

[Act 2002 No 14]



New South Wales

## Environment Protection Legislation Amendment Bill 2002

### 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* and other Acts and regulations relating to environment protection for the following purposes:

- (a) to extend accreditation periods for site auditors of contaminated land,
- (b) to make it clear that additional information required to be given after notice of a pollution incident is admissible as evidence against a person,
- (c) to require written reasons to be given for refusal of a request to surrender a licence under the *Protection of the Environment Operations Act 1997*,
- (d) to clarify the operation of certain offences and to make the owners of motor vehicles and vessels liable for certain offences,

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

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Explanatory note

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- (e) to provide for the appointment and powers of authorised officers for the purposes of the *Radiation Control Act 1990*,
- (f) to extend the powers of officers who issue penalty notices and other officers for purposes related to their functions,
- (g) to clarify the circumstances when a search warrant may be applied for,
- (h) to enable an authority that mistakenly exercises regulatory functions to continue to act as a regulatory authority if the correct authority does not direct otherwise,
- (i) to make it clear that an authority may take proceedings in the Land and Environment Court for any offence under the *Protection of the Environment Operations Act 1997* with the leave of the Court,
- (j) to make it clear that statutory notices requiring action to be taken continue to have effect until the action is taken, regardless of the expiration of time, and that failure to comply will be a continuing offence,
- (k) to vary the period within which a licence is taken to have been refused for appeal purposes,
- (l) to make it an offence to falsely represent that any goods or services are approved, provided, recommended or used by the EPA,
- (m) to set out regulation-making powers relating to licence conditions, fuel, fuel burning equipment and air impurities,
- (n) to provide for the licensing of persons to possess certain radioactive substances and apparatus,
- (o) to provide for periods of accreditation for radiation experts,
- (p) to clarify the powers of authorised officers to inspect premises and vehicles and detain vehicles used in relation to the transport of dangerous goods,
- (q) to make other amendments, consequential amendments and amendments of a 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 giving effect to the amendments to the *Contaminated Land Management Act 1997* set out in Schedule 1.

**Clause 4** is a formal provision giving effect to the amendments to the *Protection of the Environment Operations Act 1997* set out in Schedule 2.

**Clause 5** is a formal provision giving effect to the amendments to the *Radiation Control Act 1990* set out in Schedule 3.

**Clause 6** is a formal provision giving effect to the amendments to the *Road and Rail Transport (Dangerous Goods) Act 1997* set out in Schedule 4.

**Clause 7** is a formal provision giving effect to the amendments to the Act and regulations set out in Schedule 5.

## **Schedule 1   Amendment of Contaminated Land Management Act 1997**

### **Accreditation periods for site auditors**

Currently, site auditors under the *Contaminated Land Management Act 1997* are accredited for 1 year and are required to lodge an annual return showing their site audits.

**Schedule 1 [3]** enables accreditation for a period specified by the EPA, being a period not exceeding 3 years.

**Schedule 1 [8]** makes a consequential amendment and retains the requirement for annual returns to be lodged.

**Schedule 1 [1], [2], [4]–[7] and [9]** make consequential amendments.

**Schedule 1 [10] and [11]** insert savings and transitional provisions.

## **Schedule 2   Amendment of Protection of the Environment Operations Act 1997**

### **Admissibility of certain evidence**

**Schedule 2 [3]** makes it clear that licence conditions requiring additional information to be given following notification by a person of a pollution incident may be imposed. The information will be admissible in evidence against the person who makes the notification, even though it may be self-incriminating.

### **Applications for surrender of licence**

**Schedule 2 [4]** extends to applications to surrender licences the same requirements for the Environment Protection Authority (the *EPA*) to give reasons for the refusal or grant of a licence, if it is requested to do so, as apply to other licence applications.

**Schedule 2 [1]** and **[2]** make consequential amendments.

**Schedule 2 [41]** extends the meaning of the expression “licence application” as used in the *Protection of the Environment Operations Act 1997* (the *Principal Act*) to include applications to surrender licences. **Schedule 2 [30]** makes a consequential amendment.

### **Operation of, and liability for, certain offences**

**Schedule 2 [6]** reorganises the offence of pollution of waters by combining the existing separate offences into one offence.

**Schedule 2 [35]** enables the regulations to make the owner of a motor vehicle or vessel liable for an offence committed with respect to or in connection with the motor vehicle or vessel, whether or not the act or omission concerned was committed or omitted to be done by the owner.

### **Powers of authorised officers under Radiation Control Act 1990**

**Schedule 2 [8]** extends to authorised officers under the *Radiation Control Act 1990* the same powers as authorised officers have under the *Principal Act*.

### **Powers of enforcement officers and authorised officers**

The *Principal Act* confers powers on authorised officers generally with respect to enforcement action under the Act but also confers power on a class of authorised officers prescribed by the regulations to issue penalty notices (*enforcement officers*). Not all authorised officers can act in respect of any matter under the Act, the functions of some are restricted to penalty notices and, in any case, the functions of authorised officers are restricted to matters for which their employer is the appropriate regulatory authority for the matter concerned.

**Schedule 2 [11]** confers power on authorised officers of a regulatory authority to exercise powers of authorised officers so as to determine whether the authority is the appropriate regulatory authority for the matter concerned.

**Schedule 2 [14]** confers the functions (including powers) of an authorised officer on enforcement officers, but only for the purposes of exercising their responsibilities or functions as enforcement officers. **Schedule 2 [12]** and **[13]** make consequential amendments.

**Schedule 2 [10], [20]** and **[22]** enable a person whose services are made use of by a regulatory authority and who is subject to the direction and control of the authority to be appointed as an authorised officer or enforcement officer of the authority.

**Schedule 2 [9], [21], [23], [24], [25], [26], [28], [29]** and **[40]** change references to authorised officers who issue penalty notices to enforcement officers, so as to avoid confusion with other authorised officers.

### **Search warrant powers**

An authorised officer may apply for a search warrant if the officer believes on reasonable grounds that a provision of the Principal Act or regulations under that Act is being or has been contravened at any premises.

**Schedule 2 [15]** and **[16]** enable an authorised officer to apply for a search warrant if the officer believes on reasonable grounds that there is on premises matter or a thing with respect to which an offence has been committed, matter or a thing that will afford evidence of the commission of an offence or matter or a thing that was used, or is intended to be used, for the purpose of committing an offence.

### **Incorrect regulatory authority**

Under the Principal Act, a regulatory authority generally may not take action in relation to a matter or an offence unless it is the appropriate regulatory authority for that matter or offence. Section 109A of the Principal Act currently provides a mechanism for enabling a clean-up or prevention notice issued by the incorrect regulatory authority to have effect.

**Schedule 2 [17]** inserts proposed sections 212C and 212D, which apply where a regulatory authority or an authorised officer of an authority, in good faith, exercises functions of the appropriate regulatory authority or of its authorised officers in relation to an activity or work. The regulatory authority must notify the appropriate authority as soon as practicable after it becomes aware of the mistake and it and its officers may continue to exercise the functions unless the appropriate regulatory authority directs otherwise or a licence is granted in respect of the activity or work

concerned. The proposed sections also set out the consequences of any such direction, including that the appropriate regulatory authority may continue to exercise the functions exercised by the other authority.

**Schedule 2 [5]** omits section 109A.

### **Proceedings for offences by regulatory authorities**

The Principal Act limits the offences under the Principal Act or regulations for which various regulatory or other authorities (other than the EPA) may institute proceedings. The Principal Act also enables certain persons and authorities to institute proceedings for an offence in the Land and Environment Court if the Court grants the person leave to bring the proceedings.

**Schedule 2 [18]** enables an appropriate regulatory authority and various other persons and authorities to institute proceedings for an offence under the Principal Act or the regulations with the leave of the Land and Environment Court.

**Schedule 2 [19]** makes a consequential amendment.

### **Notices given under Principal Act**

Under the Principal Act, notices may be given requiring clean-up of pollution incidents, requiring action to be taken to prevent environmental harm, prohibiting the carrying on of certain activities, requiring the payment of compliance costs and with respect to noise control and other matters.

**Schedule 2 [27]** inserts proposed Division 6 of Part 8.2 (proposed section 242) which provides that a person is guilty of a continuing offence during any period that the person fails to comply with a requirement given under the Principal Act or the regulations. The proposed section will apply only if the relevant provision of the Principal Act or the regulations provides for a penalty for a continuing offence.

**Schedule 2 [33]** inserts proposed section 319A which makes it clear that the obligation to comply with a notice is a continuing obligation even though the time for taking any required action may have expired. If no time is specified in the notice the obligation to comply also continues until the notice is complied with or revoked.

### **Deemed licence refusal**

A person may appeal to the Land and Environment Court against the refusal of an appropriate authority to grant a licence application or a decision with respect to a licence. For the purposes of enabling an appeal, an application is taken to have been refused if it is not granted within 60 days after it is duly made.

**Schedule 2 [31]** extends that 60 day period to 90 days where the application is for a variation of a licence and the appropriate regulatory authority is required by the Principal Act to invite and consider public submissions because there will be a significant increase in the environmental impact of a licensed activity and there has not previously been environmental assessment and public consultation under the *Environmental Planning and Assessment Act 1979*. The period is also extended where development consent must be obtained for controlled development before a licence can be granted.

The amendment also makes it clear that there is no appeal against a condition imposed by the regulations. **Schedule 2 [32]** makes a consequential amendment.

#### **False representations about EPA approval etc**

**Schedule 2 [34]** inserts proposed section 320A which makes it an offence to knowingly make a false or misleading representation that any goods or services are approved, provided, recommended or used by the EPA.

#### **Regulation-making powers**

**Schedule 2 [36]** enables regulations to be made as to the prohibition or regulation of fuel burning equipment, industrial equipment, fuels and fuel tanks and other related equipment and ancillary matters. The amendment also enables regulations to be made with respect to requirements for the emission of, and testing for, air impurities.

**Schedule 2 [37]** enables regulations to be made that impose conditions on licences and vary or revoke licence conditions (whether or not those conditions were imposed by regulations).

#### **Other amendments**

**Schedule 2 [7]** removes the requirement for excessive air impurities emitted by a vehicle to be determined at a particular point.

**Schedule 2 [38]** and **[39]** insert savings and transitional provisions.

## **Schedule 3 Amendment of Radiation Control Act 1990**

### **Possession of radioactive substances and apparatus**

Currently, the *Radiation Control Act 1990* (the *Principal Act*) prohibits a person from using, selling or giving away radioactive substances or certain radiation apparatus unless the person holds a licence and is selling or giving it away to a person who has a licence to use or sell it. Consequently, these things may not be sold or given away to an institution which takes possession of them but does not itself use them, even though the use may be by persons such as researchers. The owner of a sealed radioactive source or certain radiation apparatus must also register it and may not allow it to be used unless the person who uses it is licensed to do so. A provision requiring premises on which unsealed radioactive sources are kept to be registered has not been commenced.

**Schedule 3 [3] and [4]** require a person who possesses a radioactive substance or radiation apparatus to hold a licence and enable a licensed person to sell or give away such a substance or apparatus to a person who has such a licence.

### **Powers of authorised officers**

**Schedule 3 [1], [2], [8], [9], [11], [12] and [13]** make consequential amendments resulting from the application of the provisions of the *Protection of the Environment Operations Act 1997* relating to authorised officers to the *Principal Act*, including renaming inspectors as authorised officers.

**Schedule 3 [7]** extends the provisions of the *Protection of the Environment Operations Act 1997* relating to enforcement powers to the exercise of powers in connection with the *Principal Act*. The amendment also retains the current power to enter premises on a reasonable suspicion that any radioactive substance or radiation apparatus is kept or used on the premises (subject to the protections applicable to the exercise of other search powers).

**Schedule 3 [10]** inserts proposed section 25A which enables penalty notices to be issued by authorised officers or police officers for offences under the *Principal Act* or regulations under that Act, being offences prescribed by the regulations.

### **Accreditation of radiation experts**

**Schedule 3 [5]** provides that the accreditation of a radiation expert is for a term to be specified by the EPA. Currently there is no specified period for which an accreditation is in force.

**Schedule 3 [6]** makes a consequential amendment.



### **Savings and transitional provisions**

**Schedule 3** [14] and [15] insert savings and transitional provisions.

### **Schedule 4 Amendment of Road and Rail Transport (Dangerous Goods) Act 1997**

**Schedule 4** extends the powers of authorised officers to situations where an authorised officer believes on reasonable grounds that there may have been a contravention of the *Road and Rail Transport (Dangerous Goods) Act 1997*.

### **Schedule 5 Other amendments**

#### **Clean Air (Motor Vehicles and Motor Vehicle Fuels) Regulation 1997**

**Schedule 5.1** [1] makes a change consequential on the method of testing for excessive air impurities being by observation rather than by carrying out a test.

**Schedule 5.1** [2] makes the owner of a motor vehicle that emits excessive air impurities guilty of an offence.

**Schedule 5.1** [3] makes it a defence to a prosecution for that offence if the owner proves that at the time the offence was committed the motor vehicle was a stolen motor vehicle or was illegally taken or used.

#### **Contaminated Land Management Regulation 1998**

**Schedule 5.2** revises accreditation fees for site auditors of contaminated land, as a result of the amendments made by the proposed Act to accreditation periods.

#### **Fines Act 1996**

**Schedule 5.3** makes an amendment consequential on the enactment of the provision conferring power to issue penalty notices under the *Radiation Control Act 1990*.

#### **Protection of the Environment Operations (General) Regulation 1998**

**Schedule 5.4** [1] and [2] make consequential amendments as a result of the requirement for statements of reasons to be provided where an application for the surrender of a licence is refused (as inserted by the proposed Act).

**Protection of the Environment Operations (Noise Control) Regulation 2000**

**Schedule 5.5 [3]** makes both the driver and owner of a motor vehicle guilty of an offence if the motor vehicle is used in a way that constitutes any one of certain offences relating to the emission of noise. The owner is not liable if the motor vehicle was stolen or illegally taken or used at the time of the offence or if the owner notifies the name and address of the person who was in charge of the motor vehicle at the time of the offence or satisfies the penalty notice officer or court that the owner does not know and could not ascertain that name and address.

**Schedule 5.5 [5]** makes the same provision as Schedule 5.5 [3] but in relation to both the owner and person in charge of a vessel that emits offensive noise.

**Schedule 5.5 [1], [2] and [4]** make consequential amendments to offences.

**Protection of the Environment Operations (Penalty Notices) Regulation 1999**

**Schedule 5.6 [1], [2] and [3]** change references to authorised officers to enforcement officers as a consequence of the change of name to enforcement officers made by the proposed Act.

**Schedule 5.6 [4]** inserts a savings and transitional provision.