO) was to improve the transparency and accountability of the new regulatory framework under the Bill. In general, the EDO favours more public involvement in the procedures under the Bill and makes some suggestions to improve the mechanisms established by the Bill for regulation of polluting activities.

Drafting Style

3.49. The EDO suggested that the Bill would benefit from features found in the Commonwealth *Telecommunications Act 1997* such as simplified outlines and notes as to the relationship between the provisions of the Bill.

Objects and Definitions

3.50. The EDO claimed that the objects clause places unnecessary emphasis on the notions of practicality and economic considerations. The EDO suggested amending the objects along the lines of the *Environmental Management and Pollution Control Act 1994* (Tas) to simplify their structure and more clearly focus on environmental protection.

3.51. The EDO was concerned that the definitions of 'material environmental harm' and 'serious environmental harm' create uncertainty about the obligations imposed and the powers granted by the Bill in that it is difficult to predict in advance of a judicial determination what environmental harm would be caught by their terms.

Environment Management Authority

3.52. The EDO is concerned that the EMA is not independent or separate from the political process. There are no restrictions or qualifications on Ministerial control. The EDO suggested mechanisms to improve transparency of the policy process on the assumption that direct Ministerial control is retained. The proposed mechanisms are discussed under the heading Powers of the Minister on page 54.

Minimum Disruption

3.53. The EDO commented that while, on the surface, the requirements of clause 18 appear reasonable, this clause places an unnecessary restriction on the power of Authorised Officers and Analysts. In support of the recommendation to delete clause 18, the EDO stated that no equivalent provision appears in NSW, Queensland or South Australian legislation.

Inspection of Documents

3.54. The EDO suggested that the following documents also be included in the list of documents available for public inspection:

- applications for environmental authorisations;
- accredited codes of practice; and
- documents containing the findings of reviews of environmental authorisations.

3.55. The EDO also suggested that fees charged for inspection of documents should not restrict public access to the documents.

Accredited Codes of Practice

3.56. The EDO believes that there should be public consultation in the development of codes of practice.

Environmental Authorisations

3.57. The EDO believes that the licensing process should be open to public view and participation. To better achieve this, the EDO suggests that there should be provisions requiring public notice of applications for authorisations, public comment on applications and public notice of granting of authorisations.

3.58. The EDO also suggested that consideration be given to establishing a trust account similar to the trust account established under the *Environmental Education Trust Account Act 1990* (NSW) for a percentage of environmental authorisation fees received.

3.59. The EDO believes that the findings of annual (or three yearly) reviews should be made public and that public notice should be given of the outcome of any review.

Environmental Protection Agreements

3.60. The EDO believes that the Bill should make provision for public notice and comment on environmental protection agreements that are proposed to be entered into.

3.61. The EDO suggests that where an environmental protection agreement is breached, the EMA should have the power to require an environmental authorisation. Under the draft legislation, where there is a breach of an environmental protection

agreement, the EMA can only require an environmental authorisation when there is serious or material environmental harm and a breach of the Act.

Environmental Improvement Plans

3.62. In relation to voluntary environmental improvement plans, the EDO commented that the requirement under paragraph (d) of subsection 67(4) for the EMA to consider whether the cost of implementing a measure is reasonably proportional to the reduction in environmental harm likely to be achieved by implementing the measure would appear to be unnecessary as this decision would have already been made by the person applying for the accreditation.

Review of Decisions

3.63. The EDO suggested that there should be public notice of decisions (both decisions made by the Minister and the EMA) of which review might be sought by persons other than the applicant.

Harm Caused by Excess Pollutant

3.64. The EDO was concerned that where an environmental authorisation is breached by the release of excess pollution, the court can only have regard to the harm caused by the excess pollutant. This means that it is possible for no (or little) harm to be caused by the excess pollutant where the environment is already degraded. The EDO recommended that clauses 43(2) and 134 be deleted.

Economic Measures

3.65. The EDO is concerned about the complete delegation of the power to develop and implement schemes involving economic measures and that the emphasis is on reducing compliance costs rather than reducing pollution.

"Without Reasonable Excuse"

3.66. The EDO stated in its submission that the inclusion of the words "without reasonable excuse" in clauses 62 and 141 create an additional element of the offence, with the onus of proof on the prosecution. The EDO believes that the onus of proof should rightly lie with the person who committed the offence and suggested amendments accordingly.

Environment Protection Orders

3.67. The EDO believes that the provisions of the Bill that require environmental harm in addition to a breach of the Act before a notice can be issued give too little weight to compliance with the Act and suggests that an environment protection order could be issued following a breach of the Act.

Injunctive Orders

3.68. The EDO believes that the civil enforcement provisions (clauses 118-122) are "so oppressive that even if all the requirements set out could be met, no properly advised litigant would make use of the provisions".

3.69. The EDO suggests that the current provision relating to standing (clause 118) be deleted and replaced with an open standing provision equivalent to that proposed in the NSW *Protection of the Environment Operations Bill 1997.*

3.70. The EDO also contends that the provision relating to security for costs is oppressive and that there is no need for special provision in the Bill that is more onerous than that which applies in litigation generally.

3.71. In relation to awarding of compensation, the EDO also believes that there is no need for the provision (section 122) as there are sufficient disincentives to litigation and controls on the litigation process to ensure that proceedings are not brought lightly.

3.72. The EDO suggested that it should be made clear in the legislation that the motivations of a third party bringing proceedings can be taken into account when determining what costs order should be made.

Self Incrimination

3.73. The EDO does not believe there is justification for granting corporations privilege against self incrimination under the Bill. In support of this argument, the EDO cited the *Evidence Act 1995* (Commonwealth) and the *Corporations Law* as well as referring to *Caltex v Environment Protection Authority* (1993) 178 CLR 477.

Due Diligence Defence

3.74. The EDO argued in its submission that clauses 143(2)(a)(v) and 143(2)(b)(iii) should be deleted as they list matters which relate to matters after the event and are more relevant to penalty than whether or not the offence was committed.

Criminal Liability of Crown Agents

3.75. Given that clause 10 of the Bill states that an agent of the Crown is immune from criminal prosecution, the EDO believes that there should be a civil enforcement provision with open standing so that there is an alternative mechanism for ensuring compliance with the Bill by government instrumentalities.

Environment Protection Authority (NSW)

3.76. The NSW Environment Protection Authority (the NSW EPA) provided comment specifically on the potential cross border implications of noise pollution. They believe that the draft Regulations do not protect the existing noise amenity in NSW and questioned whether and how adjoining land in NSW would be 'zoned'.

3.77. Two concerns were raised by the NSW EPA in relation to the proposal to draft a specific regulation dealing with noise from motor sports at Fairbairn Park. First, the NSW EPA does not believe that the approach of averaging background levels over a period of one week to determine background noise takes into account the fact that "motor sports at Fairbairn Park occur almost exclusively on weekends and predominantly on Sundays". Second, they contend that, under the NSW approach Fairbairn Park would be treated as a single venue and the overall impact on noise amenity would be significantly lower than that under the ACT proposal.

Ford, Judy

3.78. Ms Ford wrote to the Committee to express her concern about on-the-spot fines that could apply to a person washing their car in the street. She commented that the legislation does not make provision for people who do not have a lawn on which they could wash their vehicle.

Housing Industry Association Limited

3.79. The submission provided by the Housing Industry Association Limited (the HIA) sought clarification on a number of key issues with respect to the building and development industry. The HIA also indicated that they intend to work with the EMA to develop a code of practice to cover the activities of the building and development industry.

3.80. The HIA also provided a supplementary submission following their appearance at the Committee's public hearing on 7 October 1997.

Inspection of Documents

3.81. In relation to clause 20, which provides for public inspection of documents, the HIA has concerns about possible release of commercially sensitive information and information that has the potential to harm business reputations. HIA members were also concerned that there is no mechanism in the Bill to give notice to the person to whose activities the documents relate.

Public Involvement in Processes under the Bill

3.82. The HIA recognises that consultation with genuinely interested parties on the formulation of Environment Protection Policies is necessary and desirable.

3.83. However, the HIA believes that development of Codes of Practice, negotiation of Environmental Protection Agreements and grant of Environmental Authorisations are essentially private matters for negotiation between the EMA and the parties conducting the relevant activities.

3.84. They see that subjecting these matters to a process of public scrutiny and comment will thwart one of the main objects of the Bill in subclause 3(1)(d) which is to provide "people in business with the opportunity to develop their own solutions and responses to environmental problems occurring in relation to their business" [emphasis added by HIA].

3.85. In their supplementary submission, the HIA endorsed the submission by the Property Council that third party enforcement should only be possible when the person is able to establish that they are substantially and adversely affected by the breach which is the subject of proceedings.

Environmental Protection Agreements

3.86. HIA claims that there is some confusion as to precisely who must enter into an agreement under clause 37, that is, neither the Bill nor the explanatory memorandum clarifies whether the builder, the owner, the contractor and/or the land developer are each required to obtain environmental protection agreements.

3.87. They also contest that the Bill should make clear that one Agreement may cover relevant activities at an unlimited number of separate sites.

3.88. The HIA claims that there is uncertainty as to when the obligations covered by an environmental protection agreement terminate. They presume that, for example, if a developer gives possession of a site to a builder, the developer's obligations under the Agreement would end.

3.89. The HIA also suggested that substantial compliance with an environmental protection agreement should also satisfy the general environmental duty. They see no reason in principle why the general duty should be satisfied when a person complies with an Accredited Code of Practice but not when a person complies with an agreement.

3.90. In relation to concrete mixing, which is a Class B activity, the HIA suggest that it should be made clear that a 'batch' means an amount of concrete mixed at any one time. They reiterated this concern at the public hearing on 7 October 1997 and in their supplementary submission.

3.91. Another Class B activity that raised concerns for the HIA relates to major land development. They suggest that the intended focus of the Schedule is 'greenfield' sites rather than redevelopment or urban consolidation activities in already established areas.

Environmental Authorisations

3.92. In the same vein as the concerns expressed in relation to environmental protection agreements (see paragraph 3.86. above), the HIA is concerned about the uncertainty surrounding exactly who is required to be authorised. They are also similarly concerned that neither the Bill nor the explanatory memorandum make clear whether a separate authorisation is required for each separate site where the activity is conducted.

3.93. The HIA also raised a concern about the meaning and scope of the activity of 'commercial landfilling' listed as a Class A activity at Schedule 1 (item (d)) to the Bill. The concern related to the possible unintended effect that the activity of leveling a building site could be said to be a 'commercial landfilling' activity and hence

require authorisation. The HIA also reiterated this concern in their supplementary submission.

Voluntary Environmental Audits

3.94. The HIA considers that protection for information contained in voluntary environmental audits should be automatic; that there should be no requirement to approach the EMA to obtain protection. They are also concerned that third parties may have access to information which is volunteered and that it could be used in evidence in any enforcement proceedings.

Self Incrimination

3.95. The HIA considers that protection against self incrimination should extend to corporations as clause 140 of the Bill currently stands.

Timing

3.96. In order for business to develop adequate systems to achieve compliance with the new legislation, the HIA considers that a period of six months between the dates of enactment and commencement of the Bill would be reasonable. They believe that this time period would provide the opportunity to develop codes of practice as well as enter into environmental protection agreements and obtain authorisations. They also support education programs during this period.

Latham, Margaret

3.97. Margaret Latham wrote to the Committee about her concerns that the community generally should be protected from extreme and constant noise. She is surprised that she is constantly confronted by loud noise “considering how much is known about the onset of deafness due to loud and constant noise’ and commented that she has resorted to wearing industrial ear muffs on a number of occasions. Ms Latham likened the effects of noise pollution to health damage caused by passive smoking - “Those of us who want to preserve our hearing have that right to do so without being prevented from attending public occasions/shopping centres/exercise venues”. Examples of situations she finds distressing include: wind chimes; background music in shopping centres and malls; loudness of music at aerobics or exercise classes over which the instructor needs to shout to be heard; music playing at public swimming pools; loudness of music at movie theatres and club shows; TV and videos on long distance buses and trains; and electronic games centres such as ‘Timezone’.

The Law Society of the Australian Capital Territory

3.98. The submission made by the Law Society focussed on legal and procedural issues rather than policy issues.

Public Inspection of Documents

3.99. The Law Society believes that there needs to be a balance between recognising the public interest and protecting commercially sensitive information. They suggest that, as a minimum, business should be informed that someone has applied to inspect documents or be given the right to object to release at the time the documents are produced as mechanisms to protect commercially sensitive information.

3.100. They also recommend that requests for access to documents be administered in the same way as requests made under the *Freedom of Information Act 1989.*

Environmental Authorisations

3.101. The Law Society commented that, until recently, compliance with the general environmental duty was a condition of all licences in Queensland under the *Environmental Protection Act 1994.* Consequently, any breach of the general duty was a breach of the licence and an offence under the Act. They are concerned that the ACT does not unintentionally introduce similar obligations by making compliance with the general environmental duty a standard condition of environmental authorisations.

3.102. The Society suggests that, in making a decision to grant, vary, review or place conditions on an environmental authorisation, the EMA should be required to have regard to the cost and reasonableness of the measures.

3.103. The Law Society does not believe that 10 working days is sufficient time in which written submissions must be made in response to a proposal by the EMA to vary, suspend or cancel an environmental authorisation. They suggest that the period be extended to 28 days as is the case in Queensland.

3.104. In relation to the obligation of a holder of an environmental authorisation to notify the EMA of ceasing to conduct an activity within 5 working days, the Law Society does not see the reasoning for such a strict time frame.

3.105. The Law Society also believes that an environmental authorisation holder should be entitled to a refund of fees paid in advance where an authorisation is either surrendered or cancelled or where the person ceases to conduct the activity.

3.106. The Law Society recommends that the “one stop shop” process in respect of development applications under the Land Act be adopted under the Environment Protection Bill. That is, an authorisation does not take effect until the development is approved and vice versa.

3.107. In respect of the EMA’s power to cancel an authorisation if fees are not paid, the Law Society suggests that this should be a discretionary, rather than an automatic, decision by the EMA due to the serious implications of cancelling an authorisation.

Powers of Authorised Officers

3.108. The Law Society believes that the "random inspection" powers conferred by section 90 on Authorised Officers are so broad that search warrants (section 91) would very rarely be needed. The Society recommends that the powers under subclause 93(1) should only be exercised if there is a "reasonable suspicion" that an offence is being or is likely to be committed.

Review of Decisions

3.109. The Law Society does not believe that review rights have been provided under clause 125 for all relevant decisions about which a person could be dissatisfied. They suggest that a decision by the EMA under clause 84(2)(a) whether or not to make a claim on or realise a financial assurance and a decision under clause 85(1) where the EMA requires the holder of an environmental authorisation to pay a specified amount in relation to recovery of extra costs should also be reviewable.

Placing a Pollutant Where it Could Cause Harm

3.110. The Law Society noted that the equivalent provision to section 132 in the *Environmental Protection Act 1994* (Qld) includes environmental nuisance and queried why the Environment Protection Bill is restricted to environmental harm.

Criminal Liability of Company Officers

3.111. The Law Society states that clause 137 does not reflect the position in NSW although the explanatory memorandum states:

> *This clause is designed to force directors and other decision-makers in a company to take all available steps to ensure their company does not commit offences under the Bill. This clause reflects similar clauses in other States.*

3.112. The Law Society suggests that a due diligence defence should be sufficient rather than requiring due diligence plus requirements (b) and (c) of subsection 137(2).

Self Incrimination

3.113. The Law Society commented that extension of protection against self incrimination to companies is inconsistent with the decision of *EPA v Caltex Refining Company Pty Limited* (1993) 82 LGERA 51, which provides privilege in respect of documents only.

Due Diligence Defence

3.114. The Law Society recommended that subsection 143(2) should be deleted which would have the effect of simply incorporating the common law defence of due diligence without prescribing the matters to which a court shall have regard. They argue that a court should have discretion as to the matters it has regard to and that potential defendants are not covered by the subsection.

<u>Environment Protection Regulations</u>

3.115. The Law Society was concerned that the Regulations refer to several external sources, that is, they are not self contained.

3.116. In relation to noise pollution, the Law Society commented that the requirement of Regulation 31 that a complaint must be made to an Authorised Officer means that prosecution would be dependant on the availability of authorised officers to respond to complaints.

3.117. The Law Society also pointed out that the word “or” has been misplaced in Regulation 17(a).

Master Builders Association of the ACT

3.118. The Master Builders Association (the MBA) endorsed the submission made by the Property Council of Australia. The MBA especially supports the Council’s views in relation to third party appeals and the call to increase the prescribed site area for construction of a commercial building. The MBA also commented that they propose to develop a code of practice for their industry.

Norwood Park Crematorium

3.119. Norwood Park Crematorium raised a sensitivity issue relating to the way in which cremation is referred to in Schedule 1 to the Bill. Norwood Park contends that cremation should not be likened to waste destruction activities and recommended that cremation be referred to as a separate activity from incineration for destruction of wastes.

3.120. A preference was expressed in Norwood Park’s submission for the ACCA Guidelines (perhaps in an updated or amended form) to be adopted by the cremation industry throughout Australia rather than the ACT adopting the draft NSW Guidelines. The remaining concerns related to technical matters (monitoring levels, velocity of efflux and emission goals) which will need to be resolved with Environment ACT in relation to guidelines specific to the cremation industry (which would be likely to be included as conditions of the required environmental authorisation).

O’Brien, Phil

3.121. Mr O’Brien’s submission concentrated on the noise control provisions of the draft legislation. He expressed particular concern that the draft Regulations permit higher noise levels in residential areas than are provided for under the *Noise Control Act 1988*.

3.122. He accepted as reasonable the proposed noise zone standards for non residential zones but did not support the proposal to average noise standards at noise zone boundaries.

Osborne MLA, Paul

3.123. Mr Paul Osborne MLA sees the Environment Protection Bill as very important, ranking as one of this Government's more significant reforms. He believes that the general intentions behind the Bill are good but provided a submission to the Committee raising specific concerns about implications for industry and the general public.

Definitions

3.124. Mr Osborne considers that the definitions of serious and material environmental harm should be reviewed because it is difficult to predict the level of harm that an activity is likely to cause which creates uncertainty in the application of the Act.

Implications for Industry

3.125. Mr Osborne is concerned that fanatical administration of the Bill, without proper regard to business and commercial reality, could have a devastating effect on industry in the ACT.

3.126. Mr Osborne also raised insurance and financing issues facing industry. In relation to insurance, he commented that insurance cover for environmental risk is currently difficult to get. He suggested that the difficulty and cost of obtaining such insurance would be likely to increase under the Environment Protection Bill. He also raised the possibility that financial institutions may adopt the practice that committing an environmental offence will cause a loan to be in default. These factors may result in increasing prices of goods and services.

Multiple Site Activities and Activities on a Number of Sites

3.127. Mr Osborne welcomed the potential for a single environmental authorisation to cover several activities on the one site or similar activities conducted by a business at multiple sites as it reduces duplication and red tape, however, he drew attention to practical difficulties in its everyday application.

Employee Liability

3.128. Mr Osborne considers that the level of exposure of employees is unreasonable. He is concerned that a public servant carrying out their duties has always been immune from prosecution but that, under the Environment Protection Bill, this would no longer be the case. This is compounded by the fact that employers, including the Government, would be under no legal obligation to advise their staff of their potential liability under the Act and the possible consequences they would face for polluting the environment.

Visual Pollution

3.129. Mr Osborne suggested that visual aspects such as erection of a telephone pole or TV antenna, parking of cars or having a rubbish pile in someone's front yard may

constitute an offence under the Act due to the broad definition of environment. He suggested that the definitions of environment and environmental nuisance require rewording to remove references to impacts on the visual environment.

Due Diligence

3.130. Courts must have regard to steps taken by an employee to become familiar with the applicable environmental management system when assessing whether an employee has exercised due diligence under clause 143. Mr Osborne considers that the Bill should require employers to inform employees of any operational procedures in place designed to prevent or minimise environmental harm in addition to the potential liability of employees under the Act.

3.131. Mr Osborne also suggests that subsections 143(2)(a)(v) and 143(2)(b)(iii) be deleted as he does not consider these points relevant in assessing whether a person acted with due diligence.

Power to Vary an Environmental Authorisation

3.132. Mr Osborne believes that in all circumstances an authorisation holder should be given opportunity to make submissions to the EMA against a proposal to vary the authorisation. To this end, he suggested that the clause permitting variation without notice should be deleted.

Prescribed Officers

3.133. According to Mr Osborne, the definition of prescribed officer is too broad because it includes officers of a company who may not have any influence over the offending conduct as well as employees who carry out the offending task under the instruction of a more senior employee. He suggests that officers and employees should only be deemed liable for an offence committed by a corporation where they are involved in the direction, management or control of the corporation and where they have some influence over the conduct constituting the offence.

3.134. In relation to defences available to prescribed officers, Mr Osborne believes that the requirement to establish a defence for the corporation is unreasonable and that the requirement to prove that a person in his or her position could not reasonably have been expected to be aware of the contravention is illogical. He suggests that these requirements be deleted.

Entry of Premises

3.135. Mr Osborne believes that the entry and inspection powers available to authorised officers under clauses 90 and 93 are too broad. He is concerned that authorised officers may enter commercial premises without the authority of the owner and without a warrant and copy documents which contain confidential information or trade secrets. He suggests that the owner of the premises or the person in charge should be present when an officer is exercising powers under clause 93.

On-the-spot Fines

3.136. Mr Osborne expressed concern at the provision for a $100 on-the-spot fine that could apply to a person causing runoff to enter the stormwater system by washing a vehicle. He suggested that this provision should apply to commercial vehicles only.

Property Council of Australia (ACT Division)

3.137. The submission made by the Property Council addressed several aspects of the Bill and also commented on particular public criticisms of the Bill.

Definitions

3.138. The Property Council is concerned that the definitions of 'environment', 'environmental nuisance' and 'environmental harm' are too broad and provide scope for subjective judgements to be made about environmental degradation or nuisance.

Third Party Appeals

3.139. The Property Council believes that the third party appeal rights under the Bill are inappropriate and suggests that third party involvement should not go beyond the right to seek an injunctive order from the Supreme Court. Alternatively, they suggest that review rights should only be available to third parties who can show they are substantially and adversely affected by the decision.

Construction of Commercial Buildings

3.140. The Property Council argued that commercial construction activity should not be taken to be a Class B activity or that the site area which defines a construction activity to be a Class B activity be increased from 0.3 hectares to 1 hectare.

Collection of Commercial Waste

3.141. Also of concern to the Property Council is the inclusion of collection of waste from commercial premises as a Class B activity. They believe this is too broad, in that it could apply to one off or small scale collection of waste by the business or building owner and suggest that only collection of waste on a commercial basis should be classified as Class B.

Liability of Corporate Officers

3.142. The Property Council believes that clause 137 of the Bill is too broadly pitched. They suggest that the definition of 'prescribed officer' be changed to narrow the application of the deemed liability of corporate officers.

Defences

3.143. The Property Council suggested that clause 133 of the Bill should make clear that an action or omission that is permitted under an environmental protection

agreement, an environmental improvement plan or an accredited code of practice is protected by this section.

Powers of Authorised Officers

3.144. The Property Council stated in its submission that “the entry, search and seizure provisions are unreasonably invasive and prejudicial” and suggested that Part XI of the Act be amended to be consistent with the entry, search and seizure provisions of the Land Act.

Public Inspection of Documents

3.145. The Property Council has two concerns with clause 20 of the Bill, which provides for public inspection of documents. First, they suggest that the Bill should include an arrangement similar to that under section 228 of the Land Act, which allows a person to request that sensitive commercial information be excluded from public inspection. Second, the Property Council believes that documents setting out results of monitoring or testing (subsection 20(1)(f)) should not be publicly available if the information is relevant to an impending prosecution or other court proceeding.

Queanbeyan City Council

3.146. The Mayor of Queanbeyan City Council, Mr Frank Pangallo MBE, made a submission to the Committee dealing with the issue of cross border impacts of noise from motor sports. The Council objects to the Government’s proposed noise limit of 10 dB(A) above background for motor sport activities and is concerned at the lack of consultation in relation to cross border issues associated with noise from motor sports.

Raison, Barry

3.147. Mr Raison wrote to the Committee to express concerns relating to litter. He suggested a ban on leaflets being put under car windscreen wipers and a ban or limit on leaflets delivered to letter boxes. He suggested that these two forms of advertising create litter as well as wasting paper.

Ridgeway Residents’ Action Group

3.148. The submission made to the Committee by the Ridgeway Residents’ Action Group specifically concentrates on the Bill’s implications for noise pollution from motor racing at Fairbairn Park. They claim that noise permitted from motor racing at Fairbairn Park will directly discriminate against nearby NSW residents.

3.149. According to Ridgeway Residents’ Action Group, background noise at the Ridgeway has been “very thoroughly established” at around 36 to 37 dB(A). Therefore, under the existing legislation (background plus 5 dB(A)), noise at the Ridgeway is restricted to 41 to 42 dB(A). They claim that the proposed standard of 50 dB(A) for the broadacre noise zone (which includes Fairbairn Park) will almost double the permitted noise level at the Ridgeway. This is because noise is measured against a logarithmic scale, so a 10 dB(A) increase in noise represents a doubling in the intensity of the noise.

3.150. Ridgeway Residents' Action Group is particularly concerned that important details relating to noise from motor racing at Fairbairn Park have yet to be revealed by the Government. It is expected that there will be a specific Regulation dealing with motor racing noise at Fairbairn Park which is not included in the Exposure Draft of the Regulations currently in the public arena. There is also concern that, because an environmental authorisation will be required for motor racing at Fairbairn Park, there will be scope for the conditions of the authorisation to be inconsistent with other provisions of the legislation.

3.151. In their supplementary submission, the Ridgeway Residents' Action Group emphasised the point that the noise zone approach takes no account of the difference in impact of noise from a particular source at two affected residences where one is closer to the source than the other. Under the noise zone approach both houses are treated identically.

Wigley, Richard and Margaret

3.152. Richard and Margaret Wigley wrote to the Committee expressing concerns about treatment of noise pollution under the Noise Control Act. They believe that there is currently too much onus on the complainant and that the polluter gets too many chances. Their two key points are that the identity of the complainant should be kept confidential and that on-the-spot fines are an appropriate enforcement tool.

CHAPTER 4 - ISSUES CONSIDERED BY THE COMMITTEE

Introduction

4.1. The Committee did not consider that its role was to comment on every clause of the Environment Protection Bill and the related legislation. In formulating its recommendations the Committee had regard to all comments and concerns expressed in submissions as well as points of view put forward at public hearings, however, the issues which the Committee considers warrant further comment are explored in this chapter:

- user-friendliness of the Bill;
- objects and definitions;
- commencement, transitional and public education arrangements;
- the administering authority including the nature of the EMA, powers of the Minister and powers of authorised officers;
- environmental duties;
- community involvement in processes under the Bill;
- application of the Bill to Government;
- environmental management tools under the Bill;
- some specific regulated activities;
- noise issues including noise from motor sports;
- protection against self incrimination;
- offences including deemed liability for corporate officers;
- enforcement issues;
- defences available under the Bill; as well as
- some typographical and minor corrections.

User-friendliness of the Environment Protection Bill

4.2. The Environmental Defenders' Office (the EDO) suggested that the recent Commonwealth *Telecommunications Act 1997* (the Telecommunications Act) provided an excellent example of making legislation easier for the public (and lawyers) to understand. The drafting style adopted in the Telecommunications Act includes simplified outlines of sections of the Act as well as cross references between sections of the Act.[8] This suggestion by the EDO was also raised by the Conservation Council at the Committee's public hearing on 11 August 1997.[9]

4.3. Similar features are not present in the Environment Protection Bill.

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[8] Environmental Defender's Office, *Submission on Environment Protection Bill 1997*, 29 August 1997, p 1

[9] Transcript of Proceedings, 11 August 1997, p 23

4.4. In the words of the Law Society at the public hearing on 7 October 1997:

> *The more explanatory the legislation can be the better because we want to be keeping lawyers out of this as much as we can and if people can do their own work and read their own legislation [that can be achieved]. ... If you need a team of lawyers to work it out it is not going to help the man in the street, especially small business.*[10]

4.5. The Law Society agreed that the Telecommunications Act was an example where notes and cross referencing had been done well. They considered that it would not significantly delay the passage of the Environment Protection Bill if such features were to be included.[11]

4.6. The explanatory memorandum can be very helpful to understanding the Bill. However, while it remains part of the official record and may be used by the Courts in interpretation after a Bill is enacted, “in another sense, often the explanatory memorandum is put on the shelf and only dug out by the odd lawyer”[12].

4.7. At the public hearing on 11 August 1997, Government officials advised that it is proposed that a ‘user guide’ to the Act will be developed. This would be based on the current explanatory memorandum and would also include practical information with examples and contact information.[13]

4.8. The Committee acknowledges the usefulness of having cross references within the legislation as in the Telecommunications Act. The Committee believes that the addition of notes and cross references to the Environment Protection Bill would greatly enhance understanding of the links between sections.

4.9. The Committee notes that cross references to appeal rights are included in Queensland’s *Environmental Protection Act 1994*.

4.10. The Committee notes that, where appeal rights against a decision are provided for under section 125 of the Bill, the explanatory memorandum makes reference to the appeal rights when discussing each appealable decision (see, for example, paragraph 8.10.6 of the explanatory memorandum). The Committee believes that the Bill would be greatly enhanced if notes to this effect were included in the Bill.

4.11. Three possible style formats for cross references are at Appendix C to this report. Style A is similar to that used in the Telecommunications Act, Style B is based on Queensland’s *Environmental Protection Act 1994,* while the Committee’s preference is Style C.

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[10] Uncorrected Transcript of Proceedings, 7 October 1997, p 49

[11] *ibid*, pp 49–50

[12] Transcript of Proceedings, 11 August 1997, p 24

[13] *ibid*

Recommendation 1
4.12. The Committee recommends that the Environment Protection Bill be amended to include cross references between sections including, but not limited to, references to the appeal provisions. The Committee's preferred system is set out as Style C in Appendix C.

Presentation of the Regulations

4.13. The Law Society pointed out in their submission that the Regulations are not self contained and make reference to several external sources.[14] The two main issues they think need to be considered are: (1) are all the references necessary?; and (2) does the ACT want to tie itself to practices in NSW such as the NSW Ozone Protection legislation or the NSW Noise Control Manual?[15]

Objects

4.14. The EDO suggested that the objects clause places unnecessary emphasis on the notions of practicality and economic considerations. The EDO also suggested redrafting the objects along the lines of the *Environmental Management and Pollution Control Act 1994* (Tas) to improve their structure and focus.[16]

4.15. The Conservation Council agrees with the EDO that the objects of the Bill place too great an emphasis on economic and practicality considerations. They also agree that the objects should be amended along the lines of the Tasmanian legislation.[17]

4.16. On the other hand, the Housing Industry Association believes that including economic and social considerations in the objects of the Bill is "entirely appropriate"[18] while the Property Council asserts that commercial considerations should be given more rather than less emphasis in the Bill and "would have serious objections to the removal of that object [dealing with balancing environmental, economic and social considerations]".[19]

4.17. Government officials advised that striking an appropriate balance between environmental, economic and social objectives is a very important aspect of government policy.[20]

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[14] The Law Society of the Australian Capital Territory, *Submission on Environment Protection Bill 1997*, 4 September 1997, p 7
[15] Uncorrected Transcript of Proceedings, 7 October 1997, p 51
[16] Environmental Defender's Office, *op cit*, 29 August 1997, pp 1-3
[17] Conservation Council of the South-East Region and Canberra, *Conservation Council's Submission on the 1997 ACT Environment Protection Bill*, 3 September 1997, pp 1-2
[18] Uncorrected Transcript of Proceedings, 7 October 1997, p 33
[19] Property Council of Australia, *Submission - Environment Protection Bill 1997*, July 1997, p 6; Uncorrected Transcript of Proceedings, 7 October 1997, p 22
[20] Uncorrected Transcript of Proceedings, 7 October 1997, p 66

4.18. In commenting on the Tasmanian legislation, which does not include a specific object dealing with balancing environmental, economic and social considerations, the Housing Industry Association stated:

> *The fact is in all of the States around the country that authorities which supervise legislation such as this do take into account economic considerations and I can assure you that economic considerations are very much taken into account. The difficulty though is that that objective is not built into the legislation and there is no mandate for that to be there.*[21]

4.19. The Committee prepared the following comparison of the objects of Environment Protection Bill with the objects of the Tasmanian legislation and the EDO and Conservation Council proposals. The text is marked ***bold italic*** where the EDO or Conservation Council departed from the wording of the Tasmanian model.

[21] *ibid*, p 34

4.20. The Committee queried why the Conservation Council had not included the object of promoting ecologically sustainable development in its proposal. Ms Vallin accepted that "there would not be any harm in mentioning [ecologically sustainable development]".[22]

4.21. In relation to paragraph (f) in the Tasmanian legislation, the Committee notes that the ACT differs from Tasmania, in that the ACT has a Commissioner for the Environment. The Commissioner for the Environment has responsibility for monitoring and reporting on environmental quality in the general sense under the Commissioner for the Environment Act, however, the EMA does have specific monitoring and reporting responsibilities under the Environment Protection Bill. The Committee takes the view that there is no need for the EMA to duplicate the responsibilities of the Commissioner in relation to monitoring and reporting but that they should work together.

Recommendation 2
4.22. The Committee recommends that the objects of the Environment Protection Bill be re-drafted along the lines proposed by the Conservation Council but that:

- ***paragraph (f) be amended to read "to provide for the monitoring and reporting of environmental quality on a regular basis in conjunction with the Commissioner for the Environment;***
- ***paragraph (i) be taken from the Environmental Defender's Office proposal rather than the Conservation Council proposal; and***
- ***the object of promoting the principle of ecologically sustainable development should also be included.***

Definitions

Material Environmental Harm and Serious Environmental Harm

4.23. The EDO was concerned that the definitions of 'material environmental harm' and 'serious environmental harm' create uncertainty about the obligations imposed and the powers granted by the Bill in that it is difficult to predict in advance of a judicial determination what environmental harm would be caught by their terms.[23] Mr Osborne supported this view.[24] The Conservation Council has similar concerns about these definitions and suggests that examples of both types of environmental harm should be included in the Bill's explanatory memorandum.[25]

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[22] *ibid*, p 10
[23] Environmental Defender's Office, *op cit*, 29 August 1997, p 3
[24] Mr Paul Osborne MLA, *Submission to the Planning and Environment Committee - The Environment Protection Bill 1997,* 18 September 1997, p 4
[25] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 2

Visual Pollution

4.24. ACTEW, the Property Council, and Mr Osborne are concerned that there is scope for subjective judgements to be made about environmental degradation or nuisance given the broad definition of 'environment', 'environmental nuisance' and 'environmental harm'. To correct this potential definitional problem they suggest that the word 'aesthetic' in paragraph (g) of the definition of 'environment' and/or the reference to 'unsightly' in the definition of 'environmental nuisance' should be deleted (clause 4).[26]

4.25. Two examples of causing environmental harm which would normally be planning matters rather than environmental matters were suggested by the Property Council: the erection of a building that some people consider to be 'unsightly' or the erection of a second storey or antenna that effects someone's views or outlook.[27] Mr Osborne also cited the following potential examples of visual pollution under the Bill: a rubbish pile on someone's front lawn; the erection of a telephone pole or TV antenna or parking of cars.[28]

4.26. Government officials agreed that this was a problem and that they were considering removing 'Design and Siting' considerations from the definition.[29]

4.27. The Committee takes the view that aesthetics is an interesting issue which has a role in the new legislation but that it is difficult to define the concept of visual pollution. However, the Committee considers that taking into account the spirit of the Act and commonsense that such issues raised as concerns should not become a problem. The Committee expects that a Committee of the Assembly would review the provisions if necessary and that a court would take a rational approach.

Making the Transition to the New Legal Environment

Commencement and Transitional Arrangements

4.28. Different provisions of the Bill can commence on different days. Effectively, this means that the operational provisions of the Act need not commence until 6 months after the initial notification of the Act in the Gazette.

4.29. The HIA proposed that a six month period of grace between the date the Bill is enacted and the date it commences would allow business to develop adequate systems to achieve compliance with the new legislation in a reasonable time frame. They also

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[26] ACTEW Corporation Limited, *Submissions for Environment Protection Bill 1997*, 5 September 1997, p 1; Property Council of Australia, *op cit*, July 1997, p 10; Mr Paul Osborne MLA, *op cit,* 18 September 1997, p 4

[27] Property Council of Australia, *op cit*, July 1997, p 10

[28] Mr Paul Osborne MLA, *op cit,* 18 September 1997, p 4

[29] Uncorrected Transcript of Proceedings, 7 October 1997, pp 74–75

support education programs during this period.[30] The MBA supports the HIA proposals.[31]

4.30. The Committee acknowledges that certain transitional arrangements are contained in the Consequential Provisions Bill to assist in moving from the old regime to the new regime, such as continuation of licences and other instruments under the repealed legislation.

4.31. However, there will also be industries which will be regulated for the first time under the new legislation. These entities will need to comply with the new framework from the very beginning as they will have no former licence to carry over for a period.

4.32. The legislative transitional arrangements alone will not ensure a smooth transition. They will need to be accompanied by a strong education process to promote public and business awareness of the implications of the Bill on their activities. It will also be necessary that staff involved in administering and enforcing the Bill become competent in the new procedures.

4.33. Government officials advised at the public hearing on 7 October 1997 that, while the decision about when the Act commences is a decision for the Minister, they are working on the assumption that the Bill provides scope for a six month period in which industry could prepare for compliance and the EMA can get geared up as well.[32]

Recommendation 3
4.34. The Committee recommends that the Government take advantage of clause 2 of the Bill and delay the commencement of all provisions of the Act, except sections 1 & 2, until six months from the initial notification of the Act in the Gazette.

Public Education

4.35. The Committee believes that an education campaign is critical to the successful implementation of the Bill but understands that it is not possible to commence a formal public education programme until the legislation is in its final form.

4.36. The HIA supports implementation of a programme of education to ensure that its members are able to comply with the new regulatory framework before it becomes operative. In its submission, the HIA stated that it "would accept responsibility as an industry leader ... to promote an understanding of the Bill's impact and of the means of achieving compliance with it".[33]

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[30] Housing Industry Association, *HIA Response to the Environment Protection Bill 1997*, 1 September 1997, p 9
[31] Uncorrected Transcript of Proceedings, 7 October 1997, p 33
[32] *ibid*, p 68
[33] Housing Industry Association, *op cit*, 1 September 1997, p 9

4.37. The Government advised that delivering education and information to the Canberra community will be a priority in the coming year and that it would be met from within existing resources.[34]

4.38. The Committee doubts that existing resources would be adequate to conduct the extensive public education campaigns needed to raise the level of public awareness about the implications of the legislation and promote compliance.

Recommendation 4
4.39. The Committee further recommends that, during the six month period proposed in Recommendation 3, the Government conduct extensive public education and awareness campaigns. The Committee considers it likely that this task will require additional resources and, if this turns out to be the case, would expect the Government to devote appropriate resources.

4.40. In making these recommendations, the Committee is aware that because the operational provisions of the Bill will not take effect until six months after passage of the legislation, implementation will be progressive during the following twelve months, with full implementation being achieved 18 months after initial notification of the Act in the Gazette. However, the Committee stresses the importance of public education accompanying the passage of the legislation explaining the rights and responsibilities of the community.

Administering Authority

Statutory Office Holder Within the ACT Public Service versus Independent Body

4.41. At the Committee's public hearing on 11 August 1997, questions were asked about the reasoning behind the decision to make the Environment Management Authority (the EMA) a statutory office held by a public servant rather than an independent agency separate from the department. The Government official's response was that, primarily due to the small size of the ACT, it would not be practical to create a completely separate statutory authority due to the difficulty in separating policy development from enforcement which could lead to unnecessary duplication and costs.[35]

4.42. Also at the public hearing on 11 August 1997, the Conservation Council asked Government officials how the ACT proposal for the EMA to be within the Public Service rather than an independent entity compared with other Australian jurisdictions. The response to this question was that there is a mixed bag. The two most populous states, NSW and Victoria, as well as South Australia, have an independent Environment Protection Authority. Western Australia has a hybrid arrangement - it has an Environment Protection Authority (which is more of a policy body) and a Department of Environment Protection (which undertakes enforcement

[34] letter from Mr Gary Humphries MLA, Minister for the Environment, Land and Planning to Mr Michael Moore, Chair, Standing Committee on Planning and Environment, 2 September 1997
[35] Transcript of Proceedings, 11 August 1997, p 13

action). Whereas, in Queensland, Tasmania and the Northern Territory, under its draft legislation, the functions are undertaken within Government departments.[36]

4.43. The Conservation Council does not accept the argument that because the ACT is a small jurisdiction it is not possible for the EMA to be a separate entity. The Council suggests that there could be a small independent body.[37] The Environmental Defender's Office was also concerned that the EMA is not independent or separate from the political process.[38]

4.44. The EDO accepts that there is some justification in the EMA being a public servant due to the small size of the ACT but suggests that mechanisms to temper Ministerial control need to be incorporated into the Bill. (This is further discussed under the following heading 'Powers of the Minister'.)[39]

4.45. The Committee considers that the key issue is the community's perception of independence of the EMA. At this stage, the Committee is prepared to accept the Government's view that it is not necessary to have an independent agency. The Committee observes that it is within the Assembly's power to amend the legislation at a later time to provide for the EMA to be a statutory authority.

4.46. The Committee wishes to stress that it is only prepared to accept the Government's view on this point if the Bill is modified to limit the powers of the Minister, as outlined in the following section.

Powers of the Minister

4.47. Under clause 87 of the Bill, the Minister can choose to make a decision that would otherwise be made by the EMA. Where this power is used by the Minister, the decision must be notified in the Gazette.

4.48. The Conservation Council believes that clause 87 is superfluous and should be deleted. They claim that the EMA, being a public servant, is under Ministerial authority anyway and are concerned that the existence of this power multiplies opportunities for Ministerial intervention. They also suggested that any Ministerial directives be general rather than specific and should be gazetted.[40] In particular, the Conservation Council does not think the Minister should be able to direct the EMA, especially in relation to investigation or prosecution of a company.[41]

4.49. The EDO argued in its submission that the Minister would never have to use this power as they could direct the EMA to make a particular decision under the

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[36] *ibid*, pp 11-12
[37] Uncorrected Transcript of Proceedings, 7 October 1997, p 8
[38] Environmental Defender's Office, *op cit*, 29 August 1997, p 3
[39] Uncorrected Transcript of Proceedings, 7 October 1997, p 6
[40] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, pp 2-3
[41] Uncorrected Transcript of Proceedings, 7 October 1997, p 8

normal processes of Government as there are no restrictions or qualifications on Ministerial control.[42]

4.50. At the Committee's public hearing on 7 October 1997, the EDO gave the following example of a situation that could potentially occur under the Environment Protection Bill:

> *In Western Australia there was an instance where the Minister directed the Heritage Protection Authority to agree to a development when it had actually resolved not to approve it and the Minister came in over the top and said, "Well I direct you to approve it". Now that is some cause for concern.*[43]

4.51. The EDO suggested that the following mechanisms to improve transparency and accountability should be considered:

- allowing the Minister to give general policy directions to the EMA but restricting the power to give directions in specific cases (see for example section 20 of the *Director of Public Prosecutions Act 1990* reproduced below);
- requiring that directions given by the Minister be in writing and publicly disclosed; and
- prohibiting the Minister from giving directions to the EMA or Authorised Officers in relation to enforcement.[44]

4.52. The EDO referred to section 20 of the *Director of Public Prosecutions Act 1990* which specifies the limitations on the power of the Attorney-General to direct the DPP as a guide for restricting the power of the Minister to direct the EMA. This section is reproduced below:

> Directions and guidelines by Attorney-General
>
> 20(1) The Attorney-General may by instrument give directions or furnish guidelines to the Director in relation to the performance or exercise by the Director of his or her functions or powers.
>
> (2) Without limiting the generality of subsection (1), a direction or guidelines may relate to-
>
> (a) the circumstances in which the Director should institute or conduct prosecutions for offences; or
>
> (b) the circumstances in which undertakings should be given under section 9.
>
> (3) A direction or guideline shall be of a general nature and shall not refer to a particular case.

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[42] Environmental Defender's Office, *op cit*, 29 August 1997, pp 3-4
[43] Uncorrected Transcript of Proceedings, 7 October 1997, p 6
[44] Environmental Defender's Office, *op cit*, 29 August 1997, pp 3-4

(4) The Attorney-General shall not give a direction or furnish a guideline unless he or she has consulted with the Director.

(5) Where the Attorney-General gives a direction or furnishes a guideline, the Attorney-General shall-

(a) as soon as practicable after giving the direction or furnishing the guideline, cause a copy of the direction or guideline to be published in the *Gazette;* and

(b) within 15 sitting days after the direction or guideline has been published in the *Gazette,* cause a copy of the direction or guidelines to be laid before the Legislative Assembly.

4.53. In response to the proposal by the EDO, a Government official made the following comments:

> *There is nothing wrong with those suggestions. It is just that the Bill took a different approach. ... I cannot see any objection in principle to them. I do not think it would make it unworkable.*[45]

4.54. The Committee notes that the Director for Public Prosecutions rather than the EMA is responsible for the decision to prosecute offences under the Environment Protection Bill.

Recommendation 5
4.55. The Committee recommends that section 87 of the Environment Protection Bill be modified to provide the following outcome:

- ***that the Minister may direct the Authority in relation to the performance or exercise of his or her functions or powers;***
- ***such directions must be in writing and notified in the Gazette;***
- ***the Minister must not direct the Authority in relation to investigation or enforcement under the Act; and***
- ***where the Minister makes a decision under section 87, that decision is a disallowable instrument.***

Authorised Officers

Role of Authorised Officers

4.56. The Committee sees Authorised Officers as having a combined educative and enforcement role. Many people would not be aware that their own actions could constitute an offence against the Act. The following examples show how Authorised Officers could deal with minor offences, placing an emphasis on education, with on-

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[45] Uncorrected Transcript of Proceedings, 7 October 1997, pp 70-71

the-spot fines being issued after a person has already been issued with a warning in the form of an Environment Protection Order.

4.57. In relation to a complaint about noise emanating from a stereo from a particular residence, the Committee would envisage an Authorised Officer taking the following actions:

- investigate complaint including testing noise levels for compliance with the Regulations;
- issue an Environment Protection Order if needed to achieve compliance (requiring stereo to be turned down);
- undertake testing in conjunction with the person using the stereo to determine what volume level on the stereo constitutes compliance with the Regulations and what volume exceeds the noise limits prescribed in the Regulations (this may vary depending on whether windows, doors etc are open or closed);
- if subsequent complaints are found to constitute a breach of the Environment Protection Order, on-the-spot fines could be issued.

4.58. Say a person is reported to be washing their car in their driveway or street causing runoff into the stormwater system. The Authorised Officer could:

- investigate the complaint;
- issue an Environment Protection Order if needed to achieve compliance (requiring the person not to wash their car on the street or driveway);
- advise the offender of alternative ways/places for car washing and the reasoning behind the legislation;
- if subsequent complaints are found to constitute a breach of the Environment Protection Order, on-the-spot fines could be issued.

Entry, Search and Seizure Powers

4.59. The Property Council is concerned that Authorised Officers can enter premises and exercise search and seizure powers without any need for there to be a breach or even a suspicion of a breach of the Act. They believe that Authorised Officers should only be able to enter premises without notice in an emergency or if there is a serious environmental risk. They are also concerned that there is no protection for confidentiality for any documents seized and that a person who has no authority or knows little about a particular matter may be required to answer questions posed by an Authorised Officer. They suggest that Part XI of the Act be amended along the lines of the entry, search and seizure provisions of the Land Act.[46]

4.60. The Law Society also believes that the random inspection powers conferred by section 90 on Authorised Officers are too broad. The Society recommends that the powers under subclause 93(1) should only be able to be exercised if there is a

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[46] Property Council of Australia, *op cit*, July 1997, p 6

reasonable suspicion that an offence is being or is likely to be committed.[47] At the public hearing on 7 October 1997, the Law Society commented that:

> *It is important to have a balance between civil liberties issues as well as enforcing the legislation and we want the legislation to have as much teeth as necessary but, on the other hand, we do not want the individual officers in question having greater powers than our local ACT police force.*[48]

4.61. The Law Society suggested that there should be two distinct situations: "the emergency situation where wide powers were granted and the routine situation where the legislation was not designed in the slightest to disrupt business or the normal operation of a business in its normal course of events."[49]

4.62. The Society also commented that the process of obtaining a search warrant can be done fairly quickly out of hours and "that [obtaining a warrant] is something the police need to satisfy themselves of if they wish to enter into premises with a view to determining whether or not a criminal activity is being conducted."[50]

4.63. ACTEW is also concerned at the breadth of the entry, search and seizure powers of Authorised Officers. They argue that Authorised Officers should always be required to obtain consent of the occupier before entering premises. They are also concerned that information requests may be made to any person who will not know that particular information is confidential or privileged and suggest that requests should only be made to the 'person apparently in charge of the premises'. They also recommend that the occupier be given opportunity to claim privilege or confidentiality for certain information.[51]

4.64. Mr Osborne also believes that the entry and inspection powers available to authorised officers under clauses 90 and 93 are too broad in that they permit authorised officers to enter commercial premises without the authority of the owner and without a warrant and copy documents which contain confidential information or trade secrets. He recommended that clause 90 be amended to require the owner of the premises or the 'person apparently in charge of the premises' to be present when an authorised officer exercises powers under clause 93.[52]

4.65. Government officials conceded that the powers available to Authorised Officers for routine inspections should be less than those available for inspections with a search warrant. However they also emphasised the importance of routine inspections:

> *There are a lot of pollution incidents where you have got to routinely inspect - say there is something coming out of a stormwater drain, inspectors need to be able to go and look at all of those premises that actually feed into the stormwater drain, or say on a [rainy] day like this, investigating the*

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[47] The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, pp 4-5
[48] Uncorrected Transcript of Proceedings, 7 October 1997, p 45
[49] *ibid*, p 46
[50] *ibid*, p 47
[51] ACTEW Corporation Limited, *op cit*, 5 September 1997, p 2
[52] Mr Paul Osborne MLA, *op cit,* 18 September 1997, pp 6-7

> *erosion sediment controls of greenfields developments, there might not be a breach of the Act, but there is a higher risk that there could be a breach of the Act. So, if you limit their entry to only those occasions where they have got absolutely definite evidence, or that they need a search warrant, then I think the majority of pollution incidents would not be enforced.*[53]

4.66. The Committee accepts that there needs to be some routine power of entry and inspection without notice but takes the view that these powers should be limited. The Committee considers that, in the normal course of events, a search warrant should be required to exercise entry and search powers as is the case under legislation generally. The Committee does not consider that the requirement to obtain a warrant would impede an Authorised Officer in carrying out his or her inspection duties. However, the Committee acknowledges that while conducting a routine inspection, there may be circumstances of such seriousness and urgency that would require an authorised officer to exercise certain greater powers than routine powers without a warrant.

4.67. The Committee suggests that the Government consider drafting a provision along the lines of section 349R of the *Crimes Act 1900* to permit granting of search warrants over the telephone or by other electronic means.

4.68. Recommendations 6, 7 & 8 are designed to have the following effects:

- to limit the powers available to authorised officers when undertaking routine inspections;
- to permit certain other powers in cases of 'seriousness and urgency' while conducting routine inspections; and
- to require a search warrant for an authorised officer to exercise powers to seize things, copy or take extracts from documents.

4.69. The Committee notes that the power to require a person to answer questions or furnish information under section 93(2) and the proposed section 92A(3) (below) is very broad but considers that this power is balanced by the protection against self incrimination provided by section 140.

Recommendation 6

4.70. The Committee recommends that the following section 92A be included in the Bill:

> ***Inspection of premises - routine inspections***
>
> ***92A(1) An authorised officer who enters premises under subsection 90(1) may do any of the following in respect of the premises or anything on the premises:***
>
> ***(a) inspect or examine;***
>
> ***(b) take measurements or conduct tests;***

53 Uncorrected Transcript of Proceedings, 7 October 1997, pp 71-72

(c) take samples for analysis.

92A(2) An authorised officer who enters premises under subsection 90(1) may, where the officer believes on reasonable grounds that the circumstances are of such seriousness and urgency as to require the immediate exercise of those powers without the authority of a warrant, take photographs, films, or audio, video or other recordings.

92A(3) An authorised officer who enters premises under subsection 90(1) may, where the officer believes on reasonable grounds that the circumstances are of such seriousness and urgency as to require the immediate exercise of those powers without the authority of a warrant, require the occupier or a person on the premises to do any of the following:

(a) answer questions or furnish information;

(b) make available any record or other document kept on the premises;

(c) provide reasonable assistance to the officer in relation to the exercise of his or her powers under subsection (1) or (2).

Recommendation 7
4.71. The Committee recommends that:

- ***the heading of section 93 should be changed to read "Inspection of premises - search warrants";***
- ***the words "90(1) or" be deleted from subsection 93(1); and***
- ***delete subsection 93(3).***

Recommendation 8
4.72. The Committee recommends that the following section 93A be inserted to replace subsection 93(3):

Taking of samples

93A Where an authorised officer takes a sample under subsection 92A(1)(c) or 93(1)(c), the officer shall-

(a) divide the sample into 3 parts;

(b) place each of those parts in a separate container and seal each container;

(c) attach to each container a label bearing the signature of the authorised officer and particulars of the date and time when, and the place at which, the sample was taken; and

(d) deliver 1 of the 3 containers to each of the following persons:

(i) the occupier or the person apparently in charge of the premises;

(ii) an analyst;

(iii) the Authority.

Emergency Powers

4.73. ACTEW raised a concern that authorised officers, who may not have the skills to operate highly sophisticated and complex technology, may take emergency action under Division 3 of Part XI. They suggest that "direct emergency action should not be taken [by an authorised officer] until a direction by the EMA has been given and not followed. Subsection 97(a) should be subject to 97(b) first."[54]

Recommendation 9
4.74. The Committee recommends that subsection 97(1) be amended so that paragraph (a) is subject to paragraph (b) occurring first.

Minimum Disruption

4.75. In its submission, the Conservation Council proposed that section 18 of the Bill is unnecessary and should be deleted. The subjectivity of assessing what the 'minimum necessary' should be will hinder any investigation as the clause opens the doors to the possibility of litigation against the EMA.[55]

4.76. The EDO also recommended that clause 18 be deleted because, while its requirements appear reasonable on the surface, it places an unnecessary restriction on the power of Authorised Officers and Analysts. It means that such officers will always be subject to challenge in the performance of their functions and that the evidence they gather will be challenged in court proceedings to enforce the Act. In support of this recommendation, the EDO commented that no equivalent provision appears in NSW, Queensland or South Australian legislation and noted that removal of the provision will not mean that officers should not minimise disruption but merely that their actions cannot be challenged on this basis.[56]

4.77. The Housing Industry Association and ACTEW disagree with the proposal to delete this clause from the Bill.[57]

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[54] ACTEW Corporation Limited, *Supplementary Submission,* 14 October 1997, p 5
[55] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 3
[56] Environmental Defender's Office, *op cit*, 29 August 1997, p 4
[57] Uncorrected Transcript of Proceedings, 7 October 1997, p 34 (Housing Industry Association); ACTEW Corporation Limited, *op cit,* 14 October 1997, p 1

Recommendation 10
4.78. The Committee recommends that section 18 of the Bill be deleted due to the potential for unintended litigation against the Environment Management Authority, Authorised Officers and Analysts and that administrative arrangements be put in place to achieve the outcome of minimum disruption to business or premises by Authorised Officers and Analysts while exercising powers under Part XI or XII of the Bill.

Environmental Duties

General Environmental Duty

4.79. The Conservation Council considers that the general environmental duty is essentially declaratory in character and does not give rise to any specific obligations. They suggest that the clause be reworded to place stronger emphasis on 'the nature of the harm or nuisance or potential harm or nuisance'.[58]

Recommendation 11
4.80. The Committee agrees with the Conservation Council's proposal and recommends that subsection 22(2) be deleted and replaced with the following:

> ***22(2)(a) In determining whether a person has complied with the general environmental duty, regard shall be had first and foremost to the nature of the harm or nuisance or potential harm or nuisance.***
>
> ***22(2)(b) Regard shall also be had to-***
>
> ***(i) the nature and sensitivity of the receiving environment;***
>
> ***(ii) the current state of technical knowledge for the activity;***
>
> ***(iii) the financial implications of taking each of those measures; and***
>
> ***(iv) the likelihood and degree of success in preventing or minimising the harm of nuisance of each of the measures that might be taken.***

4.81. The Law Society is concerned that the ACT does not make compliance with the general environmental duty a standard condition of environmental authorisations as was the case in Queensland until recently under the *Environmental Protection Act 1994*. This could have the unintended consequence that any breach of the general duty was a breach of the authorisation and therefore an offence.[59]

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[58] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, pp 3-4
[59] The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, p 3

Duty to Notify of Actual or Threatened Environmental Harm

4.82. The Conservation Council believes that the duty to notify actual or threatened environmental harm should not be limited to the person conducting the activity that has caused or is likely to cause harm.

> *It should be everyone's duty to notify the Authority if they suspect or have full knowledge of serious or even life-threatening harm from pollution being inflicted on the environment, rather than leave it as a moral obligation.*[60]

4.83. The Committee takes the view that it would not be practicable to impose a legal obligation on everyone to notify of environmental harm as it could lead to the possibility that a person could commit an offence by not notifying an incident if someone else can prove that the person was aware of the incident.

Community Involvement

4.84. The Bill provides for community involvement in processes under the Bill (sections 25 & 88), makes certain information available to the public (section 20) and provides rights of appeal for third parties against certain decisions (sections 125 & 126).

4.85. Some parties believe that the public participation processes do not go far enough while others argue that they go too far. The various arguments are discussed below.

Access to Information by the Public

Scope of Documents Available for Inspection

4.86. The EDO argued in its submission that section 20 of the Environment Protection Bill which lists documents available for public inspection does not include all relevant documents. The EDO suggested that applications for environmental authorisations, accredited codes of practice and documents containing the findings of reviews of environmental authorisations should be added to the list.[61]

4.87. The Conservation Council agrees that documents relating to reviews of environmental authorisations and accredited codes of practice should be made public.[62]

4.88. ACTEW disagrees with the proposal that findings of reviews of authorisations should be made public.[63]

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[60] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 4
[61] Environmental Defender's Office, *op cit*, 29 August 1997, p 4
[62] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, pp 4-6
[63] ACTEW Corporation Limited, *op cit,* 14 October 1997, pp 1-2

4.89. The Property Council submitted that testing or monitoring results should not be available to the public if the information is relevant to an impending prosecution or other court proceeding.[64]

4.90. ACTEW made a stronger recommendation than the Property Council in requesting that paragraph 20(1)(f) relating to testing and monitoring results be deleted. They stated that "out of date and incomplete information released to the public may be misleading and taken out of context could cause prejudice to the particular business".[65]

4.91. The Committee believes that the processes under the Bill should be as open and accessible to the public as possible. The Committee agrees with the EDO and the Conservation Council that accredited codes of practice should be added to the list of documents available for public inspection because, although they are public in the sense that they are tabled in the Assembly, the Committee considers that they should be publicly accessible through the EMA. The Committee also agrees with the EDO and the Conservation Council that the findings of reviews of environmental authorisations should be publicly available under section 20 of the Bill.

4.92. While neither the EDO or the Conservation Council queried the non-availability of environmental audits to the public, the Committee notes that these are not included in the list at section 20. The Committee considers that the same logic of public accessibility should apply to audits.

Recommendation 12
4.93. The Committee recommends that section 20 of the Bill be amended to include:

- ***accredited codes of practice;***
- ***the results of any review of an environmental authorisation; and***
- ***environmental audit reports.***

Public Notification of Relevant Events

4.94. The EDO suggested that there should be public notice of granting of authorisations and public notice of the outcome of periodic reviews (under sections 53 and 54).[66]

4.95. The Conservation Council also believes that environmental authorisations should be gazetted and advertised but added variations to authorisations, finalised environmental protection agreements and accredited codes of practice to the list of events that should be publicly notified.[67]

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[64] Property Council of Australia, *op cit*, July 1997, p 6
[65] ACTEW Corporation Limited, *op cit,* 14 October 1997, pp 1-2
[66] Environmental Defender's Office, *op cit*, 29 August 1997, pp 8-9
[67] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 5

4.96. The Committee considers that, while environmental authorisations are included in the documents available for public inspection, there should be public notice of the granting of authorisations (as well as variations to authorisations) so that members of the public are aware of their existence. Without public notice, a third party may not know that an authorisation has been granted and consequently it may not be possible for a third party to meet the requirements of the AAT in order to appeal against the decision to grant an authorisation.

Recommendation 13
4.97. The Committee recommends that the following subsections be inserted:

> ***47(3) Within 10 working days of the Authority notifying the applicant of its decision under section 47(1), the Authority shall give notice of the grant of the authorisation in the Gazette and a daily newspaper printed and circulating in the Territory.***
>
> ***47(4) A notice under subsection (3) shall state that a copy of the authorisation is available for public inspection under section 20.***

4.98. Given that clause 125(1)(j) provides an appeal right against a decision of the EMA not to take action following a review of an authorisation, it would appear to the Committee that there should be some public notification that a review has taken place. If there is no notification it would be very difficult for a third party to lodge an appeal. It would also appear sensible to make the findings of reviews available for public inspection under section 20 which is the subject of Recommendation 12.

Recommendation 14
4.99. The Committee recommends that the following clause be included in the Environment Protection Bill:

> ***54A(1) Within 10 working days of the Authority completing a review of an environmental authorisation under section 53(1) or 54(1), the Authority shall give notice of the results of the review in the Gazette and a daily newspaper printed and circulating in the Territory.***
>
> ***54A(2) A notice under subsection (1) shall state that a copy of the results of the review is available for public inspection under section 20.***

4.100. While there is no appeal mechanism in relation to environmental protection agreements, they are available for public inspection under section 20 and the Committee agrees with the Conservation Council that finalised agreements should be publicly notified to raise the public profile of these agreements.

Recommendation 15
4.101. The Committee recommends that the following public notification clause be included in the Environment Protection Bill:

> ***39A(1) Within 10 working days of the Authority entering into an environmental protection agreement with a person under section 37, the Authority shall give notice of the finalised agreement in the Gazette and a daily newspaper printed and circulating in the Territory.***
>
> ***39A(2) A notice under subsection (1) shall state that a copy of the environmental protection agreement is available for public inspection under section 20.***

4.102. The Committee also agrees with the Conservation Council that accreditation of codes of practice should be publicly notified.

Recommendation 16
4.103. The Committee recommends that the following clause be included in the Environment Protection Bill:

> ***31(4) Within 10 working days of the Minister publishing a notice in the Gazette under subsection (1) accrediting a code of practice, the Authority shall give notice of the accreditation in a daily newspaper printed and circulating in the Territory.***
>
> ***31(5) A notice under subsection (4) shall state that a copy of the accredited code of practice is available for public inspection under section 20.***

4.104. The Committee notes that the Bill provides that draft environment protection policies must be notified in the Gazette and in a newspaper and that finalised policies must be Gazetted. The Committee considers that, for consistency, finalised environment protection policies should also be notified in a newspaper.

Recommendation 17
4.105. The Committee recommends that subsection 26(1) should be amended by adding the words "and in a daily newspaper printed and circulating in the Territory" after the word "Gazette".

Inspection and Copying Fees

4.106. The EDO believes that fees charged for inspection of documents should be as low as possible so as not to restrict public access to the documents.[68]

4.107. The Conservation Council believes that the objects of the Act would be better achieved is no fees were levied for inspection of documents.[69]

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[68] Environmental Defender's Office, *op cit*, 29 August 1997, p 4; Uncorrected Transcript of Proceedings, 7 October 1997, p 2

Recommendation 18
4.108. The Committee recommends that section 20 be amended to provide that fees not be charged for inspection of documents and that fees for copying documents should be minimal so as to encourage public access and participation.

Provision of Documents to Interested Parties

4.109. The Conservation Council proposed in its submission that copies of environmental authorisations, environmental protection agreements and accredited codes of practice should be provided directly to the Council.[70]

4.110. The Committee does not think that the Conservation Council should receive copies of documents free of charge when any other interested party would normally be charged a fee to inspect or copy those documents. However, the Committee considers it reasonable that known interested parties such as the Conservation Council could be directly notified about certain events such as the grant of environmental authorisations, finalisation of environmental protection agreements and accreditation of codes of practice.

4.111. In its submission, the Conservation Council suggested that the EMA should be formally required to provide a copy of any draft environment protection policy to the Conservation Council along similar lines to section 27 of the *Land (Planning and Environment) (Amendment) Act (No. 3) 1996* which binds the Government to provide, without charge, copies of each Preliminary Assessment under the Land Act to the Council.[71]

Recommendation 19
4.112. The Committee recommends that the Environment Protection Bill be amended to provide that a copy of every draft environment protection policy be provided to the Conservation Council along similar lines to section 27 of the Land (Planning and Environment) (Amendment) Act (No. 3) 1996.

Protection for Sensitive Information

4.113. The Property Council believes that protection for sensitive commercial information needs to be provided along similar lines to the protection contained in the Land Act.[72]

4.114. The HIA is also concerned about possible release of commercially sensitive information. They suggested that before disclosing any potentially confidential material to the public, the EMA should give notice of its intention to do so to the person to whose activities the documents relate and that that person should have 10 working days to make submissions opposing the release. In the absence of such a review mechanism, they suggest alternative protections for confidential material

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[69] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 6
[70] *ibid*, p 5
[71] *ibid*, p 4
[72] Property Council of Australia, *op cit*, July 1997, p 6

including the proposal that "improper use of or release of documents or information contained in them should be an offence under the Bill".[73]

4.115. The Law Society is similarly concerned that there is not a balance between recognising the public interest and protecting commercially sensitive information. They suggest that, as a minimum, business should be informed that someone has applied to inspect documents or be given the right to object to release at the time the documents are produced as mechanisms to protect commercially sensitive information.[74]

4.116. ACTEW also had concerns that, unlike the equivalent Tasmanian legislation, the Bill does not provide protection for confidential information and trade secrets.[75]

4.117. Government officials acknowledged these concerns and noted that protection for trade secrets is provided for information contained in the recently released National Pollutant Inventory which is a draft National Environment Protection Measure agreed to collectively by all Australian governments. They commented that they are revisiting clause 20 to see if protection for sensitive information should be provided along the lines of the National Pollutant Inventory. They also noted that the Land Act includes a provision to protect confidential information.[76]

4.118. It appears anomalous to the Committee that protection for trade secrets and sensitive commercial and financial information is exempt from disclosure under the FOI Act but not exempt from public inspection under the Environment Protection Bill. The Committee considers that a decision by the EMA about whether to prevent public inspection of information should be reviewable.

Recommendation 20
4.119. The Committee recommends that the following section 20A be included in the Environment Protection Bill:

Documents relating to business affairs etc.

20A(1) A person may apply in writing to the Authority for the Authority to exclude the whole or part of documents from public inspection by reason of the confidential nature of any of the matters contained in those documents.

20A(2) Where a request is made under subsection (1) and in the opinion of the Authority the information:

(a) contains a trade secret; or

73 Housing Industry Association, *op cit*, 1 September 1997, pp 1-2
74 The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, p 2
75 ACTEW Corporation Limited, *op cit*, 5 September 1997, pp 1-2
76 Uncorrected Transcript of Proceedings, 7 October 1997, p 66

(b) the disclosure of which would, or would reasonably be expected to, adversely affect a person in respect of the lawful business affairs of that person; and

(c) it would not be in the public interest to disclose that information;

the Authority shall exclude that information from public inspection.

20A(3) The Authority must respond in writing to a request under subsection (1) within 10 working days.

20A(4) Where a request is made under subsection (1), the Authority shall refrain from keeping a public record of that information until the Authority has dealt with the request.

20A(5) Where a part of a document is excluded from the copies made available for public inspection, each copy shall include a statement to the effect that an unspecified part of the document has been excluded for the purpose of protecting confidentiality of information.

Recommendation 21
4.120. The Committee also recommends that the following paragraph be added to subsection 125(1):

under subsection 20A(2) excluding or not excluding certain information from public inspection;

Public Involvement in Environmental Authorisations

4.121. The EDO believes that the licensing process should be open to public view and participation. To better achieve this, the EDO suggests that there should be provisions requiring public notice of applications for authorisations, public comment on applications and public notice of granting of authorisations.[77]

4.122. The Conservation Council similarly argued that there should be opportunity for public consultation in respect of environmental authorisations and variations to authorisations.[78]

4.123. The HIA opposes additional public involvement in granting of authorisations and noted in its submission that additional public consultation processes would add to the costs of this process and discourage business from developing solutions to environmental challenges because of additional delays and 'red tape'.[79]

4.124. The Committee agrees with the EDO and the Conservation Council that there should be public consultation on applications for environmental authorisations in

[77] Environmental Defender's Office, *op cit*, 29 August 1997, p 8
[78] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 6
[79] Housing Industry Association, *op cit*, 1 September 1997, p 3

addition to the right of appeal against decisions made by the EMA in relation to grant of authorisations.

Recommendation 22
4.125. The Committee recommends that the following section 45A be inserted after section 45:

> ***45A Within 10 working days of receiving an application under section 45, the Authority shall publish in the Gazette and in a daily newspaper printed and circulating in the Territory a notice-***
>
> ***(a) containing a brief description of the prescribed activity and its location to which the application relates;***
>
> ***(b) indicating where copies of the application may be obtained; and***
>
> ***(c) inviting any person to lodge a submission in relation to the application with the Authority by the date specified in the notice, being a day not less than 15 working days after the date of the notice.***

Recommendation 23
4.126. In conjunction with Recommendation 22, the Committee recommends that the words "receipt of an application under section 45" in section 46(1) be deleted and replaced with the following "date specified in a notice published under section 45A and taking into account any submissions received in response to that notice".

4.127. From the Government's perspective, the third party appeal rights in respect of a decision of the EMA to grant or not grant an environmental authorisation is sufficient public involvement in matters relating to environmental authorisations. That is, that one cycle of public involvement is enough.[80]

4.128. The Property Council believes that public involvement in periodic reviews of authorisations would interfere in the day to day business of industry. They gave the following example of potential difficulty with third party appeals in relation to annual reviews:

> *... management effort required in having to justify something which has been approved on an annual basis and the possibility of the same appellant coming back year after year after year and tying up management time and your expenses and all the rest of it."*[81]

[80] Uncorrected Transcript of Proceedings, 7 October 1997, p 57
[81] *ibid*, pp 27-28

Public Involvement in Environmental Protection Agreements

4.129. The EDO suggested that there should be public notification in a daily newspaper inviting public comment on environmental protection agreements that are proposed to be entered into.[82]

4.130. The Conservation Council also believes that there should be opportunity for public consultation in relation to environmental protection agreements.[83]

4.131. The HIA takes the view that negotiation of agreements is essentially a private matter between the EMA and the parties conducting the relevant activities. They do not support introducing public consultation processes in relation to negotiation of such agreements.[84]

4.132. Government officials confirmed on 7 October 1997 that Environmental Protection Agreements are intended to be non-binding agreements and that there is an important place in the legislation for this form of agreement. As such, they do not believe it is appropriate for formal public consultation processes to apply.[85]

4.133. The Committee considers it very important for the EMA to be able to persuade businesses to modify and improve their practices by the use of Environmental Protection Agreements. The Committee notes that environmental protection agreements are accessible by the public under section 20 of the Bill and has recommended (Recommendation 15) that finalised agreements be publicly notified.

Public Involvement in Accredited Codes of Practice

4.134. The Conservation Council and the Environmental Defender's Office argued that development of codes of practice should include community involvement.[86]

4.135. On the other hand, the HIA rejects the notion of introducing a mandatory public consultation period in the processes of obtaining accreditation of a code of practice believing it would add additional costs and time delays and create additional hurdles for business to overcome.[87]

4.136. In responding to a question at the public hearing on 11 August 1997, a Government official commented that just because the legislation doesn't specifically require community input doesn't mean that it can't be done. The industry developing the code of practice may choose to go through a public consultation process and, because the accreditation goes before the Assembly as a disallowable instrument,

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82 Environmental Defender's Office, *op cit*, 29 August 1997, pp 6-7
83 Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 5
84 Housing Industry Association, *op cit*, 1 September 1997, p 3
85 Uncorrected Transcript of Proceedings, 7 October 1997, pp 57-58
86 Environmental Defender's Office, *op cit,* 29 August 1997, p 5; Conservation Council of the South-East Region and Canberra, *op cit,* 3 September 1997
87 Housing Industry Association, *op cit*, 1 September 1997, p 3

there is scope for members of the public to influence the political process in relation to the code of practice.[88]

4.137. The Committee thinks it is appropriate that a public consultation process be conducted in the development of codes of practice due to the implication that compliance with a code of practice is deemed to be compliance with the general environmental duty.

Recommendation 24
4.138. The Committee recommends that the Bill be amended to require public consultation in the development of codes of practice.

4.139. There is also the ability for any Member of the Assembly to refer an Accredited code of practice to an environment committee of the Assembly.

Third Party Appeal Rights

4.140. The EDO suggested that there should be public notice of decisions of which review might be sought by persons other than the applicant. This notification requirement should extend to decisions made by the EMA and the Minister.[89]

4.141. The Conservation Council strongly supports the opportunity for third party appeals and would see it as contrary to the objects of the Act to prevent third party involvement in this aspect.[90]

4.142. However, the Property Council argued that the third party appeal rights provided in the Bill are inappropriate. They suggest that third parties should be limited to the avenue of seeking an injunctive order from the Supreme Court under section 118. However, if third party appeal rights remain in the Bill, they consider that third parties should be required to show that they are substantially and adversely affected by a decision in order to appeal and that only a certain category of decisions would be amenable to appeal.[91] The Property Council's view was supported by the Master Builders Association[92], ACTEW[93] and the Housing Industry Association[94].

4.143. The Property Council commented at the public hearing on 7 October 1997 that it would be possible for third parties to appeal under both the Land Act and the Environment Protection Bill which could lead to substantial delays from an industry perspective.[95]

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[88] Transcript of Proceedings, 11 August 1997, p 16
[89] Environmental Defender's Office, *op cit*, 29 August 1997, p 13
[90] Uncorrected Transcript of Proceedings, 7 October 1997, p 10
[91] Property Council of Australia, *op cit*, July 1997, p 2; Uncorrected Transcript of Proceedings, 7 October 1997, pp 24-25
[92] Master Builders Association of the ACT, Submission, 4 August 1997
[93] ACTEW Corporation Limited, *op cit*, 5 September 1997, pp 2-4
[94] Uncorrected Transcript of Proceedings, 7 October 1997, p 34; Housing Industry Association, *Supplementary Submission,* 10 October 1997, p 2
[95] Uncorrected Transcript of Proceedings, 7 October 1997, p 23

4.144. The Committee view is that the legislation sets up a partnership between community, industry and government and that, given that the environment is a public asset, the community should be able to participate in decisions that affect the environment. Therefore, the Committee considers that the appeal provisions covered by section 125 should remain as they are in the Bill.

4.145. However, the Committee notes that the appeal rights are not well balanced. That is, section 125(1)(f) provides that a person can appeal against the imposition of a certain condition on an environmental authorisation but there is no appeal provision about the non-imposition of a condition. The Committee believes that the appeal rights should be balanced.

Recommendation 25
4.146. The Committee recommends that section 125(1) should be amended to provide for a right of review against a decision by the EMA not to impose a condition on an environmental authorisation.

Application of the Bill to Government

Application to the ACT Government

4.147. At the public hearing on 11 August 1997, a Government official explained how the Bill would apply to the ACT Government as follows:

> *Territory owned corporations like Totalcare and ACTEW will be on the same footing in terms of the application of the Act as any private sector company, but the area where there would be a difference is with people who work for the mainstream Government departments. That is because those departments are part of the Crown. ... The Crown is certainly bound by the entire Act, so in terms of things like obtaining a licence or entering into an agreement and so on, a part of a department conducting an environmentally relevant activity is going to have to go through the same processes as anybody else...*[96]

Criminal Liability of Government Employees

4.148. The Government official also explained the legal 'nonsense' of making the Crown criminally liable for offences as well as the reasoning behind the criminal liability provisions for agents of the Crown.

> *It simply was not practical to make the Crown liable to the criminal provisions in the way that other people are. ... It is not practical to make the Crown itself liable for prosecution because you end up with the nonsense of the Crown prosecuting the Crown and the Crown paying fines to itself. On the other hand, we did not simply want to exempt Crown employees, as that would have left quite a hole in the Bill. We have taken a middle course. We are conscious that it is not ideal. It was the best that we could come up with, given the impracticality of binding the Crown itself. That middle course is that Crown employees can be personally liable - and this is in clause 10 of the Bill - for things done where they exhibit a mental element, such as*

[96] Transcript of Proceedings, 11 August 1997, p 24

> *intention, recklessness or negligence. We have exempted them from strict liability offences because the commission of a strict liability offence is more likely to come from some defect in the system such as them not being given enough money in their budget to do whatever they needed to do. ... The liability goes right up to and including Chief Executive level but stops short of the Minister.*[97]

4.149. The criminal liability provisions of the Crown apply to 'agents' of the Crown. Section 10 of the Bill defines an agent to include: "an instrumentality, officer or employee of the Crown and a contractor or other person who performs a function on behalf of the Crown." Therefore, a contractor undertaking a Government service is treated in the same manner as a public servant.

4.150. While not suggesting that Government employees should be immune from prosecution, Mr Paul Osborne MLA expressed concern that the level of exposure to criminal liability for Government employees is unreasonable and should be lessened. He cited the following example of the harsh consequences for a minor, unintentional, though negligent, mistake by Government workers:

> *A D[epartment] of U[rban] S[ervices] employee accidentally ploughed 5-10 hectares of the Gungahlin Grassland Reserve. As the Reserve would be considered as an area of "high conservation value" under the Bill, the employee would, therefore, have committed the offence of "negligently" or "recklessly" causing "serious environmental harm". Negligently causing environmental harm carries a maximum penalty of $150 000 and/or 3 years imprisonment. Recklessly causing environmental harm carries a maximum penalty of $200 000 and/or 5 years jail. The public servant would not be granted Crown immunity (under clause 10) as immunity does not apply to knowingly, recklessly or negligently causing environmental harm.*[98]

4.151. The EDO considers that the immunity of Crown agents from criminal prosecution strengthens the argument for a civil enforcement provision with open standing.[99]

Application to the Commonwealth Government

4.152. There is significant potential for the Commonwealth Government to cause environmental harm in the ACT. That is, Commonwealth Government agencies and instrumentalities conduct 'Class A' and 'Class B' activities listed in Schedule 1 to the Bill.

4.153. However, the ACT Government does not have jurisdiction to bind the Commonwealth to its legislation. Therefore potentially harmful activities conducted by the Commonwealth would not be subject to the usual requirements of the Environment Protection Bill, such as the requirement to hold an environmental authorisation.

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[97] *ibid*, pp 24-25
[98] Mr Paul Osborne MLA, *op cit,* 18 September 1997, p 3
[99] Environmental Defender's Office, *op cit*, 29 August 1997, p 3

4.154. The Committee is aware of the difficulties in obtaining the agreement of the Commonwealth Government to be bound by ACT legislation and acknowledges that the Minister for Environment, Land and Planning has written to the relevant Commonwealth Ministers requesting that the Commonwealth be bound by the Environment Protection Bill when it is passed.

4.155. The Committee notes that the *Australian Capital Territory (Self-Government) Regulations* binds the Commonwealth to the *Air Pollution Act 1984*, the *Noise Control Act 1988* and the *Water Pollution Act 1984.* However, the Commonwealth has not chosen to bind itself to any ACT law since self-government.

4.156. At the public hearing on 7 October 1997, the Law Society suggested that the existing legislation which binds the Commonwealth not be repealed until the Commonwealth agrees to be bound by the new legislation.[100]

Recommendation 26
4.157. The Committee recommends that the existing legislation be repealed except in so far as it applies to the Commonwealth until such time as the Commonwealth agrees to be bound by the new ACT legislation.

Cost Impacts

Implications for Community

4.158. At the Committee's public hearing on 11 August 1997, a question was asked whether there is likely to be an environmental levy paid by ratepayers as a result of the Environment Protection Bill.[101]

4.159. In response, a Government official commented that charges under the new legislation will relate specifically to regulated activities.[102]

Implications for Industry/Business

4.160. The Property Council believes that the impact of the Bill on business is very likely to depend on how it is administered.

> *If the Act is not administered or able to be administered in a commercially realistic and practical way, businesses may be forced to implement new practices or technology overnight or [be] overburdened with regulatory administration, which will have obvious implications for business and employment in the Territory.*[103]

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[100] Uncorrected Transcript of Proceedings, 7 October 1997, p 52
[101] Transcript of Proceedings, 11 August 1997, p 10
[102] *ibid*
[103] Property Council of Australia, *op cit*, July 1997, p 6

4.161. Mr Osborne agrees that fanatical administration of the Bill, without proper regard to business and commercial reality, could have a devastating effect on industry in the ACT.[104]

4.162. Government officials advised that one of the assumptions made in the legislative drafting process is that the legislation "will be administered by competent and appropriately qualified officers and those officers will take a commonsense approach to the administration of the Act".[105] Members of the Standing Committee on Planning and Environment are confident that Assembly Committees will continue to ensure that this is indeed the case.

4.163. Mr Osborne is concerned that insurance and financing issues may lead to increasing prices of goods and services. He commented in his submission that insurance cover for environmental risk is already difficult to get and that the difficulty and cost of obtaining such insurance would be likely to increase under the Environment Protection Bill. He also raised the possibility that it may become standard practice that committing an environmental offence will cause a loan to be in default. This could have serious implications for financing of business.[106]

4.164. The Committee acknowledges these concerns. On the other hand, the Committee is aware that an appropriately designed regulatory system can protect those businesses who are meeting their environmental obligations from unfair competition from businesses not fulfilling those obligations. The regulatory system can also provide an appropriate basis for industry improvement and innovation.

Environmental Management Tools Under the Bill

Environmental Protection Agreements

Nature of Environmental Protection Agreements

4.165. AGL commented in its submission that enabling organisations to maintain a degree of self regulation through environmental protection agreements appears to be a positive step in promoting a higher level of performance in corporate environmental management.[107]

4.166. The HIA suggests that it is not clear whether a separate environmental protection agreement must be obtained in relation to each separate site where the activities are conducted. They suggest that the Bill should provide a clear description of the scope of environmental protection agreements, ie. whether one Agreement will cover a specific site or all sites where the person conducts the relevant activities.[108]

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[104] Mr Paul Osborne MLA, *op cit,* 18 September 1997, p 1
[105] Uncorrected Transcript of Proceedings, 7 October 1997, p 55
[106] Mr Paul Osborne MLA, *op cit,* 18 September 1997, pp 1-2
[107] The Australian Gas Light Company, 15 September 1997
[108] Housing Industry Association, *op cit*, 1 September 1997, pp 4-6

4.167. Government officials advised at the public hearing on 7 October 1997 that:

> *Environmental Protection Agreements are intended to be as flexible as possible and while your typical agreement may well be with an individual activity manager, it is also possible to have agreements with a whole industry or an industry association for example.*[109]

4.168. The Committee notes that, in that it is not expressly prohibited, the Bill provides scope for one agreement to cover several sites. However, the Committee considers that this possibility that one agreement could cover several sites should be highlighted in the explanatory memorandum and other educative material about the Bill.

4.169. The HIA also claims that there is uncertainty about the termination arrangements for the obligations covered by an environmental protection agreement. To remove any confusion they suggest that the Bill include a precise statement of when the obligations covered by the agreement terminate for a specific person.[110]

Who Must Enter Into Environmental Protection Agreements?

4.170. HIA members are confused as to precisely who must enter in to an agreement under clause 37, that is, neither the Bill nor the explanatory memorandum clarify whether the builder, the owner, the contractor and/or the land developer are each required to obtain environmental protection agreements. They believe that the Bill should be amended to remove any doubts. In their opinion, this requires a clear definition of the persons who are conducting the activity.[111]

Compliance with an Environmental Protection Agreement

4.171. The HIA claimed that there is no reason in principle why the general duty should be satisfied when a person complies with an Accredited Code of Practice but not when a person complies with an agreement.[112]

4.172. However, the Committee considers that it would not be appropriate for the legislation to provide that compliance with an agreement satisfies the general environmental duty given the advice from Government officials[113] that environment protection agreements are non-binding which implies that they do not impose legal obligations.

Breach of an Environmental Protection Agreement

4.173. Under section 41, where there is a breach of an environmental protection agreement, the EMA can only require an environmental authorisation when there is serious or material environmental harm <u>and</u> a breach of the Act. The EDO thinks that

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[109] Uncorrected Transcript of Proceedings, 7 October 1997, p 64
[110] Housing Industry Association, *op cit*, 1 September 1997, pp 4-6
[111] *ibid*, pp 4-5
[112] Housing Industry Association, *op cit*, 1 September 1997, p 6
[113] Uncorrected Transcript of Proceedings, 7 October 1997, p 58

this gives too little weight to compliance with the Act and suggested that a breach of the Act should be sufficient to require an environmental authorisation. The EDO also suggested that the penalty for breaching an environmental protection agreement should be to require an environmental authorisation. Currently there is no penalty for breaching an environmental protection agreement.[114]

4.174. The Conservation Council supports the view that a breach of the Act should be sufficient for an environmental authorisation to be required and recommended that clause 41(2)(b) be deleted.[115]

4.175. On the contrary, ACTEW believes that clause 41 should not be amended claiming that "under the current definitions, almost any activity undertaken by a particular business or individual would cause environmental harm or nuisance".[116]

4.176. The Committee understands that while environmental protection agreements must be in place for Class B activities which do not have an environmental authorisation the EMA may also enter into environmental protection agreements with a business conducting an activity other than a Class B activity. Therefore, for any Class B activity, section 40 provides that where that agreement is terminated, say in the event of a breach, an environmental authorisation is required. However, those activities not listed as Class B activities which may be the subject of an agreement would not be considered to have as great a potential to cause environmental harm.

4.177. Therefore, the Committee takes the view that, given the administrative nature of environmental protection agreements, section 41 is sufficient and should remain as drafted.

Environmental Authorisations

Nature of Environmental Authorisations

4.178. The HIA is concerned that neither the Bill nor the explanatory memorandum make clear whether a separate authorisation is required for each separate site where the activity is conducted.[117]

4.179. The Committee notes the Minister's statement about the potential to tailor environmental authorisations to the relevant situation in his presentation speech for the Bill.

> *Activities at different sites which would normally require several authorisations could be eligible for a single, multisite authorisation. Similarly, a single authorisation could cover a number of activities on the one site.*[118]

[114] Environmental Defender's Office, *op cit*, 29 August 1997, p 7
[115] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 6
[116] ACTEW Corporation Limited, *op cit,* 14 October 1997, p 2
[117] Housing Industry Association, *op cit*, 1 September 1997, p 7
[118] ACT Legislative Assembly Hansard, 15 May 1997, p 1450

4.180. Mr Osborne commented in his submission that:

> *While the Bill does not specifically mention multiple risk activities, the Minister has indicated that it will be possible for one authorisation that covers everything that will be done on a particular site. It would also be possible to take out an authorisation while a business is doing a similar activity on multiple sites.*[119]

4.181. Mr Osborne welcomes this provision as it reduces duplication and red tape, however, he drew attention to a number of practical difficulties in its everyday application. He suggested that attention be given to the following questions:

> *Who would be responsible for getting the authorisation; who would pay for it; who would be responsible for enforcing the authorisation; if one of the contractors fails to comply with a condition of the authorisation what is the exposure of the other contractors; how will a site manager be able to ensure that every contractor, manager and employee on site is aware of their obligations?*[120]

4.182. As noted in relation to the scope of environmental protection agreements above, the Committee notes that this possibility, that one authorisation could cover several sites, appears to be permitted in that it is not expressly prohibited under the Bill. However, the Committee considers that the possibility that one authorisation could cover several sites should be highlighted in the explanatory memorandum and other educative material about the Bill.

Who Must Obtain Environmental Authorisations?

4.183. In the same vein as the concerns expressed in relation to environmental protection agreements (see paragraph 4.170. above), the HIA is concerned about the uncertainty surrounding exactly who is required to be authorised.[121]

Matters to be Taken Into Account by the EMA

4.184. Both ACTEW and the Law Society suggested in their submissions that, in making a decision to grant, vary, review or place conditions on an environmental authorisation, the EMA should be required to have regard to the cost and reasonableness of the measures in addition to the matters already prescribed in clause 56.[122]

Proposals to Vary, Suspend or Cancel an Environmental Authorisation

4.185. Clause 57(2) provides that, in certain circumstances, the EMA can vary an environmental authorisation without notice to the authorisation holder or giving the holder opportunity to submit to the EMA why the variation should not proceed.

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[119] Mr Paul Osborne MLA, *op cit,* 18 September 1997, p 2

[120] *ibid*

[121] Housing Industry Association, *op cit*, 1 September 1997, p 7

[122] ACTEW Corporation Limited, *op cit*, 5 September 1997, p 7; The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, p 3

Mr Osborne believes that opportunity to make submissions to the EMA against a proposal to vary an authorisation should be available to a holder of an authorisation in all circumstances and that this clause should be deleted.[123]

4.186. The Committee view is that the circumstances under which the EMA may vary an environmental authorisation without giving the authorisation holder opportunity to lodge a submission as to why the variation should not proceed are sufficiently limited and that there is no reason to remove this power.

4.187. The Law Society does not believe that 10 working days is sufficient time for written submissions to be lodged in response to a proposal by the EMA to vary, suspend or cancel an environmental authorisation. They suggest that clauses 57(1)(c) and 59 be amended to increase the period to 28 days as is the case in Queensland.[124]

4.188. The Committee considers that, because it is possible that environmental damage may be occurring, 10 working days is adequate and that the provisions should remain as drafted.

Notification of Ceasing Activity

4.189. In relation to the obligation of a holder of an environmental authorisation to notify the EMA of ceasing to conduct an activity, the Law Society believes that the time frame of 5 working days is too strict.[125]

4.190. The Committee agrees that it seems unnecessarily strict to impose a time limit of 5 working days for a person to notify the EMA of ceasing to conduct an activity covered by an environmental authorisation.

Recommendation 27
4.191. The Committee recommends that the time period of 5 working days specified in section 62 be increased to 10 working days.

Non-payment of Fees

4.192. Subclause 52(2) states that the EMA shall cancel an authorisation if fees are not paid. The Law Society suggests that the EMA should have discretion to decide whether or not to cancel an authorisation due to the serious implications of cancelling an authorisation. They recommend that the word "shall" in subclause 52(2) be replaced with the word "may".[126]

4.193. The Committee considers that this proposal by the Law Society is reasonable in that it would make the decision to cancel an environmental authorisation discretionary rather than automatic. However, taking the approach that major discretionary decisions should have a right of appeal, this decision to cancel an authorisation should also be subject to appeal.

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[123] Mr Paul Osborne MLA, *op cit,* 18 September 1997, p 5
[124] The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, p 3
[125] *ibid*
[126] *ibid*, p 4

Recommendation 28
4.194. The Committee recommends that:

- ***the word "shall" in subsection 52(2) be deleted and the word "may" be inserted instead; and***
- ***section 125(1) be amended to include a right of appeal against a decision under section 52(2) to cancel an authorisation.***

Refund of Fees

4.195. The Law Society considers that an environmental authorisation holder should be entitled to a refund of fees paid in advance in the events that an authorisation is surrendered or cancelled or when the person ceases to conduct the activity.[127]

Recommendation 29
4.196. The Committee recommends that the Government consider the possibility of refunding fees paid in advance (less administrative costs) where an environmental authorisation is surrendered voluntarily by the holder.

Environmental Improvement Plans

4.197. In relation to voluntary environmental improvement plans, the EDO commented that subsection 67(4)(d) which requires the EMA to consider whether the cost of implementing a measure is reasonably proportional to the reduction in environmental harm likely to be achieved would appear to be unnecessary as this decision would have already been made by the person applying for the accreditation.

Voluntary Environmental Audits

4.198. The HIA considers that protection for information contained in voluntary environmental audits should be automatic. They believe the procedures under section 73 are overly complicated and time consuming and will discourage people from undertaking voluntary audits. They claim that automatic protection for such information is "entirely consistent with the trend in other Australian States and abroad" and cite the NSW *Protection of the Environment Operations Bill 1996* as an example.[128]

4.199. At the public hearing on 7 October 1997, Government officials made the point that discretion to grant protection to such information is very important. They explained that without discretion not to grant protection it would be possible for a business to disclose a whole lot of breaches of the Act in an audit and then claim protection. They also suggested that there may be a breach so serious that the EMA is not prepared to grant protection.[129]

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[127] *ibid*, p 3
[128] Housing Industry Association, *op cit*, 1 September 1997, pp 7-8
[129] Uncorrected Transcript of Proceedings, 7 October 1997, pp 67-68

4.200. The Committee agrees that the decision by the EMA to grant protection to information contained in voluntary environmental audits should be discretionary rather than giving automatic protection to this information.

4.201. The HIA suggests that the scope of protection for information contained in voluntary audits is too limited in that third parties may have access to the information and that it could be used in evidence in any enforcement proceedings. They request that the Bill state that a protected document "may not be seized or obtained by the Authority or any other person for any purpose connected with the administration or enforcement of the Act".[130]

Economic Measures

4.202. The EDO suggested that the emphasis for using economic instruments should not be simply on reducing compliance costs but also on reducing pollution. To this end, the EDO suggested that the words "the objects of this Act" replace the words "cost effective environmental regulation" in clause 33.[131]

4.203. The Conservation Council suggested the same amendment to clause 33 as they believe that economic measures should be used as a means of achieving the objects of the Act rather than a means of achieving cost effective environmental regulation.[132]

4.204. The Committee agrees that the focus of using economic instruments should be on furthering the objects of the Act.

Recommendation 30
4.205. The Committee recommends that the words "cost effective environmental regulation" be deleted in clause 33 and replaced by "the objects of this Act".

4.206. In addition, the EDO was concerned about the complete delegation of the power to develop and implement schemes involving economic measures to the Regulations and that the Regulations could be inconsistent with the Act.[133]

Financial Assurances

4.207. The Conservation Council suggested that any activity which has the potential to cause either serious or material environmental harm should be required to provide a financial assurance as a condition of its environmental authorisation.[134]

4.208. The Committee view is that the requirement for a financial assurance should be discretionary as is the case under the draft Bill. It does not consider that a financial assurance should be a standard condition of environmental authorisations.

[130] Housing Industry Association, *op cit*, 1 September 1997, p 8
[131] Environmental Defender's Office, *op cit*, 29 August 1997, pp 5-6
[132] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 5
[133] Environmental Defender's Office, *op cit*, 29 August 1997, pp 5-6
[134] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 2

Establishment of a Trust Account

4.209. In its submission, the EDO suggested that consideration be given to establishing a trust fund with a percentage of authorisation fees received along the lines of the *Environmental Education Trust Act 1990* (NSW). The EDO suggested that the trust could be limited to authorisation fees received from government or government controlled polluters.[135] At the public hearing on 7 October 1997, the EDO added that the Tasmanian legislation also provides for a trust fund.[136]

4.210. The Conservation Council also suggested that a trust fund, such as the fund created by the *Environmental Restoration and Rehabilitation Trust Act 1990* (NSW), designed to further the objects of the Bill could be established from money raised from economic measures, authorisation fees and financial assurances. They further suggested that part of those revenues should be distributed to peak environmental groups, such as themselves, who have the objective of protecting the environment and fostering public awareness on environmental issues.[137]

4.211. At the public hearing on 7 October 1997, Government officials commented that establishment of a trust fund is essentially a budgetary decision.[138]

Regulated Activities

4.212. Schedule 1 to the Bill specifies activities for which an environmental authorisation is required (Class A activities) and those for which an environmental authorisation is required if an environmental protection agreement is not in place (Class B activities).

4.213. The Committee was made aware of concerns of several parties which argued that the inclusion of certain activities in either category should be reconsidered. In addition, requests for specific changes to definitions of certain activities were made.

Class A Activities

Commercial Incineration Activities - item (c)

4.214. Norwood Park Crematorium requested that cremation be treated separately from waste destruction incineration activities under the legislation. This would help to address sensitivity issues including “respect for the dead, the ethical differences between cremation of a corpse and incineration of other wastes, and the grieving aspect of the immediate family and close friends of the deceased”.[139]

4.215. To achieve this outcome, Norwood Park suggested that a definition of ‘cremator’ be added to the Interpretation section of Schedule 1 to the Bill and that

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[135] Environmental Defender’s Office, *op cit*, p 9
[136] Uncorrected Transcript of Proceedings, 7 October 1997, p 3
[137] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, pp 5-6
[138] Uncorrected Transcript of Proceedings, 7 October 1997, p 59
[139] Norwood Park Crematorium, *Proposed ACT Environment Protection Legislation - Concerns of Norwood Park Limited*, p 3

cremation be identified as an activity separate from other commercial incineration activities.

Recommendation 31
4.216. The Committee recommends that:

- ***cremation be identified as a separate Class A activity under Schedule 1 to the Bill;***
- ***references to cremation be deleted from Class A activities item (c); and***
- ***the following definition of 'cremator' be inserted at item 1 of Schedule 1 to the Bill: 'cremator' means an incinerator used only for the reduction by means of thermal oxidation of human bodies (ie. corpses) to cremated remains.***

Commercial Landfill Activities - item (d)

4.217. The HIA raised concerns about the precise meaning and scope of the activity of 'commercial landfilling' listed as a Class A activity. The concerns related to the possible unintended effect that the activity of leveling a building site could be said to be a 'commercial landfilling' activity and hence require authorisation. To address their concerns, they suggested that item (d) under Class A activities be amended to "exclude the filling and leveling of land for the purpose of building, construction and land development activities."[140]

4.218. At the public hearing on 7 October 1997, Government officials advised that the drafting style adopted in the Bill is that, unless otherwise specified, words have the same meaning as in the dictionary.[141] On this basis it would not be necessary to define 'landfilling' in the Bill.

Class B Activities

Concrete Production Activities - item (d)

4.219. In relation to concrete mixing, which is a Class B activity, the HIA suggest that it should be made clear that a 'batch' means an amount of concrete mixed at any one time. They believe that "the small-scale mixing operations which are conducted by bricklayers, home renovators and many builders should not be caught by the requirement to obtain an Environmental [Protection] Agreement".[142]

4.220. Government officials advised that the drafting style adopted in the Bill is that, unless otherwise specified, words have the same meaning as in the dictionary.

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[140] Housing Industry Association, *op cit*, 1 September 1997, p 7; Housing Industry Association, *op cit,* 10 October 1997, pp 1–2
[141] Uncorrected Transcript of Proceedings, 7 October 1997, p 56
[142] Housing Industry Association, *op cit*, 1 September 1997, p 4; Housing Industry Association, *op cit,* 10 October 1997, p 1

Therefore 'batch' has the meaning suggested by the HIA and it is not necessary to expressly state this in the Bill.[143]

Construction Activities - item (f)

4.221. Construction of a commercial building on a site of 0.3 hectares or more is a 'Class B' activity. The Property Council suggests that it is "regulatory overkill" to impose detailed environmental regulation on top of planning regulation on commercial construction activity and that construction activity should only be subject to detailed environmental regulation if, in a particular case, the environmental impact is likely to be significant and if material or serious environmental harm is likely to occur.

4.222. Consequently, the Property Council recommends that references to commercial construction activity be deleted from Schedule 1. Alternatively, they request that the site area should be increased to 1 hectare, "to ensure that only the most substantial commercial construction activity triggers automatic detailed environmental regulation."[144] The Master Builders Association shares the view that the prescribed site area be increased to 1 hectare.[145]

4.223. Government officials do not support this proposal. The officials commented that under current arrangements a licence would be required under the *Water Pollution Act 1984* for any site involving three or more units. While this is based on the number of houses rather than total area, the 0.3 hectare area specified in the Environment Protection Bill is close to three standard house blocks and so the requirements of both pieces of legislation are broadly similar. They also commented that 1 hectare is equivalent to approximately 13 average residential blocks.[146]

4.224. The HIA suggested that the intended focus of the land development referred to in the Schedule is 'greenfield' sites rather than redevelopment or urban consolidation activities in already established areas.[147]

4.225. However, at the public hearing on 7 October 1997, Government officials advised that it is the intention of the Bill to cover 'greenfield' sites.[148]

Storage and Production of Petroleum Products - item (h)

4.226. The Committee considers that the potential of storage and production of petroleum products to cause environmental harm warrant an environmental authorisation rather than an environmental protection agreement.

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[143] Uncorrected Transcript of Proceedings, 7 October 1997, p 6
[144] Property Council of Australia, *op cit*, July 1997, p 3
[145] Master Builders Association of the ACT, *op cit*, 4 August 1997
[146] Uncorrected Transcript of Proceedings, 7 October 1997, p 67
[147] Housing Industry Association, *op cit*, 1 September 1997, p 4
[148] Uncorrected Transcript of Proceedings, 7 October 1997, p 67

Recommendation 32
4.227. The Committee recommends that item (h) of Class B activities relating to storage and production of petroleum products be reclassified as a Class A activity in Schedule 1 to the Bill.

Waste Collection - item (k)

4.228. Both the Property Council and ACTEW assert that the inclusion of ‘collection of waste from commercial premises’ as a Class B activity is too broad in that it could apply to a one off or small collection of waste by the business or building owner. They suggest that only the collection of waste as a commercial activity should be a Class B activity and recommend that item (k) under Class B activities be changed to read ‘the commercial collection of waste from commercial premises’.[149]

4.229. At the public hearing on 7 October 1997, ACTEW commented that it is the type of material rather than the scale of collection that is relevant.[150] Government officials agreed with this observation.[151]

Noise Control

Fixed Limits versus Limits Based on Background Noise

4.230. A significant change from the treatment of noise under the *Noise Control Act 1988* (the Noise Control Act) is that the Regulations specify fixed noise limits based on land use policies under the Territory Plan whereas limits under the Noise Control Act are determined by reference to ‘background noise’ formulae.

4.231. Mr Phil O’Brien commented in his submission that the noise zone proposal seems motivated by operational simplicity and economies in procedures and staffing.[152] Further, at the Committee’s public hearing on 19 September 1997, Mr O’Brien pointed out that “certainly the Territory Plan was not fixed up for noise assessment”.[153]

4.232. Government officials advised at the public hearing on 7 October 1997 that the zone noise standards are partly based on Australian standards as well as the history of noise complaints in the ACT. They stated that the major advantage of the zone approach is its certainty. In contrast, the major drawback of the background formulae system is that it is a ‘secret speed limit’ because background noise varies from point to point and from day to day. They also reported that there would be ongoing monitoring of noise zones until the end of 1998 after which the zone noise standards could be evaluated and reviewed if necessary.[154]

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[149] Property Council of Australia, *op cit*, July 1997, p 4; ACTEW Corporation Limited, *op cit*, 5 September 1997, p 7
[150] Uncorrected Transcript of Proceedings, 7 October 1997, pp 43-44
[151] *ibid*, p 69
[152] Mr Phil O’Brien, Submission, 18 August 1997
[153] Transcript of Proceedings, 19 September 1997, p 30
[154] Uncorrected Transcript of Proceedings, 7 October 1997, pp 60, 63

4.233. The opinion of the Ridgeway Residents' Action Group is that "the many inconsistencies and inaccuracies likely to result from the 'noise zone' approach outweigh its administrative convenience and therefore make this change a retrograde step".[155]

4.234. The Australian Acoustical Society has no major objections to the noise zone standard approach adopted under the Regulations which they state "are somewhat in agreement with the zoning levels that are listed in the Australian Standard on Environmental Noise Assessment, AS1055". However, they are concerned that Table 1 of the Regulations, Zone Noise Standards, does not include an evening period and suggest that consideration be given to including such a period. They also believe it is important that Zone Noise Standards are able to be changed quickly should it be shown that a degradation to the acoustic environment for the ACT is occurring.[156]

4.235. The Committee considers that, in general, the advantages of the noise zone system make it a preferable system to the current background noise formulae.

Measuring Noise Levels

4.236. The Australian Acoustical Society was concerned that there are a number of aspects other than noise level such as tonal character and impulsiveness that will increase annoyance which should be adjusted for when measuring noise. They believe that it is essential that reference to adjustments for the nature of noise be included in Regulation 24(b).[157]

4.237. The Australian Acoustical Society suggested that item 8 in Table 2 - Noise Conditions be changed to allow for testing during the appropriate time period as the ambient noise during another period may be such that accurate test data cannot be obtained.[158]

4.238. The Acoustical Society also recommended that the heading for Regulation 39 should be changed to 'Sampling and Analysis of Pollutants Other Than Noise' because the procedures under Regulation 39 relate to laboratory analysis and are too restrictive for measurement of noise and Regulation 24 specifies the method for noise measurement.[159]

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[155] Ridgeway Residents' Action Group, *Submission to the Standing Committee on Planning and Environment on the Environment Protection Bill 1997*, 24 August 1997, p 3

[156] Australian Acoustical Society, *Comment on Integrated Environment Protection Legislation,* June 1997, p 2

[157] *ibid*

[158] *ibid*, p 3

[159] Australian Acoustical Society, *op cit,* June 1997, p 3

Recommendation 33
4.239. The Committee recommends that:

- ***paragraph (b) of Regulation 24 be changed to read "all measurements shall be made and all adjustments for the nature of the noise shall be determined using the procedures set out in the NSW Noise Control Manual"; and***
- ***the heading for Regulation 39 be changed to "Sampling and Analysis of Pollutants Other Than Noise".***

Noise in Residential Areas

4.240. In his submission, Mr O'Brien argued that the fixed limits do not take into account differing ambient noise levels between houses fronting main highways and houses distant from main roads. He claimed that the fixed noise zone limits of 45 dB(A) during the day and 35 dB(A) at night applying to all residential areas proposed under the Regulations will adversely impact on the quality of life of residents who live in a locality with a low ambient noise level. He stated that background noise levels in 'quiet' residential locations can be as low as 25 dB(A) at night and lower than 35 dB(A) during the day. He believes that all residents, particularly those who choose to live in 'quiet' areas, are well protected by the background noise basis of the existing Noise Control Act and that the current background noise formulae should be retained for residential areas.[160]

4.241. Richard and Margaret Wigley suggested that there should not be so much onus on the complainant under the new legislation as there is under the Noise Control Act and that the complainant's identity should be kept confidential to help protect individuals from harassment. They also believe that on-the-spot fines are a more appropriate form of enforcement than the noise direction notices issued under the Noise Control Act. They suggest that on-the-spot fines should increase in severity with each successive breach of the Act.[161]

4.242. Mr O'Brien also concluded that the zone noise standards for non residential zones appear reasonable but does not support the proposal to average noise standards at noise zone boundaries. His concern is that this averaging proposal would "increase very substantially the permissible noise standards for the very many residential properties that abut other noise zones".[162]

4.243. At the Committee's public hearing on 19 September 1997, Mr O'Brien further explained why he objects to averaging noise zone standards at boundaries, particularly boundaries where residential areas abut other noise zones.

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[160] Mr Phil O'Brien, *op cit*, 18 August 1997
[161] Richard and Margaret Wigley, Submission, 10 September 1997
[162] Mr Phil O'Brien, *op cit*, 18 August 1997

> *There seems to be an assumption behind the regulations that noise is somehow inevitable and inherent in operations. It is my experience, and I do have a fair bit of experience of this in terms of building development, that that is not the case. In most commercial buildings, the noise that emanates from that site is usually mechanical plant and equipment. ... I do not know of any circumstance where, with careful siting and/or screening, that cannot be remedied.*[163]

> *As far as I know, all mechanical plant and equipment can be sensitively located or screened at low cost and there seems no reason why residents should be subject to noise from residential or commercial premises. It may be that there are quite exceptional circumstances where it is not possible, and maybe there could be an appeal provision in it if it is not; but certainly, I know the vast majority can, from personal experience. ... The averaging system will indemnify careless, thoughtless or miserly owners of commercial premises who ignore the environmental quality of their residential neighbours. I know also from personal experience that very often commercial developers really do not care. If you do not have the power of legislation to force them they are very likely to say, "Well, nuts to you".*[164]

4.244. He also gave an example of a situation in which he was involved relating to a commercial development abutting a residential area where consideration had to be given to the requirements of the Noise Control Act. He commented that the new legislation is less stringent which may mean that commercial developers may not consider noise issues.

> *I remember very well when I was personally handling the medical suites in Turner Gardens. ... They abutted houses and we made sure, in those cases, that all the backyards that abutted onto the residential had a brick wall around them, a solid brick wall. All air conditioning plants were put at the bottom of that brick wall, and then you could not hear a thing. Under these Regulations, you probably would not have to do that.*[165]

4.245. The Committee considers that, where residential areas abut other noise zones, noise zone limits should not be averaged that the lower of the two adjoining limits should apply.

Recommendation 34
4.246. The Committee recommends that the words "Subject to subsection (4)," be inserted at the beginning of Regulation 27(3) and that the following Regulation 27(4) be inserted:

> ***27(4) Where the boundary of a noise zone abuts a residential area, the noise zone standard at the boundary is the lower of the zone noise standards for the adjoining noise zones in respect of the period during which it is emitted.***

[163] Transcript of Proceedings, 19 September 1997, p 31
[164] *ibid*, p 33
[165] *ibid*, p 32

Noise from Motor Sports

Ambient Noise Levels at the Ridgeway

4.247. According to Ridgeway Residents' Action Group, background noise at the Ridgeway has been "very thoroughly established" at around 36 to 37 dB(A). Therefore, under the existing legislation (background plus 5 dB(A)), noise at the Ridgeway is restricted to 41 to 42 dB(A).[166]

4.248. The NSW EPA stated in its submission that, based on Environment ACT and NSW EPA data, background noise levels have been measured at The Ridgeway as being 38-40 dB(A) on a weekly basis and 36-40 dB(A) on Sundays.[167]

4.249. At the Government's request, the Pollution Control Authority undertook monitoring of ambient noise levels at the Ridgeway over the period 23 April 1997 to 5 May 1997. This study found the average background noise level at the Ridgeway between 10AM and 5PM (the hours during which motor sports activities occur at Fairbairn Park) to be 40 dB(A). Similar results had been obtained by the Authority (measured at the same location) for the period 11 February 1997 to 25 February 1997.[168]

4.250. The NSW EPA believes that averaging background levels over a week period to determine background noise does not take into account fluctuations in noise amenity experienced by most residences during a 24 hour period or on weekends and public holidays. As a consequence, the NSW EPA does not accept the findings of the ACT Government of a background noise level of 40 dB(A) at Fairbairn Park.[169]

Government Policy on Noise from Motor Sports

4.251. In its response to the Commissioner for the Environment's Report on Management of Noise from Motorsports in the ACT the Government stated:

> *In recognition of the special case of motor sport activity at Fairbairn Park, a separate regulation will be developed under the proposed Environment Protection Bill with the objective of striking a balance between environmental concerns on one hand and providing certainty to motor sport operators on the other hand. The regulation will be drafted so as to have the effect that noise from motor sport at Fairbairn Park should not exceed average background noise plus 10 dB(A) at the Ridgeway Estate and Oaks Estate. A study to assess average background at the Ridgeway and Oaks Estate is nearing completion. The regulation will not limit the number of events provided the noise limit is met. ... The proposed noise Regulations are based on total noise emitted from a venue, not noise emitted per track. That is, total*

[166] Ridgeway Residents' Action Group, *op cit*, 24 August 1997, p 4

[167] Environment Protection Authority, NSW, *Submission - Environment Protection Bill 1997*, 29 August 1997

[168] Pollution Control Authority Report, *Average Background Noise Level - Ridgeway, NSW,* 9 September 1997

[169] Environment Protection Authority, NSW, *op cit*, 29 August 1997

> *noise emitted from all activities at Fairbairn Park must comply with the regulated limit.*[170]

4.252. The Committee notes that a separate regulation for Fairbairn Park is not included in the Exposure Draft Regulations tabled in the Assembly. The Committee shares the concern of the Ridgeway Residents' Action Group that important details have yet to be released by the Government.

4.253. Based on the Government's stated policy on noise from motor sports and the Government's determination of the average background noise at the Ridgeway to be 40 dB(A), this implies that noise from motor sports from Fairbairn Park must not exceed 50 dB(A) measured at the Ridgeway.

4.254. At the Committee's public hearing on 7 October 1997, Government officials advised:

> *In a situation other than motor racing ... the limit will be 45 which is the same as would apply in any Canberra suburb including Oaks Estate whereas if the noise is generated from motor racing, it will be another five decibels higher, ie. 50 decibels at the Ridgeway.*[171]

4.255. Ridgeway Residents' Action Group claims that the proposed standard of 50 dB(A) will almost double the permitted noise level at the Ridgeway.[172] They are concerned that the intention of the new legislation is to maintain a plus 5 dB(A) level for all noise zones in the ACT but to allow a plus 10 dB(A) level for "one activity, motor racing, in one location where it affects mainly NSW people".[173]

4.256. Queanbeyan City Council objects to the proposed policy in relation to noise from motor sport activities of 10 dB(A) above background at affected residences. The Council is concerned that this higher and unacceptable noise level is permitted every day of the year.[174]

4.257. The NSW EPA asserts that it is not the case that the Regulations will bring the treatment of noise from motor sports in the ACT into line with that of NSW. The NSW approach to motor sports under the *Environmental Noise Control Manual* is based on a sliding scale of number of events and allowable noise emission levels. The NSW EPA contends that, under the NSW approach, the overall impact on noise amenity from Fairbairn Park would be significantly lower than that under the ACT proposal.[175]

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[170] ACT Government, *Government Response to the Commissioner for the Environment's Report on Management of Noise from Motorsports in the ACT*, 15 May 1997
[171] Uncorrected Transcript of Proceedings, 7 October 1997, p 62
[172] Ridgeway Residents' Action Group, *op cit*, 24 August 1997, p 4
[173] Uncorrected Transcript of Proceedings, 7 October 1997, p 19
[174] Queanbeyan City Council, Submission, 9 September 1997
[175] Environment Protection Authority, NSW, *op cit*, 29 August 1997

Compliance Location

4.258. Government officials advised at the public hearing on 7 October 1997 that the compliance location will be specified in the specific Fairbairn Park Regulation. The compliance location will be at "a specified point on the Ridgeway close to the nearest affected residence up there and it is the same point where we have been measuring noise up until today."[176]

Conclusion

4.259. The Committee does not believe that the Government has achieved an appropriate balance between continued use of Fairbairn Park as a motor sports facility and environmental concerns relating to noise from motor sports. In particular, the Committee does not believe that the Government's policy to permit noise from motor sports at 10 dB(A) above average background noise at the Ridgeway and Oaks Estate is acceptable because it permits higher noise levels from motor sports than allowed under the current legislation.

Recommendation 35
4.260. The Committee recommends that the Government revise its policy on noise from motor sports at Fairbairn Park to 5 dB(A) above background noise at the Ridgeway and Oaks Estate.

Self Incrimination

4.261. The EDO argued that protection against self incrimination should not extend to corporations. In support of this argument, the EDO referred to the High Court decision in *Caltex v Environment Protection Authority* (1993) 178 CLR 477 as well as citing the *Evidence Act 1995* (Commonwealth) and the *Corporations Law*.[177]

4.262. The Law Society referred to the same decision of *EPA v Caltex* which provides privilege in respect of documents only for corporations.[178] The Law Society also commented that a provision such as section 140 is not uncommon in respect of environmental law and the High Court decision came as a surprise to commentators as well as general industry.[179]

4.263. The Property Council supports the provision as it stands and believes that to remove protection from self incrimination for corporations would defeat the purpose of the protection which is to encourage people to report environmental harm.[180]

4.264. ACTEW does not believe that protection against self incrimination should be removed from corporations. They consider that the decision in *EPA v Caltex* is not relevant to the context of the Environment Protection Bill in that it was decided in the context of the *Clean Waters Act 1970* (NSW) which does not contain a provision

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[176] Uncorrected Transcript of Proceedings, 7 October 1997, p 61
[177] Environmental Defender's Office, *op cit*, 29 August 1997, p 14
[178] The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, p 6
[179] Uncorrected Transcript of Proceedings, 7 October 1997, pp 47-49
[180] Property Council of Australia, *op cit*, July 1997, p 7

similar to the deemed liability for corporate officers provision in the Environment Protection Bill.[181]

4.265. The HIA also considers that protection against self incrimination should extend to corporations as the Bill currently stands. They suggest that, should this protection be removed, that there should be a corresponding amendment to the powers of Authorised Officers so that requests for documents, information and assistance must be in writing under clause 123.[182]

4.266. Government officials explained the rationale behind clause 140 at the public hearing on 7 October 1997:

> *It is fair enough if a legal person is required to answer a question and disclose incriminating information, whether it be a human person or a corporate person, ... it is fair enough that they should not be prosecuted for what they have disclosed.*[183]

4.267. They also advised that it is open for ACT legislation to depart from the common law as declared by the High Court, which is the intention of this clause.[184]

4.268. ACTEW commented that:

> *The public interest in granting the privilege against self incrimination in the context of environmental legislation is to avoid concealment and other defensive behaviour from people who have caused environmental harm or nuisance. The privilege encourages people to notify the EMA when environmental harm or nuisance has occurred and, accordingly, allows mitigation of the harm or nuisance. Companies will be reluctant to inform the EMA of problems if they have no privilege against self incrimination.*[185]

Recommendation 36
4.269. The Committee recommends that section 140 be amended to remove protection against self incrimination for corporations.

Review of Decisions

4.270. The Law Society does not believe that review rights have been provided under clause 125 for all relevant decisions about which a person could be dissatisfied. They suggest that the following decisions should also be reviewable:

- a decision by the EMA under clause 84(2)(a) whether or not to make a claim on or realise a financial assurance; and
- a decision under clause 85(1) where the EMA requires the holder of an environmental authorisation to pay a specified amount in relation to

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[181] ACTEW Corporation Limited, *op cit,* 14 October 1997, pp 3-4
[182] Housing Industry Association, *op cit*, 1 September 1997, p 8
[183] Uncorrected Transcript of Proceedings, 7 October 1997, p 68
[184] *ibid*, p 68
[185] ACTEW Corporation Limited, *op cit,* 14 October 1997, p 4

recovery of extra costs.[186]

4.271. The Committee accepts the Law Society's argument that these discretionary decisions warrant appeal rights.

Recommendation 37
4.272. The Committee recommends that section 125(1) be amended to include appeal rights against the following decisions:

- ***a decision by the EMA under subsection 84(2)(a) whether or not to make a claim on or realise a financial assurance; and***
- ***a decision under subsection 85(1) where the EMA requires the holder of an environmental authorisation to pay a specified amount in relation to recovery of extra costs.***

Offences

Terminology

4.273. The Committee is concerned about the use of the terminology 'a person's mental state' in the explanatory memorandum to describe the element of intent or consciousness in committing an offence. The Committee believes that this form of words could mean anything and does not make the explanation clear.

Recommendation 38
4.274. The Committee recommends that the wording of paragraphs 15.2, 15.3, 15.13, 15.13.2 and 15.13.3 of the explanatory memorandum be amended to replace references to 'mental state' with references to 'intent or consciousness'.

Prosecution

4.275. The Law Society suggested that time limits within which prosecution must commence should be included in the Bill. In making this suggestion, the Society stated that "normally the Society would be arguing for extended limitation periods but in this area I think clarity and precision is very important." They also stated that having a fixed time frame "puts an onus on the regulator to make sure that, one, they have got the resources and, two, they get on with the job." They noted that the draft NSW Bill adopts a time limit of 12 months for offences causing serious pollution and 3 years for lesser pollution.[187]

4.276. The Committee agrees with the Law Society that it is important that prosecutions for offences be commenced within a specified time frame. In the absence of a time limit, it would be possible for an indefinite period of time to pass before offences are prosecuted due to lack of resources.

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[186] The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, pp 5-6
[187] Uncorrected Transcript of Proceedings, 7 October 1997, p 52

Recommendation 39
4.277. The Committee recommends that the Environment Protection Bill be amended to set time limits of 12 months for prosecution of offences causing serious or material environmental harm and 3 years for other offences in line with the draft NSW Protection of the Environment Operations Bill 1997.

"Without Reasonable Excuse"

4.278. The EDO argued that the inclusion of the words "without reasonable excuse" in clauses 62 and 141 creates an additional element of the offence and places the onus of proof on the prosecution. This would mean that the prosecution would have to prove that the defendant did not have a reasonable excuse. Generally, a prosecutor would have little or no evidence about whether or not a defendant had a reasonable excuse. The onus of proving that a person had reasonable excuse should rightly lie with the person who committed the offence.[188]

4.279. The Committee notes that the phrase "without reasonable excuse" is scattered throughout the Bill in sections 23(4); 102(3); 103(2); 138(1) as well as clauses 4(2); 5(4) and 12(1)(b) of Schedule 2 to the Bill.

Recommendation 40
4.280. The Committee recommends that:

- ***the words "(the proof of which shall lie on the holder of the authorisation)" be inserted after the word "excuse" in clause 62 of the Bill;***
- ***the words "(the proof of which shall lie on the transferor)" be inserted after the word "excuse" in subclause 138(1) of the Bill;***
- ***the words "(the proof of which shall lie on the person)" be inserted after the word "excuse" in subclause 23(4); subclause 102(3); subclause 103(2); subclause 141(1); and subclause 141(2) of the Bill; and***
- ***the words "(the proof of which shall lie on the person)" be inserted after the word "excuse" in subclause 4(2); subclause 5(4); and subparagraph 12(1)(b) of Schedule 2 to the Bill.***

Strict Liability Offences

4.281. ACTEW is concerned at the introduction of strict liability for the following offences:

- contravention of an environmental authorisation (clause 43);
- polluting the environment causing environmental harm (clauses 127(3), 128(3) and 129(3));
- causing an environmental nuisance (clause 131);

[188] Environmental Defender's Office, *op cit*, 29 August 1997, pp 10, 14

- placing a pollutant where it could cause harm (clause 132); and
- the minor offences prescribed in the Regulations (Regulation 38, Schedule 5, Column 2).[189]

4.282. They state that "strict liability offences do not require a person to be at fault although the defence of honest and reasonable mistake is allowed".[190]

4.283. They suggest that it is unclear whether the imposition of strict liability means that the general environmental duty exception in clause 133(b) no longer applies in respect of many offences. If this is the case, they believe that the strict liability provision has reduced the value of accredited codes of practice in respect of the third tier of general environmental offences. That is, while substantial compliance with a code of practice will mean that the general environmental duty is complied with, strict liability may mean that such compliance alone does not avoid many offences.[191]

4.284. They suggest that clause 145 should be amended to read "Subject to sections 143, 144 and 133, an offence ..." to make clear that the general environmental duty exception to offences provided by clause 133(b) would constitute an exception to strict liability.[192]

Employee Liability

4.285. Mr Osborne considers that employers should be required to inform employees of operational procedures in place to prevent or minimise environmental harm as well as employees' potential liability under the Act.[193]

Deemed Liability of Corporate Officers

4.286. The Property Council believes that clause 137 of the Bill is too broadly pitched. They are concerned that, as the clause stands, officers who have no involvement with the matters to which the offence relates or employees who have no impact on the direction of the body corporate could be deemed to have committed an offence. They suggest that the definition of 'prescribed officer' be changed to mean officers or employees involved in the direction, management or control of the body corporate and whose duties include advising or making decisions concerning matters to which the offence relates.[194]

4.287. Mr Osborne agrees that the definition of prescribed officer is too broad and suggests the same amendment as the Property Council.[195]

4.288. ACTEW also believes that the definition of 'prescribed officer' is too broad in that it deems an officer of a corporation liable even where the officer has no control

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[189] ACTEW Corporation Limited, *op cit*, 5 September 1997, pp 6-7
[190] *ibid*
[191] *ibid*
[192] *ibid*
[193] Mr Paul Osborne MLA, *op cit,* 18 September 1997, pp 4-5
[194] Property Council of Australia, *op cit*, July 1997, p 4
[195] Mr Paul Osborne MLA, *op cit,* 18 September 1997, pp 5-6

over the activities involved in the offence. For example, ACTEW says in its submission that a board of directors would be held liable for offences committed by the company even though the board has no control over the activities constituting the offence.[196] At the public hearing on 7 October 1997, ACTEW proposed the following definition of prescribed officer: "An officer or employee of the Corporation whose duties include the direction, management or control of the Corporation and who has duties with respect to the matters giving rise to the offence."[197]

4.289. The Committee considers that the form of words proposed by ACTEW is the most appropriate definition of prescribed officer given the far reaching implications of the deemed liability provision.

Recommendation 41
4.290. The Committee recommends that subsection 137(4) of the Bill be deleted and replaced with the following:

> ***137(4) In this section-***
>
> ***"prescribed officer" in relation to an offence committed by a body corporate, means an officer or employee of the Corporation whose duties include the direction, management or control of the Corporation and/or who has duties with respect to the matters giving rise to the offence.***

Liability

4.291. The Law Society pointed out that the draft NSW Bill specifically provides that the owner of the waste as well as the polluter commits an offence. They queried whether it was intended that the ACT Bill is silent on this aspect.[198]

Seizure and Disposal of Things Used in the Commission of an Offence

4.292. The Australian Finance Conference expressed concern that the interests of innocent third parties are not protected in relation to disposal of things used in the commission of an offence. The Bill provides only for the person who committed the offence to make representations to the EMA as to why the thing should not be disposed of. The AFC contends that all interested parties should have opportunity to make representations about disposal.

4.293. They suggest that there should be public notification in a newspaper of the intention to dispose of a thing inviting all interested parties to make representations to the EMA about the disposal. They also suggest that the EMA should search registers of security interests relating to things seized and notify each registered interest holder of the intention to dispose of the thing seized.

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[196] ACTEW Corporation Limited, *op cit*, 5 September 1997, pp 4-5
[197] Uncorrected Transcript of Proceedings, 7 October 1997, p 42
[198] *ibid*, pp 52-53

4.294. Further, the AFC believes that the period between notification and disposal is too short and should be increased to six months in line with the *Proceeds of Crime Act 1991*.

Recommendation 42
4.295. The Committee recommends that the following subsection 101(1A) be added to the Bill:

> ***101(1A) At the same time as giving notice under subsection (1), the Authority shall give notice in a daily newspaper printed and circulating in the Territory inviting any interested party to show why the thing should not be disposed of.***

Recommendation 43
4.296. The Committee also recommends that:

- ***the words "under subsection (1) or (1A)" be added after the words "a notice" in subsection 101(2);***
- ***the period between notification and disposal should be increased to 20 working days under paragraph 101(2)(b); and***
- ***the words "or (1A)" be inserted after the words "subsection 1" in paragraph 101(3)(b).***

Car Washing

4.297. Under Regulation 38, an on-the-spot fine can be issued for a person washing their car. Item 6 of Schedule 5 to the Regulations specifies that "a person shall not allow runoff from the washing down of vehicles, equipment or other things to enter the stormwater system".

4.298. The Committee received comments in relation to this provision from both Ms Judy Ford and Mr Paul Osborne MLA. Mr Osborne suggested that this provision should apply only to commercial and heavy vehicles.[199]

4.299. The Committee recognises that runoff from people washing their cars is a primary source of phosphates and other chemicals winding up in the stormwater system and subsequently our lakes and rivers. In comparison, vehicle run-off at commercial car wash facilities is treated and does not directly enter the stormwater system.

4.300. However, the Committee acknowledges that not every ACT resident has a lawn on which they could wash their car in order to prevent runoff into the stormwater system. Indeed, a number of valid reasons were put to the Committee as to why people may choose to wash their own car rather than use a commercial facility.

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[199] Mr Paul Osborne MLA, *op cit,* 18 September 1997, p 3

4.301. In attempting to achieve a balance between protecting the stormwater system from pollutants created from car (and equipment) washing and providing a means for people who choose to wash their own car but do not have a lawn on which they could do so, the Committee makes the following recommendation.

Recommendation 44
4.302. The Committee recommends that Item 6 of Schedule 5 to the Regulations be amended to achieve the following outcome:

> ***6(a) Subject to paragraph 6(b), a person shall not allow runoff from the washing down of vehicles, equipment or other things to enter the stormwater system.***
>
> ***6(b) Where a person does not have access to a grassed area or a purpose built wash down area on which they could wash any vehicles, equipment or other things belonging to their household, that person must take all reasonable steps to reduce the impact on the stormwater system of runoff.***

4.303. The Committee considers there is a case for the Government to consider the imposition of appropriate Design and Siting requirements to ensure that new building developments include a suitable washing down area so that runoff does not enter the stormwater system.

Placing a Pollutant Where it Could Cause Harm

4.304. The Law Society noted that in Queensland's *Environmental Protection Act 1994,* the equivalent provision to section 132 in the Environment Protection Bill includes environmental nuisance. This means that the offences become "either environmental harm or environmental nuisance". Therefore, the Society queried why section 132 is restricted to environmental harm.[200]

Recommendation 45
4.305. The Committee recommends that section 132 be amended by adding the words "or environmental nuisance" after the words "environmental harm".

Timing of Assessment of Degree of Harm

4.306. The Conservation Council commented in its submission that the nature and full extent of environmental harm is rarely immediately apparent and suggested that the assessment of the monetary value of the damage will need to be determined over a certain period of time.[201]

4.307. The Conservation Council had earlier raised this issue at the Committee's public hearing on 11 August 1997 and asked when the assessment of the monetary

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[200] The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, p 6
[201] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 2

value of the loss or damage to property would occur to determine the level of environmental harm caused.[202]

4.308. In responding to the query at the public hearing, a Government official stated that the assessment would need to occur at the time the relevant decision (such as the decision to prosecute) was made. For these purposes solid evidence is required - predictions of the potential value of the harm caused would not be sufficient in court proceedings. The official acknowledged that there could be situations where the actual level of damage turns out to be different from that evident at the time the assessment was made due to long term consequences but added that there is no ultimate solution to this problem.[203]

Enforcement

Environment Protection Orders

4.309. The EDO believes that it is unnecessary and gives too little weight to compliance with the Act to require environmental harm in addition to a breach of the Act before an environment protection order can be issued. Consequently. the EDO proposed that section 116(1) be deleted and replaced by the following:

> 116(1) Where the Authority has reasonable grounds for believing that a person has contravened or is contravening an environmental authorisation or a provision of this Act the Authority may serve an environment protection order on that person.[204]

4.310. The Conservation Council made a similar recommendation in its submission, contending that it should be sufficient for there to be a contravention of either the Act or an environmental authorisation for an environment protection order to be issued.[205]

4.311. The Committee agrees that there may be circumstances where it would be appropriate to issue an environment protection order where there has been a breach of the Act but not environmental harm and that the recommendation by the EDO and Conservation Council should be adopted.

Recommendation 46
4.312. The Committee recommends that subsection 116(1) be deleted and replaced by the following:

> ***116(1) Where the Authority has reasonable grounds for believing that a person has contravened or is contravening an environmental authorisation or a provision of this Act the Authority may serve an environment protection order on that person.***

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[202] Transcript of Proceedings, 11 August 1997, p 14
[203] *ibid*
[204] Environmental Defender's Office, *op cit*, 29 August 1997, pp 10-11
[205] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 7

On-the-spot Fines

4.313. In relation to noise pollution, Richard and Margaret Wigley proposed that the severity of on-the-spot fines increase with successive breaches of the Act.[206]

4.314. The Committee view is that a repetitive breach should result in a charge being laid rather than a further on-the-spot fine.

Injunctive Orders

4.315. The EDO believes that these enforcement provisions are oppressive and that no properly advised litigant would make use of them and commented that she sees very little justification for restrictions on standing.[207]

4.316. The EDO suggests that clause 118 be deleted and replaced with an open standing provision equivalent to that proposed in the NSW *Protection of the Environment Operations Bill 1997*.[208] The Conservation Council presented similar views in its submission.[209]

4.317. The EDO went on to say that "there are sufficient disincentives to litigation and controls on the litigation process to ensure that proceedings are not brought lightly."[210] The Conservation Council also believes that "given the legal costs incurred by people who would bring proceedings I think you would only do it for a good purpose."[211]

4.318. The Housing Industry Association does not support the proposal for open standing as they consider "that it is the role of the EMA, and not members of the general public, to enforce the duties which are created by the Bill".[212]

4.319. Government officials consider that "it is a reasonable requirement that somebody wishing to make use of these provisions should ... pass some sort of public interest test." They also commented that it is a reasonable requirement that a person must satisfy the court that they have tried to get the regulator to take the proceedings but that the regulator has refused.[213]

4.320. The Committee supports the principle of open standing but considers that it is reasonable to require a person to first approach the EMA to apply for an injunctive order.

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[206] Richard and Margaret Wigley, *op cit*, 10 September 1997
[207] Environmental Defender's Office, *op cit*, 29 August 1997, pp 11–12; Uncorrected Transcript of Proceedings, 7 October 1997, pp 3-4
[208] Environmental Defender's Office, *op cit*, 29 August 1997, pp 11–12
[209] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 7
[210] Environmental Defender's Office, *op cit*, 29 August 1997, p 12
[211] Uncorrected Transcript of Proceedings, 7 October 1997, p 11
[212] Housing Industry Association, *op cit,* 10 October 1997, p 2
[213] Uncorrected Transcript of Proceedings, 7 October 1997, p 59

Recommendation 47
4.321. The Committee recommends that section 118 be deleted and replaced by the following:

> ***118 An application for an order under section 119 may be made to the Supreme Court by-***
>
> ***(a) the Authority; or***
>
> ***(b) any other person who has requested the Authority in writing to make an application for an order under this section and the Authority has failed to do so within a time that is reasonable in the circumstances.***

4.322. The EDO cited the decision in *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 as an example that the fact that proceedings were brought by a third party in the public interest to restrain a breach of the law is an irrelevant consideration for the purposes of determining whether to award costs against an unsuccessful plaintiff and mentioned that this point is currently being considered by the High Court. The EDO suggested that the following clause be inserted after clause 119 to make it clear that the motivations of a third party bringing proceedings can be taken into account when determining what costs order should be made:

> 119A Where a person (other than the Authority) brings proceedings pursuant to section 118 and an application for costs is made against that person the Supreme Court may take into account the fact that the person brought the proceedings not for private benefit but in the public interest.[214]

Recommendation 48
4.323. The Committee endorses the recommendation made by the EDO that the following clause be inserted after section 119 of the Bill:

> ***119A Where a person (other than the Authority) brings proceedings pursuant to section 118 and an application for costs is made against that person the Supreme Court may take into account the fact that the person brought the proceedings not for private benefit but in the public interest.***

4.324. The EDO proposed that clause 121 relating to security for costs be deleted as Supreme Court rules already provide for granting of security for costs in proceedings. The EDO claimed that it is not necessary to make special provision in the Bill and there is no justification for having a security for costs regime which is more onerous than that which applies in litigation generally.[215]

[214] Environmental Defender's Office, *op cit*, 29 August 1997, p 13
[215] *ibid*, p 12

4.325. In relation to compensation, the EDO also believes that section 122 is unnecessary and should be deleted. The EDO states that:

> *Where an interlocutory injunction is sought there is usually a requirement that the applicant give an undertaking as to damages. This protects a defendant in relation to losses incurred as a result of the granting of the injunction if the plaintiff is not ultimately successful.*[216]

4.326. ACTEW disagrees with the EDO and believes that section 122 is "a sensible and practical provision" and should not be deleted.[217]

Recommendation 49
4.327. The Committee considers that sections 121 & 122 are unnecessary and recommends that they should be deleted.

Harmed Caused by Excess Pollutants

4.328. The EDO was concerned that, where an environmental authorisation is breached by the release of excess pollution, the court can only have regard to the harm caused by the excess pollutant and recommended that clauses 43(2) and 134 be deleted.[218]

> *This may have the effect that a polluter who is authorised to discharge large volumes of pollutant has no greater liability for a breach of the law than a minor polluter who breaches the law. Indeed their liability may be even less because the environment to which the unlawful discharge is occurring will have been degraded by the lawful pollution and hence there will be less scope for further environmental harm.*[219]

4.329. The Conservation Council also recommends that clause 43(2) be deleted as it believes that the liability for contravening an environmental authorisation should be proportional to the amount of harm caused by the release of the excess pollutant.[220]

4.330. The Committee considers that it should be at the discretion of the Court whether it will have regard to only harm caused by the excess pollutant due to potential for harm to be caused by lawful pollution.

Recommendation 50
4.331. The Committee recommends that clauses 43(2) and 134 of the Environment Protection Bill be deleted.

Community Service Orders

4.332. The Committee notes that, while not specifically referred to in the Environment Protection Bill, community service orders can be used for offences as

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[216] *ibid*
[217] ACTEW Corporation Limited, *op cit,* 14 October 1997, p 3
[218] Environmental Defender's Office, *op cit*, 29 August 1997, pp 7 & 14
[219] *ibid*, p 7
[220] Conservation Council of the South-East Region and Canberra, *op cit*, 3 September 1997, p 6

the *Supervision of Offenders (Community Service Orders) Act 1985* applies. The Committee supports the use of community service orders where appropriate for offences under the Environment Protection Bill.

Defences

No Offence Committed

4.333. ACTEW considers that an act or omission permitted under an environmental protection agreement or environmental improvement plan should also be included as an exception to an offence under section 133.[221]

4.334. The Property Council went slightly further than ACTEW in suggesting that the protection afforded by clause 133 of the Bill should apply to an action or omission that is allowed under an environmental protection agreement, an environmental improvement plan or an accredited code of practice.[222]

Due Diligence

4.335. Both the EDO and Mr Osborne suggested that subsections 143(2)(a)(v) and 143(2)(b)(iii) should be deleted. The EDO suggested that the clauses list matters which relate to matters after the event and are more relevant to penalty than whether or not the offence was committed.[223] Mr Osborne does not consider whether a person reacted immediately and personally when he or she became aware of any incident connected with the harm relevant to the assessment of whether the person acted with due diligence.[224]

4.336. The Law Society recommended that subsection 143(2) be deleted in its entirety which would be consistent with the practice adopted in other Australian state legislation. In their submission, they argued that the matters to which a court shall have regard should be discretionary rather than mandatory because the defence of due diligence is a common law defence which is continually evolving. They are also concerned that clause 143(2) only mentions directors of bodies corporate, persons in management or employees and does not include sole traders, small businesses, partners or corporations who could also be potential defendants.[225]

Recommendation 51
4.337. The Committee recommends that the Government reconsider the due diligence defence (section 143) in the light of the comments made by the Law Society, the EDO and Mr Osborne.

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[221] ACTEW Corporation Limited, *op cit*, 5 September 1997, p 4
[222] Property Council of Australia, *op cit*, July 1997, p 4
[223] Environmental Defender's Office, *op cit*, 29 August 1997, p 14
[224] Mr Paul Osborne MLA, *op cit,* 18 September 1997, p 5
[225] The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, pp 6-7

Typographical and Minor Corrections

Defence Available to Prescribed Officers

4.338. Under subsection 137(2), the defence available to a prescribed officer of a body corporate is:

(a) the defendant exercised due diligence;

(b) the defendant could not reasonably have been expected to be aware of the contravention; and

(c) the body corporate would not have been found guilty of the offence by reason of its being able to establish a defence available to it under the Act.

4.339. Both ACTEW and Mr Osborne MLA recommended in their submissions that paragraphs (b) and (c) should be deleted; that a defence of due diligence should be sufficient.[226]

4.340. Alternatively, the Law Society suggested in its submission that paragraphs (a), (b) and (c) of subsection 137(2) should stand alone as defences (ie. be separated by ‘or’) rather than requiring all three conditions to be met (ie. being separated by ‘and’) to constitute a defence for a prescribed officer of a body corporate.[227]

4.341. Government officials confirmed that this was a drafting error and that the word ‘or’ should replace the word ‘and’.[228]

Recommendation 52
4.342. The Committee recommends that the word “and” be replaced by the word “or” in paragraph (b) of subsection 137(2).

Review of Decisions

4.343. The Law Society pointed out that the reference to subsection 70(2) in paragraph 125(1)(w) should refer to subsection 70(1) as this is the subsection that relates to the decision by the EMA.[229]

Recommendation 53
4.344. The Committee recommends that, in paragraph 125(1)(w), the reference to subsection 70(2) be replaced by reference to subsection 70(1).

4.345. Paragraph 125(1)(ze) refers to a decision by the EMA under paragraph 81(3)(a) imposing a condition requiring the provision of a financial

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[226] ACTEW Corporation Limited, *op cit,* 5 September 1997, pp 4-6; Mr Paul Osborne MLA, *op cit,* 18 September 1997, p 6
[227] The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, p 6
[228] Uncorrected Transcript of Proceedings, 7 October 1997, pp 66-67
[229] The Law Society of the Australian Capital Territory, *op cit*, 4 September 1997, p 5

assurance. The Law Society suggested that the reference should be to subsection 80(1).[230] However, the Committee considers that subsection 125(1)(ze) appears to be superfluous given that a right of review against a decision of the EMA to grant an environmental authorisation subject to a specified condition (a financial assurance being one of the conditions the EMA may impose) is provided under subsection 125(1)(f).

4.346. The Committee also considers that the appeal provision of paragraph 125(1)(h) is already provided under subsection 125(1)(f) as it relates to a condition of an environmental authorisation.

Recommendation 54
4.347. The Committee recommends that paragraphs 125(1)(h) and 125(1)(ze) be deleted as a right of review against a decision to impose a condition on an environmental authorisation is already provided for under paragraph 125(1)(f).

Environment Protection Regulations

4.348. The Law Society pointed out that the word "or" has been misplaced in Regulation 17(a).[231]

Recommendation 55
4.349. The Committee recommends that Regulation 17(a) be deleted and replaced with the following:

> ***(a) the sale, purchase, storage, supply, use or disposal of-***
>
> > ***(i) a substance; or***
> >
> > ***(ii) a thing that contains a substance***
> >
> > ***merely because the substance includes an insignificant quantity or proportion of an ozone depleting substance.***

4.350. The Australian Acoustical Society commented in its submission that no noise condition is associated with Period 5 in Table 3, Schedule 2 to the Regulations.[232]

Recommendation 56
4.351. The Committee recommends that Period 5 be deleted from Table 3 - Time Periods at Schedule 2 to the Regulations as no associated noise condition is identified for that time period.

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[230] *ibid*
[231] *ibid*, p 7
[232] Australian Acoustical Society, *op cit,* June 1997, p 3

Michael Moore MLA
Chair

27 October 1997

APPENDIX A - LIST OF SUBMISSIONS

[Submissions were numbered in order of receipt by the Committee Office of the Legislative Assembly]

1. Judy Ford

2. Master Builders Association of the ACT, Bernie Bryant, Executive Director

3. Phil O'Brien

3A. Phil O'Brien (supplementary)

4. Property Council of Australia, ACT Division, Jennifer Cunich, Executive Director

5. Ridgeway Residents' Action Group, Ron Murnain and Warren Whitnall, Co-Convenors

5A. Ridgeway Residents' Action Group, Ron Murnain and Warren Whitnall, Co-Convenors (supplementary)

6. Norwood Park Crematorium, Peter Sorel, Chairman

7. Environmental Defender's Office (ACT), Rosemary Budavari

8. Environment Protection Authority, NSW, Gary Whycross, Director, Western Regions

9. Australian Finance Conference, Ron Hardaker, Executive Director

10. Barry Raison

11. Housing Industry Association Limited, Martin Walsh, Director, ACT/Southern NSW Region

11A. Housing Industry Association Limited, Martin Walsh, Director, ACT/Southern NSW Region (supplementary)

12. Conservation Council of the South-East Region and Canberra

13. The Law Society of the Australian Capital Territory, L A King, Executive Director

14. ACTEW Corporation, Bob Gibbs, General Manager Operations

14A. ACTEW Corporation, Bob Gibbs, General Manager Operations (supplementary)

15. Queanbeyan City Council, Frank Pangallo MBE, Mayor

16. Richard and Margaret Wigley
17. The Australian Gas Light Company, Julie Dickson, Health, Safety and Environment Department
18. Australian Acoustical Society, Marion Burgess, Convenor ACT Group
19. Paul Osborne MLA
20. Margaret Latham

APPENDIX B - WITNESSES AT HEARINGS

[By date and order of appearance]

Monday 11 August 1997

ENVIRONMENT ACT
- Mr Peter Burnett
- Ms Janine Cullen

Friday 19 September 1997

MR PHIL O'BRIEN

Tuesday 7 October 1997

ENVIRONMENTAL DEFENDER'S OFFICE (ACT)
- Ms Rosemary Budavari

CONSERVATION COUNCIL OF THE SOUTH-EAST REGION AND CANBERRA
- Ms Isabelle Vallin

RIDGEWAY RESIDENTS' ACTION GROUP
- Dr Ron Murnain

PROPERTY COUNCIL OF AUSTRALIA
- Mr Tony Hedley
- Ms Mary-Ellen Barry

HOUSING INDUSTRY ASSOCIATION
- Mr Martin Walsh
- Mr Peter Briggs

MASTER BUILDERS ASSOCIATION
- Mr Bernie Bryant
- Mr Trevor Rodgers

ACTEW CORPORATION
- Mr John Dymke

THE LAW SOCIETY OF THE ACT

Mr Greg Burnett

Mr Alfonso del Rio

ENVIRONMENT ACT

Mr Peter Burnett

Ms Janine Cullen

Dr Tony Hodgson

APPENDIX C - CROSS REFERENCING STYLES

Style A

46. (1) Subject to section 56, the Authority shall, within 20 working days of the receipt of an application under section 45—

(a) grant an environmental authorisation in respect of a specified activity, for the period and subject to the conditions (if any) specified in the authorisation;

> ***Note:** Section 125 provides for a review of a decision to grant an environmental authorisation; to grant an environmental authorisation for a specified period; or to grant an environmental authorisation subject to a specified condition.*

(b) refuse to grant an environmental authorisation in respect of a specified activity;

> ***Note:** Section 125 provides for a review of a decision refusing to grant an environmental authorisation.*

(c) require the applicant to provide further specified information by a specified date, being a date not less than 10 working days after the date of the notice; or

(d) request the Minister under section 88—

(i) to direct that an Assessment be made of the possible environmental impact of the specified activity; or

(ii) to establish a panel to conduct an Inquiry into the specified activity.

(2) Where under paragraph (1) (c) the Authority requires the applicant to provide further information, the Authority shall within 10 working days after receiving the further information—

(a) grant the environmental authorisation pursuant to paragraph (1) (a);

(b) refuse to grant the environmental authorisation pursuant to paragraph (1) (b); or

(c) make a request of the Minister pursuant to paragraph (1) (d).

(3) If within 20 working days after the Authority makes a request under paragraph (1) (d) or (2) (c) the Minister has not acceded to the request, the Authority shall—

(a) grant the environmental authorisation pursuant to paragraph (1) (a);

(b) refuse to grant the environmental authorisation pursuant to paragraph (1) (b); or

(c) require further information pursuant to paragraph (1) (c).

(4) Where under paragraph (3) (c) the Authority requires the applicant to provide further information, the Authority shall within 10 working days after receiving the further information—

(a) grant the environmental authorisation pursuant to paragraph (1) (a); or

(b) refuse to grant the environmental authorisation pursuant to paragraph (1) (b).

(5) Where—

(a) before the Authority makes a decision granting or refusing to grant an environmental authorisation under subsection (1), (2), (3) or (4), the Minister on his or her own initiative under section 88—

(i) directs that an Assessment be made of the possible environmental impact of the specified activity; or

(ii) establishes a panel to conduct an Inquiry into the specified activity; or

(b) before the Authority makes a decision granting or refusing to grant an environmental authorisation under subsection (3), the Minister accedes to a request under paragraph (1) (d) or (2) (c);

the Authority shall within 20 working days after receiving a copy of the Assessment or report of the Inquiry panel—

(c) grant the environmental authorisation pursuant to paragraph (1) (a); or

(d) refuse to grant the environmental authorisation pursuant to paragraph (1) (b).

(6) The Authority shall not grant an environmental authorisation in respect of a development unless an application to conduct that development has been approved under Part VI of the Land Act.

Style B

46. (1) Subject to section 56, the Authority shall, within 20 working days of the receipt of an application under section 45—

(a) grant an environmental authorisation in respect of a specified activity, for the period and subject to the conditions (if any) specified in the authorisation[233];

(b) refuse to grant an environmental authorisation in respect of a specified activity[234];

(c) require the applicant to provide further specified information by a specified date, being a date not less than 10 working days after the date of the notice; or

(d) request the Minister under section 88—

(i) to direct that an Assessment be made of the possible environmental impact of the specified activity; or

(ii) to establish a panel to conduct an Inquiry into the specified activity.

(2) Where under paragraph (1) (c) the Authority requires the applicant to provide further information, the Authority shall within 10 working days after receiving the further information—

(a) grant the environmental authorisation pursuant to paragraph (1) (a);

(b) refuse to grant the environmental authorisation pursuant to paragraph (1) (b); or

(c) make a request of the Minister pursuant to paragraph (1) (d).

(3) If within 20 working days after the Authority makes a request under paragraph (1) (d) or (2) (c) the Minister has not acceded to the request, the Authority shall—

(a) grant the environmental authorisation pursuant to paragraph (1) (a);

(b) refuse to grant the environmental authorisation pursuant to paragraph (1) (b); or

(c) require further information pursuant to paragraph (1) (c).

(4) Where under paragraph (3) (c) the Authority requires the applicant to provide further information, the Authority shall within 10 working days after receiving the further information—

(a) grant the environmental authorisation pursuant to paragraph (1) (a); or

(b) refuse to grant the environmental authorisation pursuant to paragraph (1) (b).

(5) Where—

(a) before the Authority makes a decision granting or refusing to grant an environmental authorisation under subsection (1), (2), (3) or (4), the Minister on his or her own initiative under section 88—

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[233] *Section 125 provides for a review of a decision to grant an environmental authorisation; to grant an environmental authorisation for a specified period; or to grant an environmental authorisation subject to a specified condition.*

[234] *Section 125 provides for a review of a decision refusing to grant an environmental authorisation.*

(i) directs that an Assessment be made of the possible environmental impact of the specified activity; or

(ii) establishes a panel to conduct an Inquiry into the specified activity; or

(b) before the Authority makes a decision granting or refusing to grant an environmental authorisation under subsection (3), the Minister accedes to a request under paragraph (1) (d) or (2) (c);

the Authority shall within 20 working days after receiving a copy of the Assessment or report of the Inquiry panel—

(c) grant the environmental authorisation pursuant to paragraph (1) (a); or

(d) refuse to grant the environmental authorisation pursuant to paragraph (1) (b).

(6) The Authority shall not grant an environmental authorisation in respect of a development unless an application to conduct that development has been approved under Part VI of the Land Act.

Style C

46. (1) Subject to section 56, the Authority shall, within 20 working days of the receipt of an application under section 45—

(a) grant an environmental authorisation in respect of a specified activity, for the period and subject to the conditions (if any) specified in the authorisation;

Note: Section 125 provides for a review of a decision to grant an environmental authorisation; to grant an environmental authorisation for a specified period; or to grant an environmental authorisation subject to a specified condition.

(b) refuse to grant an environmental authorisation in respect of a specified activity;

Note: Section 125 provides for a review of a decision refusing to grant an environmental authorisation.

(c) require the applicant to provide further specified information by a specified date, being a date not less than 10 working days after the date of the notice; or

(d) request the Minister under section 88—

(i) to direct that an Assessment be made of the possible environmental impact of the specified activity; or

(ii) to establish a panel to conduct an Inquiry into the specified activity.

(2) Where under paragraph (1) (c) the Authority requires the applicant to provide further information, the Authority shall within 10 working days after receiving the further information—

(a) grant the environmental authorisation pursuant to paragraph (1) (a);

(b) refuse to grant the environmental authorisation pursuant to paragraph (1) (b); or

(c) make a request of the Minister pursuant to paragraph (1) (d).

(3) If within 20 working days after the Authority makes a request under paragraph (1) (d) or (2) (c) the Minister has not acceded to the request, the Authority shall—

(a) grant the environmental authorisation pursuant to paragraph (1) (a);

(b) refuse to grant the environmental authorisation pursuant to paragraph (1) (b); or

(c) require further information pursuant to paragraph (1) (c).

(4) Where under paragraph (3) (c) the Authority requires the applicant to provide further information, the Authority shall within 10 working days after receiving the further information—

(a) grant the environmental authorisation pursuant to paragraph (1) (a); or

(b) refuse to grant the environmental authorisation pursuant to paragraph (1) (b).

(5) Where—

(a) before the Authority makes a decision granting or refusing to grant an environmental authorisation under subsection (1), (2), (3) or (4), the Minister on his or her own initiative under section 88—

(i) directs that an Assessment be made of the possible environmental impact of the specified activity; or

(ii) establishes a panel to conduct an Inquiry into the specified activity; or

(b) before the Authority makes a decision granting or refusing to grant an environmental authorisation under subsection (3), the Minister accedes to a request under paragraph (1) (d) or (2) (c);

the Authority shall within 20 working days after receiving a copy of the Assessment or report of the Inquiry panel—

(c) grant the environmental authorisation pursuant to paragraph (1) (a); or

(d) refuse to grant the environmental authorisation pursuant to paragraph (1) (b).

(6) The Authority shall not grant an environmental authorisation in respect of a development unless an application to conduct that development has been approved under Part VI of the Land Act.

ADDITIONAL COMMENTS - MS LUCY HORODNY MLA

I believe that this Inquiry has been very effective in examining in detail a complex piece of legislation and being able to recommend a range of improvements to the Environment Protection Bill. However, there are some areas of the Report where my views differ significantly from the majority view of the Committee. While I am prepared to accept the outcome of the Inquiry because I acknowledge that the recommendations are the result of a degree of compromise between Members, I would like to place on public record my preferred position on some of the issues the Committee addressed.

An independent Environment Management Authority (Recommendation 3)

It is the Greens' view that the Environment Management Authority (EMA) should be an independent body beyond the direct control of the Government and not just a public service office within the Department of Urban Services. We do not agree with the Government's view that the ACT is too small to support a separate EMA. There are a number of examples where past and present ACT Governments have established small statutory authorities for specific purposes eg. the Gungahlin Development Authority, the Commissioner for the Environment (a statutory position), and the ACT Casino Surveillance Authority, and we see no reason why this cannot be done for the EMA. It would also be a positive sign of the Government's commitment to environmental protection. I do not believe that an independent body would be particularly resource-intensive, as administrative support for an independent EMA could still be provided through the Department of Urban Services.

Public involvement in Environment Protection Agreements

The committee recommended the provision of public notification of applications for environmental authorisations but not for environment protection agreements. I believe that this is inconsistent as agreements can be a substitute for authorisations for all activities other than those in class A. Given that the content of agreements is quite discretionary I believe it is important that the public have the opportunity to challenge the stringency of these agreements.

Breach of an Environment Protection Agreement

The Committee supported the provision in the Bill that the EMA can only require an environmental authorisation when there is a potential or actual breach of the Act <u>and</u> serious or material environmental harm has occurred or is likely to occur. I believe however that a breach of the Act should be sufficient justification for an environmental authorisation to be required.

Non-payment of fees (Recommendation 28)

I question the Committee's recommendation that the EMA should have the discretion, rather than being required, to cancel an authorisation for non-payment of fees. If an authorisation is cancelled then the applicant could not legally continue to undertake the activity. I believe that the Committee's approach is inconsistent with other Government processes, eg. in the Land Act fees are required to be paid before an application is assessed. I do however support the Committee's view that a decision to cancel an authorisation for non-payment of fees should be subject to appeal.

Economic measures

I am concerned that, under subsection 36(2), regulations to establish schemes involving economic measures to achieve environmental protection can be inconsistent with the Act. I think this gives the Government too much flexibility in establishing these schemes. If these schemes can only work by being inconsistent with the Act or other regulations then I believe the Assembly needs to be provided with a greater opportunity to scrutinise such schemes. This could be through further amendments to the Act to expand on the general concepts regarding economic measures contained in sections 34 and 35.

Financial assurances

I believe that the provision for the EMA to impose a financial assurance as a condition of an environmental authorisation is a powerful form of regulation. However the Bill does not provide a clear indication of when financial assurances will be required. I would prefer that the EMA develop guidelines on when financial assurances will be required so that there is some consistency about their use. These guidelines could be a disallowable instrument to allow Assembly scrutiny.

Regulated activities

I am not convinced that the regulated activities in Schedule 1 of the Bill are comprehensive enough, or that some activities in class B should not be transferred to class A. For example, neither class includes a wide range of industrial activities. Paragraph (g) in class A only covers stock feedlots and it is not clear whether it would apply to all forms of intensive animal farming, eg battery hen farms. The thresholds at which some activities become covered by class A are also quite high, eg concert venues holding 2000 persons or more.

Noise control

I am not convinced that the proposed changes to the noise control regulations are preferable to what currently exists under the *Noise Control Act 1988*. At present, excessive noise at a particular location is determined relative to the existing background noise levels at that location. The proposed regulations however impose a standard acceptable noise level across a whole zone as defined in the Territory Plan. This means that residential areas in Canberra that are currently very quiet could be subject to much higher noise interference, up to the proposed noise zone standard, than what is currently allowed.

Lucy Horodny MLA

27 October 1997