

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 Contaminated Land Management Act 1997 (the Principal Act):

(a) to permit the Environment Protection Authority (the EPA) to order certain persons to carry out a preliminary investigation of a site to identify any contamination, and

(b) to change the current approach to managing contamination through the declaration of investigation areas and remediation sites and the issuing of investigation and remediation orders in relation to land within those areas by instead providing for the declaration of contaminated land as significantly contaminated land and providing for the issuing of management orders that can require a person to investigate and remediate the contamination of significantly contaminated land, and

(c) to allow the EPA to regulate contaminated land if the EPA considers that the contamination is significant enough to warrant regulation instead of first determining whether any contamination presents a significant risk of harm, and

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(d) to clarify that more than one person may be responsible for contamination, and

(e) to clarify that the EPA can approve a voluntary management proposal unconditionally or subject to conditions, and

(f) to enable the EPA to recover certain of its costs under the Principal Act, and

(g) to enable the EPA to issue clean-up and prevention notices in respect of land regulated under the Principal Act, and

(h) to permit a penalty notice to be withdrawn within 28 days after it is issued, and

(i) to create a general offence of providing false or misleading information that replaces a more specific offence along those lines, and

(j) to allow the regulations to set out when information may be disclosed, and

(k) to enable the Minister to enter into arrangements with a person responsible for contamination that cannot be remediated in a reasonable time under which the person provides assistance to affected communities, and

(l) to make other minor amendments.

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 other than a number of specified provisions that commence on the date of assent to the proposed Act.

Clause 3 is a formal provision that gives effect to the amendments to the Contaminated Land Management Act 1997 set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to each instrument specified in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced.

Schedule 1 Amendment of Contaminated Land Management Act 1997

Schedule 1 [6] omits Part 2 (Main functions of EPA under this Act) of the Principal Act and inserts a number of sections. Proposed section 6 determines who is responsible for contamination of land. Proposed section 7 determines who is to be a notional owner of land for the purposes of the Principal Act. Proposed section 8 sets out some general functions of the EPA. Proposed section 9 requires the EPA to have

regard to the principles of ecologically sustainable development in the exercise of its functions under the Principal Act.

Currently Part 3 (Investigation and remediation of contaminated land) of the Principal Act permits the EPA to declare land to be an investigation area and then issue an investigation order requiring an investigation into the contamination and

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then following this or alternatively the EPA may declare land to be a remediation site then issue a remediation order requiring remediation of the land.

Schedule 1 [8] and [9] replace Part 3 of the Principal Act. The new provisions allow the EPA to declare land to be significantly contaminated land if it has reason to believe that the land is contaminated and it believes that the contamination is significant enough to warrant regulation under proposed Division 2 of Part 3. Once land is declared to be significantly contaminated land the EPA can make a management order in respect of the land requiring certain persons to take such action in relation to the management of the contamination of the land as is specified in the order. The order can require a person to do a number of things including investigating or remediating the contamination of the land. The proposed Part 3 also removes the concept of significant risk of harm in determining when the EPA can act under the Principal Act. Now land can be declared to be significantly contaminated land if the EPA considers the contamination is significant enough to require regulation under Part 3 of the Principal Act.

Proposed Division 1 of Part 3 allows the EPA to order certain persons to conduct a preliminary investigation of land to investigate whether the land is contaminated with a substance that the EPA reasonably suspects may contaminate the land.

Proposed Division 2 of Part 3 relates to the regulation of land. Proposed section 11 sets out how the EPA can declare land to be significantly contaminated land. Any such declaration is to be made by notice published in the Gazette. Proposed section 12 specifies the matters to be considered before declaring land to be significantly contaminated land. These include, amongst other things, whether the substances that the EPA believes contaminate the land are toxic, persistent or bioaccumulative, or whether they have already caused harm. Proposed section 13 provides for the determination of the appropriate person on whom a management order may be served in respect of significantly contaminated land. Appropriate persons include a person who is responsible for significant contamination of the land, an owner of the land and a notional owner of the land. A management order may be served on more than one appropriate person. Proposed section 14 sets out how the EPA is to make a management order and proposed section 15 sets out the matters that must be specified in a management order. Proposed section 16 sets out some actions that may be required to be carried out by a person who is subject to a management order.

Proposed section 17 provides for voluntary management proposals in respect of significantly contaminated land. The EPA may approve a voluntary management proposal in respect of one or more parties to the proposal (an approved party). The EPA can only make a management order in respect of an approved party if the terms of the proposal are not carried out, the management order relates to a matter that is not adequately addressed by the proposal or the approval of the proposal was based on false or misleading information.

Proposed Division 3 of Part 3 deals with the ongoing maintenance of land that has been the subject of a management order or an approved voluntary management proposal, whether or not the land is still significantly contaminated land. Proposed section 28 allows the EPA to make an ongoing maintenance order in respect of any

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such land, and section 29 permits the EPA to impose restrictions on the use of, or public positive covenants on, any such land. An ongoing maintenance order, restriction or public positive covenant can require the owner of the land, amongst other things, to carry out such ongoing management of the land as may be specified, to provide reports, to inform the EPA of any change in ownership, to refrain from carrying out certain activities on the land and to not use the land for certain purposes. An ongoing maintenance order can also be issued to an occupier of land.

Proposed Division 4 of Part 3 sets out how public authorities may carry out the requirement of an order issued to a person other than the public authority under the proposed Part (a preliminary investigation order, a management order or an ongoing maintenance order). Proposed section 30 provides that if a person fails to comply with the requirements of an order the EPA may carry out those requirements or order another public authority to carry out the requirements. Proposed section 31 requires a public authority to comply with any such order.

Proposed Division 5 of Part 3 deals with entry onto land. Proposed section 32 provides that an order under the proposed Part does not confer any power to enter land without the permission of the occupier. However, if the occupier refuses to give permission to the person subjected to the order, the EPA may revoke the order and issue an order to the occupier. Proposed section 33 provides that a person who enters land as required by an order is liable to both the owner and occupier for any loss suffered by those persons as a result of the entry except as prescribed by the regulations.

Proposed Division 6 of Part 3 deals with costs. Proposed section 33A provides that an amount that is required to be paid or entitled to be recovered under the proposed Division may be recovered as a debt in a court of competent jurisdiction. Proposed section 34 enables the EPA to require a person to pay certain costs that the EPA incurs under the Principal Act. Proposed section 35 allows a public authority to recover the costs it incurs in carrying out an order under the proposed Part. Proposed section 36 provides for the recovery of costs by other persons who carry out requirements under a management order or under an approved voluntary management proposal (see proposed section 17 (8)). The costs are generally recoverable from persons who are responsible for the contamination. Proposed section 37 provides that a public authority that carries out the requirements of an order under proposed Part 3 in respect of land disclaimed as onerous property has priority over the holder of any security over the land in relation to the recovery of the public authority's costs. Proposed section 38 limits the liability of a legal personal representative or a trustee with respect to significantly contaminated land. Proposed section 39 enables a public authority that issues a notice to an owner of land under proposed section 35 (2) to apply to the Registrar-General for registration of the notice. Proposed section 40 provides that on registration of the notice a charge is created on the land. The charge ceases to have effect when the person pays the public authority or sells the land with the consent of the authority or to a person who has no knowledge of the charge. Proposed section 41 provides for the cancellation or removal of the notice once the charge ceases to have effect. Proposed section 42

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provides for payments to the Consolidated Fund in circumstances where public authorities have been paid from that Fund in respect of managing contaminated land and have also recovered money under the proposed Division in respect of that land. Proposed Division 7 of Part 3 contains a number of general matters. Proposed section 43 provides that multiple orders or notices can be issued under the proposed Part in respect of the same person or the same land. Proposed section 44 provides that orders

and notices under the proposed Part can be amended or repealed. Proposed section 45 creates an offence (maximum penalty \$137,500 in the case of a corporation and \$66,000 in the case of an individual (plus daily penalties in the case of a continuing offence)) of wilfully delaying or obstructing a person carrying out any action in compliance with an order or notice under the proposed Part. Proposed section 46 permits the EPA to issue clean-up notices and prevention notices under the Protection of the Environment Operations Act 1997 in relation to significantly contaminated land as if it were the appropriate regulatory authority under the Protection of the Environment Operations Act 1997.

Schedule 1 [1]–[3], [7], [10], [12], [14], [16]–[21], [23], [25], [26], [28], [32], [33], [35], [38], [39], [43], [46], [47] and [56] make consequential amendments.

Schedule 1 [4] removes redundant definitions from the Principal Act and inserts a number of new definitions. Schedule 1 [11] makes a consequential amendment.

Schedule 1 [5] clarifies that the power of the EPA to order a person to take specified action under proposed Part 3 includes a power to order the person to refrain from taking specified action. Schedule 1 [51] makes a consequential amendment.

Schedule 1 [15] remakes sections 59 and 60 of the Principal Act in part as a consequence of the amendments made by Schedule 1 [5]. Proposed section 59 includes a requirement that a local authority that includes advice in a planning certificate in relation to certain matters that no longer apply to the land is to make this clear on the certificate. Proposed section 60 imposes a duty on persons who have contaminated land and owners of contaminated land to notify the EPA of the contamination (maximum penalty \$165,000 in the case of a corporation and \$77,000 in the case of an individual (plus daily penalties in the case of a continuing offence)).

Schedule 1 [29] provides that in any proceedings under the Principal Act no proof is required (until evidence is given to the contrary) of the fact that a person is, or at any relevant time was, the owner or occupier of any land to which the proceedings relate.

Schedule 1 [31] permits the Director-General of the Department of Environment and Climate Change or a person designated by the Director-General to certify that an instrument under the Principal Act was published in a specified manner on a specified day. Any such certificate is admissible in any proceedings under the Principal Act and is prima facie evidence of the matters so certified.

Schedule 1 [37] permits a penalty notice served under the Principal Act to be withdrawn within 28 days after it has been served. If a penalty notice is withdrawn further proceedings in respect of the alleged offence may be taken against a person, including the person on whom the penalty notice was served, as if the penalty notice

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was never served. This brings this provision into line with the equivalent provision in the Protection of the Environment Operations Act 1997.

Schedule 1 [40] replaces section 98 of the Principal Act that deals with offences by corporations. The new provision is in similar terms to section 169 of the Protection of the Environment Operations Act 1997. The new provision provides that if a corporation contravenes a provision of the Principal Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision, unless the person satisfies the court that the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or the person, if in such a position, used all due diligence to prevent the contravention by the corporation.

Schedule 1 [41] clarifies that section 102 (Disputes between EPA and public authorities) of the Principal Act extends to disputes in relation to orders made under proposed section 30.

Schedule 1 [42] creates a new offence (maximum penalty \$137,500 in the case of a

corporation and \$66,000 in the case of an individual) of giving false or misleading information in purported compliance with the Principal Act. Schedule 1 [13] makes a consequential amendment.

Schedule 1 [44] and [45] permit the EPA to vary the terms of approval of a guideline under section 105 of the Principal Act and to allow a guideline to amend or revoke another guideline. The EPA is not required to publicly exhibit minor amendments to guidelines (for example if a guideline corrects typographical or grammatical errors). Schedule 1 [48] provides that the EPA or a local authority may disclose to any person a site audit report or site audit statement if the report or statement relates to a statutory site audit within the meaning of Part 4 of the Principal Act.

Schedule 1 [50] makes it clear that nothing in the Principal Act prevents the EPA from issuing a clean-up notice or prevention notice under the Protection of the Environment Operations Act 1997.

Schedule 1 [52] permits the Minister to enter into offset arrangements with a person responsible for the contamination of land under which the person provides assistance (other than direct monetary assistance) to communities affected by the contamination. The arrangements may specify the circumstances and manner in which functions under the Principal Act are to be exercised if the assistance is duly provided. Arrangements may be entered only if the Minister reasonably considers that it would not be practicable to remediate the contamination within a reasonable time.

Schedule 1 [53] permits regulations to be made with respect to the waiving or refunding of costs recoverable by the EPA under proposed section 34 and the disclosing of information obtained in connection with the administration or execution of the Principal Act.

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Schedule 1 [55] permits the regulations to contain provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [58] makes it clear that a direction given under section 35 of the Environmentally Hazardous Chemicals Act 1985 may be revoked by the EPA at any time.

Schedule 1 [61] inserts a number of savings and transitional provisions in Schedule 2 to the Principal Act consequential on the amendments made by the proposed Act.

Schedule 1 [22], [24], [27], [30], [34], [36], [49], [54], [57], [59] and [60] make statute law revision amendments.

Schedule 2 Amendment of instruments

Schedule 2 amends the Environmental Planning and Assessment Regulation 2000, the Local Government (General) Regulation 2005 and the Water Sharing Plan for the Alstonville Plateau Groundwater Sources 2003 as a consequence of the proposed amendments in Schedule 1.