

Protection of the Environment Operations Amendment Bill 2005

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Protection of the Environment Operations Act 1997 (the Principal Act)* and other legislation as follows:

- (a) to extend the matters that may be taken into account when considering whether a person is a fit and proper person to hold an environment protection licence (a **licence**),
- (b) to make other provision with respect to licences, including in relation to conditions that may be imposed on licences and suspension and revocation of licences,
- (c) to require the environmental values of water to be considered in relation to licensing matters and prevention notices,
- (d) to increase penalties for offences,
- (e) to make provision with respect to the regulation of land pollution and waste, including new offences relating to land pollution and the supply of false information about waste and amendment of existing offences,
- (f) to provide for the use of smoke abatement notices to control smoke pollution from residential premises and for offences for failure to comply with notices,
- (g) to confer additional powers on authorised officers and make other provision in relation to authorised officers,
- (h) to make provision with respect to enforcement, including providing for voluntary undertakings to the Environment Protection Authority (the **EPA**) and their enforcement,
- (i) to enable noise control notices to be issued in relation to proposed activities,
- (j) to provide for green offsets to be implemented under licence conditions and to enable provision for the operation and elements of green offsets to be made by regulations,
- (k) to provide for the enforcement provisions contained in Chapter 8 of the Principal Act to apply in respect of the *Environmentally Hazardous Chemicals Act 1985*,
- (l) to extend from 3 years to 4 years the interval between the making of reports by the EPA on the state of the environment,
- (m) to make other miscellaneous amendments of a minor, consequential or savings and transitional nature.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Protection of the Environment Operations Act 1997* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Acts and regulation set out in Schedule 2.

Schedule 1 Amendment of Protection of the Environment Operations Act 1997

Licence amendments

Schedule 1 [3] amends section 45 of the Principal Act to make it clear that, in exercising functions relating to licences, an appropriate regulatory authority may take into account the pollution previously caused by an activity.

Schedule 1 [9] amends section 50 of the Principal Act to prohibit the variation of a

licence relating to development for which development consent is required but has not been obtained. **Schedule 1 [10]** makes a consequential amendment.

Schedule 1 [11] amends section 57 of the Principal Act to require a notice to be given of a penalty imposed for failing to pay a licence fee by the required date.

Schedule 1 [16] amends section 66 of the Principal Act to enable licence conditions to require certification of compliance with licence conditions to be done by a person prescribed by the regulations.

Schedule 1 [17] and [18] amend section 66 of the Principal Act to enable a licence condition relating to certification to require certification of compliance with applicable provisions of the regulations, in addition to licence conditions.

Schedule 1 [20] substitutes section 70 of the Principal Act to enable a condition of a suspension, revocation or surrender of a licence to require a former licence holder to provide a financial assurance.

Schedule 1 [24] substitutes section 76 of the Principal Act to enable a licence condition to be imposed requiring any licence holder to prepare a closure plan and (in the case of the last licensee) to implement such a plan.

Schedule 1 [25] amends section 78 of the Principal Act to extend from 3 years to 5 years the interval within which the appropriate regulatory authority must review a licence.

Schedule 1 [26] amends section 78 of the Principal Act to remove the requirement for notice of the review of a licence to be published within a specified period before the review is undertaken.

Schedule 1 [27] amends section 79 of the Principal Act to clarify that a licence may be revoked while the licence is suspended.

Schedule 1 [28] amends section 79 of the Principal Act to provide that a licence may be suspended or revoked if the holder fails to pay a waste contribution under section 88 of the Principal Act.

Schedule 1 [29] amends section 80 of the Principal Act to expressly provide for an application for surrender of a licence to be refused if the appropriate regulatory authority is of the opinion that it is appropriate to manage the ongoing environmental impact of an activity that has ceased to be carried on by way of licence conditions.

Schedule 1 [12] makes a consequential amendment.

Schedule 1 [31] amends section 83 of the Principal Act to allow additional factors to be taken into consideration by an appropriate regulatory authority in determining whether a person is a fit and proper person for the purposes of provisions relating to the grant, suspension or revocation of licences.

Schedule 1 [39] amends section 88 of the Principal Act to allow regulations to be made that permit a contribution, payable by the operator of a licensed waste facility, to be calculated on the basis of estimates.

Water quality

Currently, water quality standards are imposed on certain classified waters of the State under the *Clean Waters Regulations 1972* (as continued in force by the Principal Act). The standards do not apply to all the waters of the State. The amendments repeal a provision continuing those regulations and replace the current system with a general requirement that environmental values of water (being the values set out in the *Australian and New Zealand Guidelines for Fresh and Marine Water Quality 2000*) be considered when licensing functions are exercised or prevention notices issued under the Principal Act.

Schedule 1 [5] amends section 45 of the Principal Act to enable an appropriate regulatory authority, when exercising licensing functions, to consider the effect of an activity or work on environmental values of water and the practical measures that can be taken to restore or maintain those environmental values.

Schedule 1 [48] amends section 96 of the Principal Act to require an appropriate regulatory authority considering issuing a prevention notice relating to an activity

that causes or is likely to cause water pollution to consider the effect of the activity on environmental values of water and the practical measures that can be taken to restore or maintain those environmental values.

Schedule 1 [150] omits the provision that continues the *Clean Waters Regulations 1972* in force.

Schedule 1 [152] inserts a definition of ***environmental values of water***.

Penalties and enforcement

Schedule 1 [6]–[8], [13], [15], [35], [38], [42], [49], [53], [56], [57], [59]–[61], [63], [68], [70], [71], [75]–[81], [83] and [96] amend various sections of the Principal Act to increase the penalties for certain offences under that Act. **Schedule 1 [30]** makes a consequential amendment.

Schedule 1 [54] amends section 107 of the Principal Act to provide for the recovery of costs of an appropriate regulatory authority associated with registering a compliance cost notice, and any resulting charge on land, arising out of environment protection notices.

Schedule 1 [84]–[86] amend section 169 of the Principal Act. The amendments remove the “no knowledge” defence in relation to corporations that contravene the Principal Act or regulations under that Act. The amendments also allow evidence of the opinion, belief or purpose (in addition to intention) of an officer, employee or agent of a corporation as evidence of that corporation’s state of mind in proceedings against the corporation for an alleged contravention of the Principal Act or regulations under that Act.

Schedule 1 [99] amends section 213 of the Principal Act to extend Chapter 8 of the Principal Act (which relates to proceedings for offences, penalty notices, remedies and civil enforcement) to the *Environmentally Hazardous Chemicals Act 1985* and the regulations under that Act. **Schedule 1 [100]** prevents a person other than the EPA from instituting proceedings for an offence under that Act or those regulations.

Schedule 1 [101] amends section 216 of the Principal Act to provide that proceedings for offences under proposed sections 142A and 144AA or the *Environmentally Hazardous Chemicals Act 1985* must be commenced within 3 years of the offence being committed or first coming to the attention of any relevant authorised officer.

Schedule 1 [102] inserts proposed section 218A into the Principal Act. The proposed section clarifies that an agent of an appropriate regulatory authority may institute proceedings under the Principal Act on behalf of the authority.

Schedule 1 [103] inserts proposed sections 237A and 237B. The proposed sections provide for the recovery of costs of an appropriate regulatory authority associated with registering a charge, and lodging a caveat, on land to which a restraining order imposed under the Principal Act applies.

Schedule 1 [104] amends section 248 of the Principal Act to include the costs of transporting, storing or disposing of evidence during the investigation of the offence in the costs that may be recovered by order of a court from an offender.

Schedule 1 [105] amends section 249 of the Principal Act to allow a court that finds an offence under the Principal Act proved to order the offender to pay a further penalty of an amount that the court is satisfied, on the balance of probabilities, represents the amount of any monetary benefit to the offender as a result of the commission of the offence.

Schedule 1 [106] amends section 250 of the Principal Act to enable a court that finds an offence under the Principal Act proved to order the offender to publicise the circumstances of an offence.

Schedule 1 [107] amends section 250 of the Principal Act to enable a court that finds an offence under the Principal Act proved to make additional orders in relation to the offender, including orders requiring payment of amounts to the Environmental Trust, requiring offenders, employees and contractors to attend training courses, requiring

offenders to establish training courses and requiring offenders to provide financial assurances. **Schedule 1 [108] and [109]** make consequential amendments.

Schedule 1 [111] inserts proposed section 253A. The proposed section establishes a scheme for the giving of binding undertakings to the EPA by a person in connection with matters relating to the EPA's functions under the Principal Act. An undertaking may be varied or withdrawn with the EPA's consent and is enforceable by the Land and Environment Court, which may also make specified orders for breaches.

Schedule 1 [110] makes a consequential amendment.

Waste

Schedule 1 [36] amends section 87 of the Principal Act to remove the requirement for a supervisory licence relating to landfill sites used for the disposal of putrescible waste to be subject to a condition relating to the separation, re-use, reprocessing and recycling of waste.

Schedule 1 [41] amends section 88 of the Principal Act to make it clear that interest is payable on any part of an unpaid waste contribution under that section.

Schedule 1 [68] amends section 143 of the Principal Act. The amendment extends the offence of transporting waste to a place that cannot lawfully be used as a waste facility for the waste to causing or permitting the transport of waste to any such place.

Schedule 1 [70] substitutes section 144 of the Principal Act and inserts proposed section 144AA. Proposed section 144 extends the existing offence of permitting land that cannot lawfully be used as a waste facility to be used as a waste facility to using land as a waste facility without lawful authority (this would cover the circumstances where a waste facility cannot be used to dispose of particular waste). Proposed section 144AA makes it an offence to supply information (including a record containing information), or cause or permit information to be supplied, about waste that is false or misleading in a material respect to another person in the course of dealing with the waste. The offence will apply to dealings relating to the sale or disposal of waste or the storage, transport, handling, deposit, transfer, processing, recycling, recovery, re-use or use of waste.

Schedule 1 [157] substitutes the definition of **waste** for the purposes of the Principal Act. The new definition changes references to substances intended for "recycling, reprocessing, recovery" to references to "recycling, processing, recovery" and includes as waste (in the circumstances prescribed by the regulations) processed, recycled, re-used or recovered substances, produced wholly or partly from waste, that are applied to land or used as fuel.

Schedule 1 [1], [21]–[23], [37], [40], [46], [58], [69], [141]–[146] and [158] make consequential amendments.

Smoke abatement notices

Schedule 1 [62] inserts proposed Division 3 of Part 5.4 (proposed sections 135A–135D) which provides a new scheme for managing smoke pollution arising from residential premises. An authorised officer of a local authority will be able to issue a smoke abatement notice if it appears to the officer that more than a specified amount of smoke has been emitted from a residence. The notice will allow 21 days for ceasing to emit excessive smoke and it will be an offence to contravene a notice without reasonable excuse. A smoke abatement notice will have effect for 6 months but may be revoked earlier.

Land pollution

Currently land pollution is regulated under the Principal Act by regulating waste disposal, the transport of waste and littering. **Schedule 1 [66]** inserts Division 2 of Part 5.6 (proposed sections 142A–142E) relating to a specific new offence of land pollution. Land pollution is defined broadly (a definition is inserted by **Schedule 1 [154]**) to mean placing or introducing matter in or on or into or onto land that causes degradation of the land resulting in specified harm or damage, or placing or introducing matter that is of a prescribed nature, description or class or does not

comply with a prescribed standard. The proposed sections provide for a defence of authority conferred by regulation or a licence or lawful authority or if a substance placed on land is a pesticide or a fertiliser or another specified substance. There will also be a defence for substances placed into or onto an unlicensed landfill that is notified to the EPA and operated in accordance with the regulations. **Schedule 1 [64], [65] and [67]** make consequential amendments.

Powers of authorised officers

Schedule 1 [87] inserts proposed section 198A into the Principal Act. The proposed section provides that an authorised officer may, on any premises entered lawfully under that Act, turn off or disable a building intruder alarm or motor vehicle intruder alarm that is or has been sounding in breach of that Act or the regulations.

Schedule 1 [88] amends section 203 of the Principal Act to confer powers on authorised officers to require a person to attend to answer questions in relation to matters under the Principal Act, if such attendance is reasonably required so that questions can be put and answered and a place and time have been nominated by the person or are reasonable in the circumstances.

Schedule 1 [89] inserts proposed section 203A into the Principal Act. The proposed section provides that an authorised officer may record questions by authorised officers and answers to those questions and sets out recording methods if the officer has informed the person that the record is to be made.

Schedule 1 [90] amends section 204 of the Principal Act to authorise an authorised officer to request a person who is required to state his or her name and address to provide proof of the name and address. It will not be an offence to fail to provide the proof.

Schedule 1 [92] amends section 206 of the Principal Act to remove a limit on the quantity of a substance which may be removed by an authorised officer for testing.

Schedule 1 [93] and [95] amend section 208 of the Principal Act to confer power on authorised officers to require a vehicle or vessel to be moved to a suitable place for inspection or testing. If it is not to be done immediately, the notice must be in writing and specify the date, time and place for inspection or testing. **Schedule 1 [94]** makes a consequential amendment.

Schedule 1 [98] inserts proposed section 212E. The proposed section enables the Minister to enter into arrangements with Ministers of other States or Territories to provide for authorised officers of this State and of the other State or Territory to exercise functions under the Principal Act in the other State or Territory. Such actions will relate only to matters that relate to the environment of this State.

Noise pollution

Schedule 1 [114] amends section 264 of the Principal Act to confer on appropriate regulatory authorities the power to issue noise control notices to a person who proposes to carry on an activity or use an article at any premises.

Schedule 1 [118] amends section 278 of the Principal Act to enable noise abatement directions to be given to the State, a person acting on behalf of the State, a public authority or an employee of a public authority by an authorised officer appointed by the EPA.

Green offsets

Schedule 1 [4] amends section 45 of the Principal Act to enable an appropriate regulatory authority, in exercising functions relating to licences, to consider any relevant green offset scheme or green offset works.

Schedule 1 [14] amends section 66 of the Principal Act to extend monitoring under licence conditions to matters required by a licence, such as requirements to implement green offset schemes or green offset works.

Schedule 1 [19] substitutes section 69 of the Principal Act to enable licence conditions to be imposed that implement or otherwise relate to green offset schemes and green offset works.

Schedule 1 [129] inserts proposed Part 9.3B (proposed sections 295M–295X). The proposed Part, together with section 69, establishes a scheme to require licence holders to provide or participate in schemes for the provision of green offsets to mitigate the effect of licensed activities. A green offset scheme or green offset works may be used to prevent, control, abate, mitigate or otherwise offset harm to the environment caused by a licensed activity or to make good environmental damage arising from such an activity. A green offset scheme may also be used to carry out a specified program for the restoration or enhancement of the environment related to a licensed activity. A green offset scheme may contain elements, including contractual arrangements, creation of a market for participation entitlements and credits and the payment of financial contributions. Both a scheme and offset works may relate to activities and premises other than those covered by the licence and be arranged, implemented or managed by a person on behalf of the licence holder, but must relate to licensed activities of the same kind. The provisions enable regulations to impose conditions on licences. Regulations may also be made for or with respect to green offset schemes and green offset works, including in relation to determination of whether specified outcomes are met, cost recovery and conferring on the EPA functions relating to credits and participation rights. The provisions also confer on the EPA functions relating to management or appointment of managers for green offset schemes or green offset works and entering into agreements with managers. A Green Offsets Fund is established. The Crown is protected by the provisions from liability for acts done in good faith in connection with the operation of green offset schemes or green offset works and green offset credits are excluded from liability for duty.

Schedule 1 [126]–[128] and [153] make consequential amendments as a result of the insertion of proposed Part 9.3B.

Other amendments

Schedule 1 [2] inserts a note into section 6 of the Principal Act for the purpose of clarifying matters relating to appropriate regulatory authorities.

Schedule 1 [32], [34], [50], [115], [117] and [122]–[125] amend sections 84, 86, 99, 267, 271, 287, 288, 289 and 290 of the Principal Act, respectively, to provide that an appeal lodged against a licence decision, breach notice, prevention notice, noise control notice or noise abatement order does not operate to stay the decision, notice or order appealed against except to the extent that the Land and Environment Court otherwise directs. The amendments also provide for the operation of the decisions, notices or orders if a stay is granted. **Schedule 1 [33]** makes a consequential amendment.

Schedule 1 [43] amends section 94 of the Principal Act so that an appropriate regulatory authority can waive a prescribed fee for preparing and giving a clean-up notice without a request from the recipient of the notice to do so.

Schedule 1 [45] amends section 95 of the Principal Act to extend the circumstances in which a prevention notice may be given to the situation where an activity is being carried on in contravention of, or is likely to cause a contravention of, a condition of a surrender of a licence or an exemption.

Schedule 1 [47] amends section 96 of the Principal Act to make it clear that a prevention notice may require a person to review the carrying out of an activity.

Schedule 1 [51] amends section 100 of the Principal Act so that an appropriate regulatory authority can waive a prescribed fee for preparing and giving a prevention notice without a request from the recipient of the notice to do so.

Schedule 1 [55] amends section 110 of the Principal Act to prohibit a fee from being charged for the variation of an environment protection notice. **Schedule 1 [44] and [52]** make consequential amendments.

Schedule 1 [72] makes a statute law revision amendment to section 146 of the Principal Act.

Schedule 1 [73] amends section 148 of the Principal Act to clarify that an employer who is notified by an employee of a pollution incident related to an activity carried on by or on behalf of the employer, or who otherwise becomes aware of such an incident, must notify the appropriate regulatory authority of the incident.

Schedule 1 [74] amends section 148 (as a result of the inclusion of the emission of odours as pollution incidents by **Schedule 1 [156]**) to provide that obligations to report pollution incidents do not extend to incidents involving only the emission of an odour.

Schedule 1 [82] omits Division 3 of Part 5.8, as these provisions relating to unleaded petrol are now covered by Commonwealth legislation.

Schedule 1 [91] makes marine park rangers authorised officers for certain purposes.

Schedule 1 [155] makes a consequential amendment.

Schedule 1 [97] amends section 212C of the Principal Act to allow an appropriate regulatory authority or an authorised officer of an authority to exercise a function that is not authorised or controlled by a licence, or a function in relation to which the authority is not the appropriate regulatory authority, in certain circumstances without the current requirement that the functions be exercised in good faith.

Schedule 1 [112] amends section 261 of the Principal Act to insert evidentiary provisions enabling certain matters to be proved by the production of certificates.

Schedule 1 [113] amends section 262 of the Principal Act to provide that an analyst's certificate which states that a container containing a sample was sealed, and the seal securing the container was unbroken, is admissible in evidence in any proceedings under the Principal Act. Currently, to be admissible, the certificate must certify that a container containing the sample was sealed and signed by an authorised officer.

Schedule 1 [116] inserts proposed sections 267A and 267B. The proposed sections enable the charging and recovery of the administrative costs of preparing and giving noise control notices and the costs of monitoring and ensuring compliance with noise control notices.

Schedule 1 [119] and [120] amend section 285 of the Principal Act to update references to the rural fire brigade.

Schedule 1 [121] provides that an accredited rescue unit, whose members are given an exemption under section 285 of the Principal Act for an offence done or omitted in good faith, has the same meaning as it has in the *State Emergency and Rescue Management Act 1989*.

Schedule 1 [130] amends section 300 of the Principal Act to enable an appropriate regulatory authority to require a licence holder who is required to give a financial assurance to provide an independent assessment of the cost of the relevant work or program for which the assurance is required. This is to enable the authority to determine the amount of the assurance, which may not exceed the total cost of the work or program.

Schedule 1 [131] amends section 301 of the Principal Act to enable regulations to be made for or with respect to guidelines to be observed in calculating the amount of a financial assurance.

Schedule 1 [132] amends section 308 of the Principal Act to make it clear that an appropriate regulatory authority is required only to include in its public register matters that are applicable to it.

Schedule 1 [133]–[135] amend section 319 of the Principal Act in relation to the disclosure of information obtained in connection with the administration or execution of the Principal Act. The amendments provide that disclosure may be made to a person engaged in administering another law of this State providing for the protection of the environment and permit the EPA to disclose information formerly required to be kept on a register. The amendments also prevent a person from being required to produce a document or thing, or to disclose information, to a court if the EPA certifies in writing that it is not in the public interest to do so.

Schedule 1 [136]–[138] amend section 319A of the Principal Act to make it clear that a condition of a licence that specifies a time by which action is to be taken continues to have effect until it is complied with and that a condition that does not specify a time continues to have effect until it is complied with.

Schedule 1 [139] amends section 320A of the Principal Act to provide that a person is guilty of an offence if the person, knowing it to be false or misleading, represents that the person holds a licence that permits certain activities.

Schedule 1 [140] inserts proposed section 323 (5A) into the Principal Act to provide that a condition of a licence may be inconsistent with a requirement of the same kind in a regulation, but only to the extent that the condition imposes a more stringent requirement than the regulation. Section 323 (5) currently provides that a condition that is inconsistent with a regulation has no force or effect. **Schedule 1 [151]** inserts a savings and transitional provision into the Principal Act to provide that the new section 323 (5A) applies to a condition that was attached to a licence before the commencement of that subsection.

Schedule 1 [147] amends Schedule 2 to the Principal Act to expand the regulation-making power relating to the payment of fees for services provided by the EPA to include services provided by other appropriate regulatory authorities and to clarify that these fees include administrative costs and the costs associated with the functions of the EPA and other appropriate regulatory authorities under the Principal Act.

Schedule 1 [148] amends Schedule 2 to the Principal Act to provide for a regulation-making power in respect of the independent certification of load-based licences.

Schedule 1 [149] enables savings and transitional regulations to be made as a consequence of the proposed Act.

Schedule 1 [151] inserts savings and transitional provisions as a consequence of the enactment of the proposed Act.

Schedule 2 Amendment of other Acts and regulation

Schedule 2.1 amends the *Environmentally Hazardous Chemicals Act 1985* to remove provisions relating to enforcement, as these matters will now be covered by the application of the Principal Act.

Schedule 2.2 [1] and [2] amend the *Pesticides Act 1999* to provide that an accredited rescue unit, whose members are given an exemption under section 116 of that Act for an offence done or omitted in good faith, has the same meaning as it has in the *State Emergency and Rescue Management Act 1989*.

Schedule 2.2 [3] amends the *Pesticides Act 1999* to insert proposed section 118A. The proposed section makes it clear that a notice or order given under that Act, or a condition of a licence or certificate of competency under that Act, that specifies a time by which action is to be taken continues to have effect until it is complied with and that a requirement that does not specify a time continues to have effect until it is complied with.

Schedule 2.2 [4] and [5] amend the *Pesticides Act 1999* to enable savings and transitional regulations to be made as a consequence of the amendment of that Act by the proposed Act.

Schedule 2.3 [1] amends the *Protection of the Environment Administration Act 1991* to provide that the EPA must make its report on the state of the environment every 4 years rather than every 3 years.

Schedule 2.3 [2] and [3] amend the *Protection of the Environment Administration Act 1991* to enable savings and transitional regulations to be made, and to insert savings and transitional provisions, as a consequence of the amendment of that Act by the proposed Act.

Schedule 2.4 amends the *Protection of the Environment Operations (General) Regulation 1998* to provide for additional matters that are to be included in a public

register held by a regulatory authority.

Schedule 2.5 amends the *Sydney Olympic Park Authority Act 2001* to remove a provision that makes the EPA the appropriate regulatory authority for the premises of Sydney Olympic Park.