

ENVIRONMENTAL OFFENCES AND PENALTIES ACT 1989
No. 150

NEW SOUTH WALES



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ENVIRONMENTAL OFFENCES AND PENALTIES ACT 1989
No. 150

NEW SOUTH WALES



Act No. 150, 1989

An Act to create further offences relating to the pollution of the environment; to amend certain Acts; and for other purposes.
[Assented to 27 November 1989]

The Legislature of New South Wales enacts:

PART 1 - PRELIMINARY

Short title

1. This Act may be cited as the Environmental Offences and Penalties Act 1989.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Object of the Act

3. (1) The principal object of this Act is to supplement other laws which protect the environment from pollution:

- (a) by creating additional offences relating to:
 - (i) the disposal of waste without lawful authority, and
 - (ii) the leaking, spillage and escape of substances from their containers,by which harm is or is likely to be caused to the environment; and
- (b) by enabling the imposition of penalties for the additional offences of:
 - (i) up to \$1,000,000 in the case of a corporation; and
 - (ii) up to \$150,000 or 7 years imprisonment, or both, in any other case; and
- (c) by enabling courts to make orders restricting the disposition of property or other dealings with property by a person against whom proceedings have been brought under the proposed Act so as to ensure that the person has sufficient assets to pay:
 - (i) the costs of cleaning up environmental pollution caused by the person; and
 - (ii) any other damages which may be awarded against the person in respect of that environmental pollution.

(2) Except as provided in sections 29 and 30, nothing in this Act affects any of the provisions of any other Act, or any regulations, ordinances or by-laws made under another Act or takes away any

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powers vested in any person or body by any other Act, or any regulations, ordinances or by-laws made under any other Act.

Definitions

4. (1) In this Act:

"pollution control authority" means:

- (a) a licence granted by the State Pollution Control Commission in respect of:
 - (i) scheduled premises or scheduled equipment within the meaning of the Clean Air Act 1961; or
 - (ii) the pollution of waters within the meaning of the Clean Waters Act 1970; or
 - (iii) a drain which discharges or is likely to be used for discharging any pollutants into any classified waters within the meaning of the Clean Waters Act 1970; or
- (b) a licence or certificate of registration granted under section 23 of the Waste Disposal Act 1970; or
- (c) a licence granted under section 28 of the Environmentally Hazardous Chemicals Act 1985; or
- (d) a prescribed licence, permission or other authority given under the Water Board Act 1987, the Water Supply Authorities Act 1987, the Hunter Water Board Act 1988 or a regulation made under any of those Acts;

"public authority" means a public or local authority constituted by or under an Act, a Government Department or a statutory body representing the Crown, and includes a person exercising functions on behalf of that authority, Department or body;

"restraining order" means an order made under section 16;

"waste" means:

- (a) effluent, being any matter or thing, whether solid or liquid or a combination of solids and liquids, which is of a kind that may be removed from a septic tank, septic closet, chemical closet, sullage pit or grease trap, or from any holding tank or other container forming part of or used in connection with a septic tank, septic closet, chemical closet, sullage pit or grease trap; or

- (b) trade waste, being any matter or thing, whether solid, gaseous or liquid or a combination of solids, gases and liquids (or any of them), which is of a kind that comprises refuse from any industrial, chemical, trade or business process or operation, including any building or demolition work; or
- (c) garbage, being all refuse other than trade waste and effluent.

(2) In this Act, a reference to the disposal of waste includes a reference to the causing or permitting of the disposal of waste.

(3) For the purposes of this Act, a substance is not precluded from being waste merely because it may be refined or recycled.

(4) In this Act:

- (a) a reference to a function includes a reference to a power, authority and duty; and
- (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

PART 2 - OFFENCES

Disposal of waste without lawful authority

5. (1) A person who, without lawful authority, wilfully or negligently disposes of waste in a manner which harms or is likely to harm the environment is guilty of an offence.

(2) A person who, without lawful authority, attempts to dispose of waste in a manner which harms or is likely to harm the environment is guilty of an offence.

(3) A person who aids, abets, counsels or procures another person to dispose of waste without lawful authority in a manner which harms or is likely to harm the environment is guilty of an offence.

(4) A person who conspires to commit an offence against this section is guilty of an offence.

(5) The onus of proving that a person had lawful authority to dispose of waste lies with the defendant.

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Leaks, spillages etc.

6. (1) If a person, without lawful authority, wilfully or negligently causes any substance to leak, spill or escape from a container in a manner which harms or is likely to harm the environment:

- (a) the person; and
- (b) if the person is not the owner of the substance, the owner,

are each guilty of an offence.

(2) If:

- (a) the person in possession of the substance at the time of the leak, spill or escape; or
- (b) the owner of the container; or
- (c) the owner of the land on which the container was located at the time of the leak, spill or escape; or
- (d) the occupier of the land on which the container was located at the time of the leak, spill or escape,

wilfully or negligently, in a material respect, caused or contributed to the conditions which gave rise to the commission of the offence under subsection (1), the person is guilty of an offence.

(3) The onus of proving that a person had lawful authority to cause a substance to leak, spill or escape from a container lies with the defendant.

(4) In this section, "container" includes any thing for the purpose of storing, transporting or handling the substance.

Defence

7. It is a defence to any proceedings against a person for an offence against a provision of this Act for the person to prove that the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.

Penalty for offences

8. A person who is guilty of an offence against this Act is liable to a penalty not exceeding \$1,000,000 in the case of a corporation or, in any other case, \$150,000 or 7 years imprisonment, or both.

Matters to be considered in imposing penalty

9. In imposing a penalty for an offence against this Act, the court is to take into consideration (in addition to any other matter the court considers relevant):

- (a) the extent of the harm caused or likely to be caused to the environment by the commission of the offence; and
- (b) the practical measures which may be taken to prevent, control, abate or mitigate that harm; and
- (c) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence; and
- (d) the extent to which the person who committed the offence had control over the causes which gave rise to the offence; and
- (e) whether, in committing the offence, the person was complying with orders from an employer or a supervising employee.

Offences by corporations

10. (1) If a corporation contravenes, whether by act or omission, any provision of this Act, each person who is a director of the corporation or who is concerned in the management of the corporation is to be taken to have contravened the same provision unless the person satisfies the court that:

- (a) the corporation contravened the provision without the knowledge actual, imputed or constructive of the person; or
- (b) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or
- (c) the person, if in such a position, used all due diligence to prevent the contravention by the corporation.

(2) A person may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or been convicted under that provision.

(3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act.

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PART 3 - PROCEEDINGS FOR OFFENCES

Nature of proceedings for offences

11. (1) Proceedings for an offence against this Act may be dealt with:

- (a) summarily before a Local Court constituted by a Magistrate sitting alone; or
- (b) summarily before the Land and Environment Court in its summary jurisdiction; or
- (c) on indictment before the Supreme Court.

(2) If proceedings are brought in a Local Court, the maximum penalty that the Local Court may impose for the offence is, notwithstanding any other provision of this Act, \$10,000 or 2 years imprisonment, or both.

(3) If proceedings are brought in the Land and Environment Court, the maximum penalty that the Court may impose for the offence is, notwithstanding any other provision of this Act, \$1,000,000 in the case of a corporation or, in any other case, \$150,000 or 2 years imprisonment, or both.

Time within which proceedings dealt with summarily may be commenced

12. Despite the Justices Act 1902 or any other Act, proceedings for an offence against this Act dealt with summarily may be commenced not later than 3 years after the date alleged to be the date on which the offence was committed.

Consent to institution of proceedings

13. (1) Proceedings for an offence against this Act may be instituted only with the written consent of:

- (a) the Minister; or
- (b) a member of the State Pollution Control Commission authorised in writing by the Minister for the purposes of this section; or
- (c) the State Pollution Control Commission; or
- (d) a member or officer of the State Pollution Control Commission authorised in writing by the Commission for the purposes of this section,

except as provided by this section.

(2) Proceedings against the Crown, a person acting on behalf of the Crown, or a public authority, for an offence against this Act may be instituted only with the written consent of:

- (a) the Minister; or
- (b) a member of the State Pollution Control Commission authorised in writing by the Minister for the purposes of this section.

PART 4 - RESTORATION, COMPENSATION AND DAMAGES

Orders for restoration and compensation

14. (1) In addition to imposing a penalty for an offence against this Act, a court may order the person convicted to take such steps as are specified in the order, within such time as is so specified (or such further time as the court on application may allow), to prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence.

(2) In addition to imposing a penalty for an offence against this Act, a court may, where it appears to the court that:

- (a) a public authority has incurred costs and expenses in connection with the prevention, control, abatement or mitigation of any such harm; or
- (b) a person (including a public authority) has, by reason of the commission of the offence, suffered loss of or damage to property or has incurred costs and expenses in preventing or mitigating, or in attempting to prevent or mitigate, any such loss or damage,

order the person so convicted to pay to the public authority or person the costs and expenses so incurred, or compensation for loss of or damage to property so suffered, as the case may be, in such amount as is fixed by the order.

(3) An order made by the Land and Environment Court under subsection (2) is enforceable as if it were an order made by the Court in Class 4 proceedings under the Land and Environment Court Act 1979.

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Recovery of damages

15. (1) If, after the date of conviction of any person for an offence against this Act:

- (a) a public authority has incurred costs and expenses in connection with the prevention, control, abatement or mitigation of any harm to the environment caused by reason of the commission of the offence; or
- (b) a person (including a public authority) has, by reason of the commission of the offence, suffered loss of or damage to property or has incurred costs and expenses in preventing or mitigating, or in attempting to prevent or mitigate, any such loss or damage,

the person or public authority may recover from any person convicted of the offence the costs and expenses incurred or the amount of the loss or damage in the Land and Environment Court or any other court of competent jurisdiction.

(2) The amount of any such costs and expenses (but not the amount of any such loss or damage) may be recovered as a debt.

Restraining order over property of defendant

16. (1) Where:

- (a) proceedings have been taken against a person for an offence against this Act and, as a result of those proceedings the defendant may be required to pay an amount referred to in section 14 (2); or
- (b) proceedings are taken under section 15,

the person bringing the proceedings may apply for an order directing that any property of the defendant is not to be disposed of, or otherwise dealt with, by the defendant or by any other person, except in such manner and in such circumstances (if any) as are specified in the order.

(2) The application may be made:

- (a) in the case of proceedings taken before a Local Court - to the Land and Environment Court; and
- (b) in any other case - to the court before which the proceedings are brought.

(3) On such an application:

- (a) the court may, if it thinks fit, require the person making the application to give notice of the application to a person who the court has reason to believe has an interest in the property or part of the property; and
- (b) a person to whom the court requires notice to be given under paragraph (a) is entitled to appear and to adduce evidence at the hearing of the application.

(4) On such an application, the court may, if it is satisfied that there is a real risk that the defendant will dispose of, or otherwise deal with, his or her assets in order to avoid paying an amount referred to in section 14 (2) or 15 (1), make an order directing that any property of the defendant is not to be disposed of, or otherwise dealt with, by the defendant or by any other person, except in such manner and in such circumstances (if any) as are specified in the order.

(5) The court may refuse to make an order if the person making the application refuses or fails to give to the court such undertakings as the court considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and operation of the order.

Court may make further orders

17. (1) If the court makes a restraining order, the court may, at the time when it makes the restraining order or at any later time, make any ancillary orders that the court considers appropriate, and without limiting the generality of this, the court may make any one or more of the following orders:

- (a) an order for the examination on oath of:
 - (i) the defendant; or
 - (ii) another person,before the court, or an officer of the court prescribed by the rules of court, concerning the affairs of the defendant, including the nature and location of any property of the defendant;
- (b) an order varying the restraining order in respect of the property to which it relates;
- (c) an order varying any conditions to which the restraining order was subject.

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- (2) An order under this section may be made on application:
- (a) by the applicant for the restraining order; or
 - (b) by the defendant; or
 - (c) with the leave of the court - by any other person.

Charge on property subject to restraining orders

18. (1) If:
- (a) the court has made a restraining order in respect of particular property or all of the property of the defendant; and
 - (b) the court orders the payment of an amount referred to in section 14 (2) or 15 (1),

there is created by force of this section, on the making of the order, a charge on all the property to which the restraining order applies to secure the payment to a public authority or person of the amount referred to in section 14 (2) or 15 (1).

- (2) Such a charge ceases to have effect in respect of the property:
- (a) on payment by the defendant to a public authority or person of the amount referred to in section 14 (2) or 15 (1); or
 - (b) on the sale or other disposition of the property with the consent of the court; or
 - (c) on the sale of the property to a purchaser in good faith for value who, at the time of the purchase, has no notice of the charge,

whichever first occurs.

- (3) Such a charge:
- (a) is subject to every charge or encumbrance to which the property was subject immediately before the penalty was imposed or the order was made and, in the case of land under the provisions of the Real Property Act 1900, is subject to every mortgage, lease or other interest recorded in the Register kept under that Act; and
 - (b) subject to subsection (2), is not affected by any change of ownership of the property.

- (4) If:
- (a) such a charge is created on property of a particular kind and the provisions of any law of the State provide for the registration of title to, or charges over, property of that kind; and

(b) the charge is so registered,
a person who purchases or otherwise acquires the property after the registration of the charge is, for the purposes of subsection (2), to be taken to have notice of the charge.

(5) Where a charge under this section relates to land under the provisions of the Real Property Act 1900, the charge has no effect until it is registered under that Act.

Registration of restraining orders

19. (1) If a restraining order applies to property of a particular kind and the provisions of any law of the State provide for the registration of title to, or charges over, property of that kind, the authority responsible for administering those provisions is required, on application by any person, to record the particulars of the restraining order on the register kept under those provisions.

(2) If the particulars of a restraining order are so recorded, a person who subsequently deals with the property is, for the purposes of section 18, to be taken to have notice of the restraining order.

(3) If a restraining order applies to land under the provisions of the Real Property Act 1900, a caveat may be lodged under that Act in relation to the order.

Contravention of restraining orders

20. (1) A person who knowingly contravenes a restraining order by disposing of, or otherwise dealing with, property that is subject to the restraining order is guilty of an offence and punishable, on conviction, by a fine equivalent to the value of the property (as determined by the court) or by imprisonment for a period not exceeding 2 years, or both.

(2) If:

- (a) a restraining order is made against property, and
- (b) the property is disposed of, or otherwise dealt with, in contravention of the restraining order; and
- (c) the disposition or dealing was either not for sufficient consideration or not in favour of a person who acted in good faith,

the person who applied for the restraining order may apply to the court for an order that the disposition or dealing be set aside.

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(3) If an application is made under subsection (2) in relation to a disposition or dealing, the court may make an order:

- (a) setting aside the disposition or dealing as from the day on which the disposition or dealing took place; or
- (b) setting aside the disposition or dealing as from the day of the order under this subsection and declaring the respective rights of any persons who acquired interests in the property on or after the day on which the disposition or dealing took place and before the day of the order.

Courts may revoke restraining orders

21. If, in reliance on the charging of a person with an offence against this Act, the court has made a restraining order, the court may, on application made to it by the person, revoke the order if the person:

- (a) gives security satisfactory to the court for the payment of any amount referred to in section 14 (2) or 15 (1) that may be imposed on or ordered to be paid by the person under this Act in respect of the person's conviction for the offence; or
- (b) gives undertakings satisfactory to the court concerning the person's property.

Time when restraining order ceases to be in force

22. If, when a restraining order was made in reliance on the charging of a person with an offence against this Act:

- (a) the charge is withdrawn and the person is not charged with a related offence by the time of the withdrawal, the restraining order ceases to be in force when the charge is withdrawn; or
- (b) the person is acquitted of the charge and the person is not charged with a related offence by the time of the acquittal, the restraining order ceases to be in force when the acquittal occurs.

PART 5 - GENERAL

Act to bind Crown

23. This Act binds the Crown in right of New South Wales and, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Appointment of persons to exercise certain functions

- 24.** (1) This section applies to a public body, being
- (a) the council of a local government area; or
 - (b) a county council of a county district; or
 - (c) any other public body which:
 - (i) is constituted by or under an Act; and
 - (ii) is not subject to the control or direction of a Minister.
- (2) If, in the opinion of the Governor, the environment is harmed or is likely to be harmed because of
- (a) the failure or refusal of a public body to which this section applies to exercise a function conferred or imposed on the body by or under an Act; or
 - (b) the manner in which the body exercises such a function,
- the Governor may, by proclamation, appoint another person to exercise such functions of the body as are specified in the proclamation.
- (3) The person so appointed is to be taken, during the period of the appointment, to have the functions specified in the person's appointment and to have those functions to the exclusion of the body which would, but for the appointment, have those functions.
- (4) A proclamation under subsection (2), unless sooner revoked, ceases to have effect on the expiration of 21 sitting days of the Legislative Assembly after it is made.
- (5) The Governor may, by proclamation, revoke or amend the terms of an appointment under this section at any time before the proclamation ceases to have effect.
- (6) The regulations may make provision for or with respect to the functions of a person in connection with the person's appointment and, in particular, for or with respect to:
- (a) the remuneration of the person; and
 - (b) the incurring of expenditure by the person; and
 - (c) requiring other persons to render all necessary assistance to the person in the exercise of a function specified in the person's appointment.

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Restraint of breaches of an Act or statutory rule which harm environment etc.

25. (1) Proceedings may be brought in the Land and Environment Court for an order to restrain a breach, or a threatened or apprehended breach, of this or any other Act, or any statutory rule under an Act, if the breach, or the threatened or apprehended breach, is causing or is likely to cause harm to the environment.

(2) Proceedings may be brought under this section by:

- (a) the Minister; or
- (b) a member of the State Pollution Control Commission authorised in writing by the Minister for the purposes of this section; or
- (c) the State Pollution Control Commission; or
- (d) a member or officer of the State Pollution Control Commission authorised in writing by the Commission for the purposes of this section; or
- (e) any other person with the consent of the State Pollution Control Commission.

(3) If another Minister is responsible for the administration of such an Act or statutory rule, that Minister is to be consulted by the Minister before the proceedings may be brought, and a certificate by the Minister or such a member or officer of the State Pollution Control Commission certifying that the consultation has occurred is evidence of that fact.

(4) If a person applies for consent to bring proceedings under this section, the State Pollution Control Commission must notify the person in writing whether or not consent is granted, and if consent is refused, must inform the person of the reasons for the refusal not later than 28 days after the date of the notice of refusal.

(5) If the Court is satisfied that a breach, or a threatened or apprehended breach, will, unless restrained by order of the Court, be committed or be likely to be committed, it may make such orders as it thinks fit to restrain the breach or other conduct of the person by whom the breach is committed or by whom the threatened or apprehended breach is likely to be committed.

(6) Without limiting the powers of the Court under this section, an order under this section may suspend any pollution control authority.

(7) In this section, "**statutory rule**" means a regulation, by-law, rule or ordinance:

- (a) that is made by the Governor; or
- (b) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor.

Minister may revoke or suspend authorities granted under other Acts

26. (1) If

- (a) the holder of a pollution control authority; or
- (b) the occupier of premises the subject of a pollution control authority,

is convicted of a pollution offence, the Minister may, by notice in writing served on the person, revoke the authority or suspend it for such portion of its unexpired term as the Minister thinks fit.

(2) Where another Minister is responsible for the administration of the Act or regulations under which the pollution control authority is granted, the Minister is to consult with that Minister before revoking or suspending the authority under this section.

(3) In this section, "**pollution offence**" means an offence the commission of which has caused or is likely to cause harm to the environment.

Evidence of analysts

27. (1) The State Pollution Control Commission may, by instrument in writing, appoint appropriately qualified persons to be analysts for the purposes of this Act.

(2) A certificate of such an analyst stating the result of an analysis or examination is admissible in evidence in any proceedings for an offence against this Act as evidence of the facts stated in the certificate and of the correctness of the result of the analysis or examination.

(3) For the purposes of this section, a document purporting to be a certificate under this section is, unless the contrary is proved, to be taken to be such a certificate.

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Regulations

28. The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Amendment of the Land and Environment Court Act 1979 No. 204

29. The Land and Environment Court Act 1979 is amended:

- (a) by inserting after section 20 (1) (ch) the following paragraph:
 - (ci) proceedings under section 15 or 25 of the Environmental Offences and Penalties Act 1989;
- (b) by inserting after section 21 (c) the following paragraph:
 - (ca) proceedings under section 5, 6 or 10 of the Environmental Offences and Penalties Act 1989;

Amendment of the State Pollution Control Commission Act 1970 No. 95

30. The State Pollution Control Commission Act 1970 is amended:

- (a) by omitting from paragraph (d) of the definition of "Pollution Control Acts" in section 5 the word "and";
- (b) by inserting at the end of paragraph (e) of the definition of "Pollution Control Acts" in section 5 the following word and paragraph:
 - and
 - (f) the Environmental Offences and Penalties Act 1989;
- (c) by omitting section 17P (2) and by inserting instead the following subsection:
 - (2) Any particulars so supplied to the Commission are admissible in evidence in any prosecution of that holder for any offence against a Pollution Control Act, whether or not the particulars might tend to incriminate that holder.
- (d) by inserting in the definition of "Pollution Control Acts" in section 30B (4) after the matter "1985" the words "or the Environmental Offences and Penalties Act 1989".

[Minister's second reading speech made in -
Legislative Assembly on 1 August 1989
Legislative Council on 21 September 1989]