

[Act 1997 No 140]



New South Wales

Contaminated Land Management Bill 1997

Explanatory note

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

Overview of Bill

The object of this Bill is to establish a process for investigating and (where appropriate) remediating land areas where contamination presents a significant risk of harm to human health or some other aspect of the environment.

In particular, the proposed Act:

- (a) sets out accountabilities for managing contamination if a significant risk of harm is identified, and
- (b) sets out the role of the EPA in the assessment of contamination and the supervision of the investigation, remediation and management of contaminated sites, and

* Amended in committee—see table at end of volume.

- (c) provides for the accreditation of site auditors of contaminated land to ensure appropriate standards of auditing in the management of contaminated land, and
- (d) aims to ensure that contaminated land is managed with regard to the need to maintain ecologically sustainable development.

Outline of provisions

Part 1 Preliminary

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.

Clause 3 states the objects of the proposed Act.

Clause 4 defines a number of terms used generally in the proposed Act.

Clause 5 defines *contamination*.

Part 2 Main functions of EPA under this Act

This Part summarises the cardinal duties and powers of the Environment Protection Authority (EPA) under the proposed Act and outlines how the EPA is to decide when contamination presents a significant risk of harm.

The EPA must (**clause 6**) examine and respond to reports of contamination and, if the EPA has reasonable grounds to believe that the contamination presents a significant risk of harm, may formally order an investigation (**clause 7**). If land is found to be contaminated and to present such a risk, the EPA may order remediation (clause 7). In other cases, the EPA may adopt other strategies, but is not required to act (**clause 8**). Factors to be taken into account in assessing a significant risk of harm are set out in **clause 9**, and there is a general requirement that the EPA exercise its functions under the proposed Act with regard to the need to maintain ecologically sustainable development (**clause 10**).

Part 3 Investigation and remediation of contaminated land

Part 3 provides details of the investigation and remediation procedures.

Division 1 Preliminary

In summary (**clause 11**), the EPA may declare investigation areas and remediation sites, and make investigation orders and remediation orders. Choice of the appropriate person to investigate or remediate must be according to **clause 12**, interpreted in the light of **clause 13** (dealing with cases of indirect or delayed contamination). The principal contaminator is the first choice, but if that person is not found or is insolvent, the owner of the contaminated land is the next choice, followed by its *notional owner* (defined in **clause 14**). An alternative to all these choices is to make the order against a public authority.

Contributions from different parties towards the costs of investigation or remediation are dealt with later (Division 6).

Division 2 Investigation

Details are given of the basis and procedure for declaring general investigation areas (**clause 15**) and ending such declarations (**clause 16**) as well as the making of investigation orders (**clause 17**) that require a person to carry out specified actions (**clause 18**).

Division 3 Remediation

Details are given of the basis and procedure for declaring specific remediation sites (**clause 19**) and ending such declarations (**clause 20**) as well as the making of remediation orders (**clause 21**) that require a person to carry out specified actions (**clause 22**).

The nature of remediation is outlined in **clause 23**. It includes a range of actions besides full clean-ups, such as sealing off contamination, not disturbing land, or fencing land off so that it cannot be disturbed.

Voluntary remediation is not restricted by the proposed Act, and the EPA may agree with the parties to voluntary proposals not to issue remediation orders against them (**clause 24**), but may still issue such orders in circumstances falling outside the proposals (**clause 25**).

The EPA may require the continuation of remediation action (for example, the maintenance of barriers created for the purposes of remediation). Those requirements may be made by notice to owners or occupiers under **clause 26** or by a type of positive covenant under **clause 27**.

Division 4 Action by public authority

Public authorities must comply with investigation orders (**clause 29**), though they cannot be prosecuted for a failure to do so if they are not contaminators or owners of the relevant land (clause 21 (5)). They may also under **clause 28** carry out orders originally directed against other persons who have failed to comply with those orders.

Division 5 Entry on land to investigate or remediate that or other land

A requirement to investigate or remediate does not confer an ancillary power to enter land. However, an occupier who refuses to permit entry may be required to comply with that requirement instead (**clause 30**). On the other hand, losses suffered by an occupier or owner because of investigation or remediation carried out by another person may be recouped by the occupier or owner (**clause 31**).

Division 6 Cost of investigation or remediation

The costs associated with investigation and remediation orders may be recovered (EPA administrative costs under **clause 32**, public authorities' substantive costs of compliance under **clause 33** and other persons' substantive costs of compliance under **clause 34**). Ultimately it is the persons responsible for the contamination who have the responsibility to pay, but if some or all of them cannot pay or cannot be found, some or all of the costs may remain with the owner.

A public authority has priority over a person holding a security over land remediated by the authority if the land is disclaimed as onerous property (**clause 35**). A personal representative's or trustee's liability cannot extend beyond the value of the property that may be disposed of by him or her (**clause 36**).

A costs notice served by a public authority may be registered by the Registrar-General (**clause 37**) to create a charge on the land investigated or remediated (**clause 38**) that has priority over all other encumbrances. Regulations may be made providing for the removal of the charge (**clause 39**).

A public authority that recovers any money in respect of the authority's investigation or remediation of land must pay the money into the Consolidated Fund if the authority's relevant costs were originally met by an appropriation from that Fund (for example in the case of "orphan sites", the owners and contaminators of which are untraceable): **clause 40**.

Division 7 General

Ancillary provisions:

- (a) make it clear that more than one notice, declaration or order may be issued under Part 3 (**clause 41**) and that notices, declarations and orders may be varied or revoked (**clause 42**), and
- (b) prohibit the obstruction of persons carrying out orders (**clause 43**), and
- (c) prohibit the making of false reports (**clause 44**).

Part 4 Audit of investigation or remediation

This Part sets standards for the audit of investigation or remediation of contaminated land (*site audit* and other terms being defined in **clause 45**), particularly but not exclusively when the audit is carried out to satisfy some statutory requirement (**clause 46**). Matters to be taken into account in site audits and in statements prepared in relation to them are specified in **clause 49**.

A scheme for the accreditation of site auditors is set up (applications are made under **clause 47**, accreditation is granted under **clause 48** and accreditation may be suspended or revoked under **clause 54**). A person must not falsely pretend to be an accredited site auditor (**clause 55**).

Site auditors must under **clause 50** let the EPA know when they conduct an audit for the purposes of a statutory requirement, prepare site audit statements for all audits, and give the EPA and local authorities copies of statements of audits conducted for the purposes of a statutory requirement. They must make annual returns (**clause 51**), avoid conflicts of interest (**clause 52**), and not make false audits or statements (**clause 53**).

Part 5 Information

The EPA is to maintain a record of declarations and orders made under Part 3 and site audit statements furnished under Part 4, but only while they are current (**clause 56**). The record is to be open for inspection by the public. Local authorities are to be informed by the EPA of declarations and orders (**clause 57**).

A person who carries on an activity on land that has contaminated it in such a way as to present a significant risk of harm, and an owner of land who knows of an activity that has contaminated the land at any time in such a way, have a duty to inform the EPA of the contamination (**clause 58**).

Part 6 Appeals

A person ordered to investigate or remediate may appeal to the Land and Environment Court against the order (**clause 59**). The appellate powers of the Court are outlined in **clause 60**.

Part 7 Orders against directors or companies to investigate or remediate at own expense

Provision is made to deal with certain cases of evasion by corporations of their obligations under investigation or remediation orders.

If a corporation is wound up to avoid compliance with an order, a director (**clause 61**) or holding company (**clause 63**) may be ordered by the Land and Environment Court to comply with the order instead.

If contaminated land is disposed of to avoid compliance with an order, a director of the corporation that disposed of the land may be similarly ordered to comply (**clause 62**).

Part 8 Evidence

Part 8 contains provisions (including definitions in **clause 64**) relating to presumptions as to certain matters:

- (a) responsibility for contamination of land (**clause 65**),
- (b) ownership or occupation of land (**clause 66**),
- (c) appointments of various officers (**clause 67**),
- (d) authenticity and authorship of documents and signatures (**clause 68**),
- (e) various matters set out in certificates (**clause 69**),
- (f) authenticity and correctness of scientific analyses and reports (**clause 70**).

Part 9 Authorised officers

Division 1 Administration

Authorised officers may be appointed for the purposes of the proposed Act (**clause 71**), with unrestricted authority or subject to limits (**clause 72**) and must be issued with proof of identity and show it when appropriately asked to do so (**clause 73**).

Division 2 Powers to require information or records

In certain situations, the EPA may require (**clause 75**) the provision of information or records within the knowledge or control of a person (**clause 78**), or an authorised officer may make such a requirement (**clause 76**). A manner and reasonable period for compliance must be specified (**clause 77**). Whether a power of entry under proposed Division 3 has been exercised is irrelevant to the operation of this Division (**clause 74**). **Clause 78** also provides that the person furnished with the material may require it to be provided in written form and may copy it.

Division 3 Powers of entry and search of land

An authorised officer may enter land (**clause 79**), but if that means entering a residence, only with a search warrant or the occupier's permission (**clause 80**). Once on the land, the officer may carry out examinations and do other things specified in **clause 81**. Officers may apply for search warrants (**clause 82**) and may require the assistance of occupiers of premises entered by the officers (**clause 83**). They must exercise care in entering and searching premises (**clause 84**) and the EPA must (with certain exceptions) compensate persons who suffer loss through damage caused when an officer exercises a power of entry (**clause 85**).

Division 4 Powers to question persons

An authorised officer may require a person to provide answers and the EPA may require a body corporate to nominate a representative to provide such answers (**clause 86**).

Division 5 General

Offences of failing to answer questions, lying and obstructing under the Part are set out in **clause 87**. Procedural and evidentiary provisions concerning questioning are set out in **clause 88**.

Part 10 Offences

Division 1 Proceedings for offences generally

The courts that have jurisdiction over offences under the proposed Act (**clauses 89 and 90**) and limitations for the bringing of prosecutions (**clause 91**) are specified.

Division 2 Who may institute proceedings for offences

The EPA is the normal initiator of proceedings (**clause 92**) for a breach of the proposed Act or the regulations made under the proposed Act; but any person may initiate proceedings with the leave of the Land and Environment Court if the EPA does not do so (**clause 93**).

Division 3 Restraint of breaches without prosecution for offence

Any person may seek an order against an actual or threatened breach of the Act or regulations made under the proposed Act (**clause 94**).

Division 4 General

Clause 95 sets out matters to be considered in sentencing.

A director of a corporation that commits an offence is guilty of the same offence as the corporation unless the director can disprove his or her guilt (**clause 96**).

A defendant to any proceedings under a provision that provides a defence of reasonable excuse has the onus of proving the defence (**clause 97**).

In dealing with an offence under the proposed Act, a court may, among other things, dismiss a charge or conditionally discharge a defendant under section 556A of the *Crimes Act 1900* or defer sentence under section 558 of that Act (**clause 98**).

Part 11 Miscellaneous

The proposed Act binds the Crown (**clause 99**), provides for the resolution of disputes between the EPA and other public authorities (**clause 100**), prohibits false statements generally under the proposed Act (**clause 101**), makes it clear that the EPA may conduct education programs about contamination (**clause 102**), enables the EPA to make guidelines and sets out the procedure for their making (**clause 103**), prohibits (with exceptions) the disclosure of secrets learnt in the administration of the proposed Act (**clause 104**) and provides various means for the service of notices under the proposed Act (**clause 105**).

The operation of other Acts is not restricted (**clause 106**) and civil and other remedies are not displaced (**clause 107**).

Clause 108 makes it clear that the notes in the text are not actually part of the proposed Act.

Clause 109 is a regulation-making power.

Clause 110 repeals the *Environmentally Hazardous Chemicals Amendment Act 1996* which remains uncommenced. The purpose of that Act is served by the inclusion of Part 4 of the proposed Act (Audit of investigation or remediation).

Clause 111 is a formal provision giving effect to the various consequential amendments set out in Schedule 1. The amendments include the repeal of Part 5 of the *Environmentally Hazardous Chemicals Act 1985*, as that Part is to be substantially covered by Part 3 of the proposed Act.

Clause 112 is a formal provision giving effect to the savings and transitional provisions set out in Schedule 2.

Clause 113 is a standard provision requiring the Minister to review the operation of the proposed Act after 5 years.

Schedule 1 Amendments is referred to under clause 111 above.

Schedule 2 Savings and transitional provisions is referred to under clause 112 above.