



New South Wales

Protection of the Environment Legislation Amendment Bill 2014

Explanatory note

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

Overview of Bill

The objects of this Bill are:

- (a) to amend the *Contaminated Land Management Act 1997*:
 - (i) to increase the penalties for certain offences against the Act, and
 - (ii) to enable the Environment Protection Authority (the *EPA*) to require a person to whom a management order is directed to provide financial assurance to secure or guarantee funding for or towards the carrying out of an action required by or under the order, and
 - (iii) to enable certain court orders to be made against a convicted offender in connection with the offence against the Act that the offender committed (including an order for the payment of an additional penalty based on a monetary benefit derived by the offender), and
 - (iv) to enable the regulations under the Act to prescribe different amounts of penalties for a penalty notice based on the number of times that an offender has been convicted of, or paid a penalty notice for, the same offence within a 5-year period, and
 - (v) to provide for the liability of offenders for continuing offences and the continuing effect of notices, orders and conditions under the Act and the regulations under the Act, and
- (b) to amend the *Protection of the Environment Operations Act 1997*:
 - (i) to enable clean-up notices to be given to owners of premises as well as occupiers, and

- (ii) to clarify the obligations of occupiers of premises from which point source emissions or non-point source emissions occur in connection with the prevention or minimisation of such emissions, and
 - (iii) to enable certain court orders to be made in connection with offences requiring the offender to undertake restorative justice activities agreed to by the offender and to enable the EPA to accept undertakings to carry out such activities, and
 - (iv) to enable the EPA to require persons who transport waste to ensure that approved GPS tracking devices are installed, used and maintained on motor vehicles used to transport their waste, and
 - (v) to provide that an appeal against a decision to suspend or revoke a licence does not operate to stay the decision, and
 - (vi) to remove the requirement to provide a person with a notice of intention to suspend or revoke a licence and remove certain other outdated provisions of the Act, and
- (c) to amend the *Radiation Control Act 1990*:
- (i) to enable certain court orders to be made against a convicted offender in connection with the offence against the Act that the offender committed (including an order for the payment of an additional penalty based on a monetary benefit derived by the offender), and
 - (ii) to enable the EPA to accept undertakings to carry out restorative justice activities, and
 - (iii) to enable the regulations under the Act to prescribe different amounts of penalties for a penalty notice based on the number of times that an offender has been convicted of, or paid a penalty notice for, the same offence within a 5-year period, and
 - (iv) to enable persons to apply for orders from the Supreme Court to remedy or restrain a breach of the Act or the regulations under the Act, and
- (d) to amend the *Protection of the Environment Administration Act 1991* to provide for certain fees and charges under legislation administered by the EPA to be paid into the Environment Protection Authority Fund, and
- (e) to make consequential amendments to the *Land and Environment Court Act 1979* and *Protection of the Environment Operations (General) Regulation 2009*.

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.

Schedule 1 Amendments concerning contaminated land management

1.1 Contaminated Land Management Act 1997 No 140

Financial assurances for actions required by management orders

Schedule 1.1 [2] amends the *Contaminated Land Management Act 1997* to enable the EPA to require a person to whom a management order is directed to provide financial assurance to secure or guarantee funding for or towards the carrying out of an action required by or under the order. **Schedule 1.1 [4]** inserts provisions based on Part 9.4 (Financial assurances) of the *Protection of the Environment Operations Act 1997* concerning the procedure to be followed in connection with requiring such assurances.

Penalty increases

Schedule 1.1 [3], [5]–[10] and [16] increase the maximum penalties for certain offences against sections 14, 48, 57, 60, 89 and 103 of the *Contaminated Land Management Act 1997*. Schedule 1.1 [3] also clarifies the circumstances in which a person will be treated as failing to comply with a management order.

Schedule 1.1 [11] enables the regulations under the Act to prescribe different amounts of penalties for a penalty notice based on the number of times that an offender has been convicted of, or paid a penalty notice for, the same offence within a 5-year period.

Court orders in connection with offences (including for restorative justice)

Schedule 1.1 [12] inserts provisions that:

- (a) enable the Land and Environment Court to order an offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount that represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence, and
- (b) enable court orders to be made requiring an offender:
 - (i) to publicise the offence and its consequences, or
 - (ii) to notify persons of the offence and its consequences, or
 - (iii) to carry out a project for the restoration or enhancement of the environment, or
 - (iv) to provide a financial assurance in proceedings to which the EPA is a party.

Schedule 1.1 [12] also enables the Land and Environment Court to require an offender to carry out a restorative justice activity that the offender has agreed to carry out. A *restorative justice activity* is a social or community activity for the benefit of the community or persons that are adversely affected by the offence. **Schedule 1.1 [1]** makes a consequential amendment.

Enforcement of undertakings

Schedule 1.1 [14] enables the EPA to accept and enforce a written undertaking given by a person for the purposes of the proposed section in connection with a matter in relation to which the EPA has a function under the Act, including undertakings to carry out restorative justice activities. The provision is based on section 253A of the *Protection of the Environment Operations Act 1997*. **Schedule 1.1 [13]** makes a consequential amendment.

Continuing offences

Schedule 1.1 [15] provides for the liability of offenders for continuing offences. The provision is based on section 242 of the *Protection of the Environment Operations Act 1997*.

Notices, orders and conditions

Schedule 1.1 [17] provides for the continuing effect of notices, orders and conditions under the Act and the regulations under the Act. The provision is based on section 319A of the *Protection of the Environment Operations Act 1997*.

Savings and transitional provisions

Schedule 1.1 [18] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of any Act that amends the *Contaminated Land Management Act 1997*, including the proposed Act.

Schedule 1.1 [19] omits a reference to an obsolete set of guidelines.

Schedule 1.1 [20] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

1.2 Land and Environment Court Act 1979 No 204

Schedule 1.2 [1] and [2] amend the *Land and Environment Court Act 1979* to allocate the following kinds of proceedings in exercise of new jurisdiction to be conferred by Schedule 1.1 to Class 4 of the jurisdiction of the Land and Environment Court:

- (a) proceedings to resolve disputes about claiming on or realising financial assurances under the *Contaminated Land Management Act 1997*,
- (b) proceedings for the enforcement of undertakings under the *Contaminated Land Management Act 1997*.

Schedule 1.2 [3] makes a consequential amendment.

Schedule 2 Amendments concerning protection of environment operations

2.1 Protection of the Environment Operations Act 1997 No 156

Removal of outdated procedural provisions

Schedule 2.1 [1] amends the *Protection of the Environment Operations Act 1997* to provide that the appropriate regulatory authority is not required (as is currently the case) to give the holder of a licence notice of the authority's intention to suspend or revoke the licence (whether with or without conditions) before giving a notice of that suspension or revocation.

Schedule 2.1 [6] and [7] remove the exception for odours from certain requirements to report pollution incidents.

Schedule 2.1 [8] removes certain requirements concerning the affixing of labels on vehicles about the giving of notices.

Clean-up notices to owners

Schedule 2.1 [2] enables an appropriate regulatory authority to give the owner of premises (as well as the occupier of premises) a clean-up notice under section 91 of the *Protection of the Environment Operations Act 1997*.

Pollution mitigation obligations for point source and non-point source emissions

Schedule 2.1 [3] and [4] seek to clarify the operation of section 128 (Standards of air impurities not to be exceeded) of the *Protection of the Environment Operations Act 1997* following the decision of the Land and Environment Court in *Environment Protection Authority v Ravensworth Operations Pty Ltd* [2013] NSWLEC 92.

In that case, the Land and Environment Court held that concentration standards prescribed under section 128 could extend to non-point source emissions (such as emissions of dust from mining) as well as to point source emissions (such as emissions from chimneys, pipes and vents). However, concentrations of non-point source emissions cannot be measured by currently available methodologies.

The result of the decision is that section 128 cannot be used to deal with non-point source emissions because it is not currently possible to prescribe concentration standards or emission rates for them.

The amendments made by Schedule 2.1 [3] and [4] confirm that:

- (a) concentration standards and emission rates prescribed under section 128 apply only to point source emissions, and
- (b) the occupier of premises emitting non-point source emissions must carry on any activity, or operate any plant, in or on the premises by such practicable means as may be necessary to prevent or minimise air pollution from such emissions.

Approved GPS tracking devices for waste transportation vehicles

Schedule 2.1 [5] enables the EPA, by notice in writing, to require a person who is engaged in the transportation of waste to ensure that:

- (a) approved GPS tracking devices are installed, used and maintained, in the manner specified in the notice, on any motor vehicles that are used by the person (or an employee, subcontractor or agent of the person) to transport waste, and
- (b) such devices are not tampered with.

A failure to comply with such a notice will be an offence with a maximum penalty of 200 penalty units (currently, \$22,000) for a corporation and 100 penalty units (currently, \$11,000) for an individual. **Schedule 2.1 [12]** makes a consequential amendment.

Restorative justice activities

Schedule 2.1 [9] enables the Land and Environment Court to require an offender to carry out a restorative justice activity that the offender has agreed to carry out. **Schedule 2.1 [14]** makes a consequential amendment.

Schedule 2.1 [10] enables the EPA to accept a written undertaking to carry out restorative justice activities.

Appeals against decisions to suspend or revoke licences

Schedule 2.1 [11] provides that an appeal against a decision to suspend or revoke a licence does not operate to stay the decision.

Savings and transitional provisions

Schedule 2.1 [13] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

2.2 Protection of the Environment Operations (General) Regulation 2009

Schedule 2.2 makes amendments to the *Protection of the Environment Operations (General) Regulation 2009* concerning penalty notices that are consequential on the amendments made to the *Protection of the Environment Operations Act 1997*.

Schedule 3 Amendment of Radiation Control Act 1990 No 13

Court orders in connection with offences (including for restorative justice)

Schedule 3 [2] amends the *Radiation Control Act 1990* to insert provisions that:

- (a) enable the Supreme Court to order an offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount that represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence, and
- (b) enable court orders to be made requiring an offender:
 - (i) to publicise the offence and its consequences, or
 - (ii) to notify persons of the offence and its consequences, or
 - (iii) to carry out a project for the restoration or enhancement of the environment, or
 - (iv) to attend, or to cause an employee or employees or a contractor or contractors of the offender to attend, a training or other course, or
 - (v) to establish training courses for employees and contractors, or
 - (vi) to provide a financial assurance in proceedings to which the EPA is a party.

Schedule 3 [2] also enables the Supreme Court to require an offender to carry out a restorative justice activity that the offender has agreed to carry out. **Schedule 3 [1]** makes a consequential amendment.

Enforcement provisions

Schedule 3 [3] enables the EPA to accept a written undertaking to carry out restorative justice activities.

Schedule 3 [4] enables the regulations under the *Radiation Control Act 1990* to prescribe different amounts of penalties for a penalty notice based on the number of times that an offender has been convicted of, or paid a penalty notice for, the same offence within a 5-year period.

Schedule 3 [5] enables persons to apply for orders from the Supreme Court to remedy or restrain a breach of the Act or the regulations under the Act. The provision is based on section 253 of the *Protection of the Environment Operations Act 1997*, which confers a corresponding jurisdiction on the Land and Environment Court.

Savings and transitional provisions

Schedule 3 [6] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of any Act that amends the *Radiation Control Act 1990*, including the proposed Act.

Schedule 3 [7] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 4 Amendment of Protection of the Environment Administration Act 1991 No 60

Schedule 4 [1] amends the *Protection of the Environment Administration Act 1991* to provide for certain fees and charges under legislation administered by the EPA to be paid into the Environment Protection Authority Fund.

Schedule 4 [2] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of any Act that amends the *Protection of the Environment Administration Act 1991*, including the proposed Act.