

Protection of the Environment Legislation Amendment Act 2011 No 63

[2011-63]



New South Wales

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Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

Notes—

- **Note**

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Protection of the Environment Legislation Amendment Act 2011 No 63



New South Wales

An Act to amend environment protection legislation to create the office of Chairperson of the Environment Protection Authority and to make further provision with respect to the notification and management of pollution incidents; and for other purposes.

1 Name of Act

This Act is the *Protection of the Environment Legislation Amendment Act 2011*.

2 Commencement

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

Schedule 1 Amendment of **Protection of the Environment Administration Act 1991 No 60**

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

Chairperson means the Chairperson of the Authority appointed under section 18.

[2] Section 3 (1), definition of “Director-General”

Omit the definition.

[3] Sections 14, 19 (Chairperson to manage and control affairs of Authority), 21 (1A), (2) (b) and (3) (d), 24 (1) (a), 35 (1) and 36 and clause 1 (definition of “appointed member”) of Schedule 1

Omit “Director-General” wherever occurring. Insert instead “Chairperson”.

[4] Section 15 Establishment of Board

Omit section 15 (2) and (3). Insert instead:

- (2) The Board is to consist of 5 members, being:
 - (a) the Chairperson, and
 - (b) 4 part-time members appointed by the Governor on the recommendation of the Minister.
- (3) Of the part-time members:
 - (a) 1 is to have expertise in the area of environmental science, and
 - (b) 1 is to have expertise in environmental law, and
 - (c) 1 is to have expertise in corporate, financial and risk planning and management, and
 - (d) 1 is to have expertise in business.

[5] Section 16 Functions of Board

Insert after section 16 (a):

- (b) to oversee the effective, efficient and economical management of the Authority,

[6] Section 16 (2)-(6)

Insert at the end of section 16:

- (2) The Board is not subject to the control and direction of the Minister in the exercise of any of its functions.
- (3) The Board is, on an annual basis, to provide the Minister with a statement that contains or addresses the following matters:
 - (a) an assessment of the success of the Authority in reducing risks to human health and in preventing the degradation of the environment and whether the level of environmental protection achieved by the Authority is satisfactory in comparison with other Australian jurisdictions,
 - (b) an assessment of the performance by those industries regulated by the Authority in reducing risks to human health and in preventing the degradation of the environment, and the impact that those industries have on the environment,
 - (c) recommendations for improving the Authority's performance, and the performance of the industries regulated by the Authority, in relation to the matters referred to in paragraphs (a) and (b),

- (d) such other matters as may be prescribed by the regulations.
 - (4) The Minister must table a copy of the statement under this section in both Houses of Parliament within one month after the Minister receives it.
 - (5) If a House of Parliament is not sitting when the Minister seeks to table a copy of the statement to it, the Minister may present copies of the statement to the Clerk of the House concerned.
 - (6) The statement:
 - (a) on presentation and for all purposes is taken to have been tabled in the House, and
 - (b) may be printed by authority of the Clerk of the House, and
 - (c) if printed by authority of the Clerk, is for all purposes taken to be a document published by or under the authority of the House, and
 - (d) is to be recorded:
 - (i) in the case of the Legislative Council—in the Minutes of the Proceedings of the Legislative Council, and
 - (ii) in the case of the Legislative Assembly—in the Votes and Proceedings of the Legislative Assembly,
- on the first sitting day of the House after receipt of the statement by the Clerk.

[7] Part 5, Division 3, heading

Omit “**Director-General**”. Insert instead “**Chairperson**”.

[8] Sections 18 and 18A

Insert before section 19:

18 Chairperson of the Authority

- (1) The Governor may appoint a Chairperson of the Authority.
- (2) The Chairperson may be appointed on a full-time or part-time basis.
- (3) The Chairperson has the functions conferred or imposed on the Chairperson by or under this or any other Act.
- (4) The employment of the Chairperson is subject to Part 3.1 of the *Public Sector Employment and Management Act 2002*, but is not subject to Chapter 1A of that Act.

- (5) The Governor may remove the Chairperson from office only for misbehaviour, incapacity or incompetence, despite anything to the contrary in section 77 of the *Public Sector Employment and Management Act 2002*.

18A Acting Chairperson

- (1) The Minister may, from time to time, appoint a person to act in the office of the Chairperson during the illness or absence of the Chairperson or during a vacancy in the office of the Chairperson. The person, while so acting, has all the functions of the Chairperson and is taken to be the Chairperson (including as a member of the Board).
- (2) The Minister may, at any time, remove a person from the office to which the person was appointed under this section.
- (3) A person while acting under this section is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.

[9] Schedule 1 Provisions relating to members and procedure of the Board

Omit clauses 2 and 3 (3).

[10] Schedule 1, clause 11

Omit "6 members".

Insert instead "3 members (one of whom must be the Chairperson)".

[11] Schedule 1, clause 12

Omit the clause. Insert instead:

12 Presiding member

- (1) The Chairperson is to preside at a meeting of the Board.
- (2) The presiding member is to have a deliberative vote and, in the event of an equality of votes, a second or casting vote.

[12] Schedule 4 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Protection of the Environment Legislation Amendment Act 2011

[13] Schedule 4, Part 4

Insert after Part 3:

Part 4 Provision consequent on enactment of [Protection of the Environment Legislation Amendment Act 2011](#)

9 Existing Board members

A person who, immediately before the commencement of Schedule 1 [4] to the [Protection of the Environment Legislation Amendment Act 2011](#), held office as a member of the Board:

- (a) ceases to hold that office, and
- (b) is not entitled to any remuneration or compensation because of the loss of that office.

Schedule 2 Amendment of [Protection of the Environment Operations Act 1997 No 156](#)

[1] Section 66 Conditions requiring monitoring, certification or provision of information, and related offences

Insert after section 66 (5):

- (6) **Publication of results of monitoring** The holder of a licence subject to a condition referred to in subsection (1) (a) must, within 14 days of obtaining monitoring data as referred to in that subsection:
 - (a) if the holder maintains a website that relates to the business or activity the subject of the licence—make any of the monitoring data that relates to pollution, and the licensee’s name, publicly and prominently available on that website in accordance with any requirements issued in writing by the EPA, or
 - (b) if the holder does not maintain such a website—provide a copy of any of the monitoring data that relates to pollution, to any person who requests a copy of the data, at no charge and in accordance with any requirements issued in writing by the EPA.

Maximum penalty:

- (a) in the case of a corporation—\$4,400, or
- (b) in the case of an individual—\$2,200.

- (7) **False or misleading publication of results** A person who makes available or provides

monitoring data in accordance with subsection (6) is guilty of an offence if the monitoring data is false or misleading in a material respect.

Maximum penalty:

- (a) in the case of a corporation—\$4,400, or
- (b) in the case of an individual—\$2,200.

[2] Section 148 Pollution incidents causing or threatening material harm to be notified

Omit “as soon as practicable” wherever occurring in section 148 (2)-(5).

Insert instead “immediately”.

[3] Section 148 (2)-(4)

Omit “the appropriate regulatory authority” wherever occurring.

Insert instead “each relevant authority”.

[4] Section 148 (8)

Insert after section 148 (7):

(8) **Meaning of “relevant authority”** In this section:

relevant authority means any of the following:

- (a) the appropriate regulatory authority,
- (b) if the EPA is not the appropriate regulatory authority—the EPA,
- (c) if the EPA is the appropriate regulatory authority—the local authority for the area in which the pollution incident occurs,
- (d) the Ministry of Health,
- (e) the WorkCover Authority,
- (f) Fire and Rescue NSW.

[5] Sections 149 (1) and (2) (b), 150 and 151

Omit “this Part” wherever occurring. Insert instead “section 148”.

[6] Section 150 Relevant information to be given

Insert “, if known” after “involved” in section 150 (c).

[7] Section 150 (e)

Insert “, if known” after “threatened pollution”.

[8] Section 150 (2) and (3)

Insert at the end of section 150:

- (2) The information required by this section is the information known to the person notifying the incident when the notification is required to be given.
- (3) If the information required to be included in a notice of a pollution incident by subsection (1) (c), (d) or (e) is not known to that person when the initial notification is made but becomes known afterwards, that information must be notified in accordance with section 148 immediately after it becomes known.

[9] Section 151 Incidents not required to be reported

Omit “of the person” from section 151 (1). Insert instead “of each person”.

[10] Section 151A

Insert after section 151:

151A EPA may require other notification of pollution incidents

- (1) This section applies to the occupier of premises where a pollution incident has occurred in the course of an activity so that material harm to the environment is caused or threatened.
- (2) The EPA may direct a person to whom this section applies to notify such other persons of the incident as the EPA requires.
- (3) The direction is not required to be given in writing.
- (4) The direction may specify the manner or form of notifying the pollution incident and the information that must be provided.
- (5) The direction may require that an initial verbal notification be followed by written notification.
- (6) A person must not fail to comply with a direction given under this section.
- (7) This section does not extend to a pollution incident involving only the emission of an odour.
- (8) If a direction under this section is given to a person who is carrying out an activity, is engaged as an employee in carrying out an activity, or is the

employer of such a person, the obligations under this section are in addition to, and not in derogation of, the obligations under section 148 (except as provided by section 151 (1)).

[11] Section 152 Offence

Omit the penalty clause. Insert instead:

Maximum penalty:

- (a) in the case of a corporation—\$2,000,000 and, in the case of a continuing offence, a further penalty of \$240,000 for each day the offence continues, or
- (b) in the case of an individual—\$500,000 and, in the case of a continuing offence, a further penalty of \$120,000 for each day the offence continues.

[12] Part 5.7A

Insert after Part 5.7:

Part 5.7A Duty to prepare and implement pollution incident response management plans

153A Duty of licence holder to prepare pollution incident response management plan

The holder of an environment protection licence must prepare a pollution incident response management plan that complies with this Part in relation to the activity to which the licence relates.

Maximum penalty:

- (a) in the case of a corporation—\$1,000,000 and, in the case of a continuing offence, a further penalty of \$120,000 for each day the offence continues, or
- (b) in the case of an individual—\$250,000 and, in the case of a continuing offence, a further penalty of \$60,000 for each day the offence continues.

153B EPA may direct other persons to prepare pollution incident response management plan

- (1) The EPA may, in accordance with the regulations, require the occupier of premises at which industry is carried out to prepare a pollution incident response management plan that complies with this Part in relation to activities at the premises.
- (2) A person must not fail to comply with such a requirement.

Maximum penalty:

- (a) in the case of a corporation—\$1,000,000 and, in the case of a continuing offence, a further penalty of \$120,000 for each day the offence continues, or
- (b) in the case of an individual—\$250,000 and, in the case of a continuing offence, a further penalty of \$60,000 for each day the offence continues.

(3) The regulations may make provision for or with respect to:

- (a) the class or classes of premises, or industries carried out at premises, that may be the subject of a requirement to prepare a pollution incident response management plan, and
- (b) the circumstances in which some or all premises within those classes may be the subject of a requirement to prepare a pollution incident response management plan.

153C Information to be included in plan

A pollution incident response management plan must be in the form required by the regulations and must include the following:

- (a) the procedures to be followed by the holder of the relevant environment protection licence, or the occupier of the relevant premises, in notifying a pollution incident to:
 - (i) the owners or occupiers of premises in the vicinity of the premises to which the environment protection licence or the direction under section 153B relates, and
 - (ii) the local authority for the area in which the premises to which the environment protection licence or the direction under section 153B relates are located and any area affected, or potentially affected, by the pollution, and
 - (iii) any persons or authorities required to be notified by Part 5.7,
- (b) a detailed description of the action to be taken, immediately after a pollution incident, by the holder of the relevant environment protection licence, or the occupier of the relevant premises, to reduce or control any pollution,
- (c) the procedures to be followed for co-ordinating, with the authorities or persons that have been notified, any action taken in combating the pollution caused by the incident and, in particular, the persons through whom all communications are to be made,
- (d) any other matter required by the regulations.

153D Keeping of plan

A person who is required to prepare a pollution incident response management plan under this Part must ensure that it is kept at the premises to which the relevant environment protection licence relates, or where the relevant activity takes place, and is made available in accordance with the regulations.

Maximum penalty:

- (a) in the case of a corporation—\$1,000,000 and, in the case of a continuing offence, a further penalty of \$120,000 for each day the offence continues, or
- (b) in the case of an individual—\$250,000 and, in the case of a continuing offence, a further penalty of \$60,000 for each day the offence continues.

153E Testing of plan

A person who is required to prepare a pollution incident response management plan under this Part must ensure that it is tested in accordance with the regulations.

Maximum penalty:

- (a) in the case of a corporation—\$1,000,000 and, in the case of a continuing offence, a further penalty of \$120,000 for each day the offence continues, or
- (b) in the case of an individual—\$250,000 and, in the case of a continuing offence, a further penalty of \$60,000 for each day the offence continues.

153F Implementation of plan

If a pollution incident occurs in the course of an activity so that material harm to the environment (within the meaning of section 147) is caused or threatened, the person carrying on the activity must immediately implement any pollution incident response management plan in relation to the activity required by this Part.

Maximum penalty:

- (a) in the case of a corporation—\$2,000,000 and, in the case of a continuing offence, a further penalty of \$240,000 for each day the offence continues, or
- (b) in the case of an individual—\$500,000 and, in the case of a continuing offence, a further penalty of \$120,000 for each day the offence continues.

[13] Section 175

Omit the section. Insert instead:

175 Circumstances in which mandatory environmental audit can be imposed

Conditions requiring the undertaking of a mandatory environmental audit may only be imposed if:

- (a) the appropriate regulatory authority reasonably suspects:
 - (i) that the holder of the licence has on one or more occasions contravened this Act, the regulations or the conditions of the licence, and
 - (ii) that the contravention or contraventions have caused, are causing or are likely to cause, harm to the environment, or
- (b) the appropriate regulatory authority reasonably suspects that an activity has been or is being carried out by the holder of the licence in an environmentally unsatisfactory manner (within the meaning of section 95).

[14] Section 215 Proceedings for other offences

Omit “200 penalty units” from section 215 (2).

Insert instead “1,000 penalty units”.

[15] Section 254 Definitions

Omit “Director-General of the EPA” from the definition of ***designated officer***.

Insert instead “Chairperson”.

[16] Section 259 Proof of certain appointments not required

Omit “Director-General of the EPA” from section 259 (a).

Insert instead “Chairperson”.

[17] Section 261 Certificate evidence of certain matters

Omit “Director-General of the EPA” from section 261 (1).

Insert instead “Chairperson”.

[18] Section 261 (2) (u)

Omit “Director-General”. Insert instead “Chairperson”.

[19] Part 9.3D

Insert after Part 9.3C:

Part 9.3D Pollution incidents—analysis of risk

295ZB Definition

In this Part:

relevant person, in relation to a pollution incident, means:

- (a) the occupier of the premises at or from which the EPA reasonably suspects that the pollution incident occurred or is occurring, or
- (b) the person who is reasonably suspected by the EPA of having caused the pollution incident.

295ZC Conduct of health risk analysis

- (1) If the EPA reasonably suspects that a pollution incident has occurred or is occurring, the EPA may request that the Chief Health Officer of the Ministry of Health undertake an analysis of the risk created by that incident to the health of any person or group of persons.
- (2) The Chief Health Officer may undertake such an analysis.
- (3) If such an analysis is undertaken, the Director-General of the Ministry of Health may, by notice in writing, require any or all of the relevant persons in relation to the pollution incident to pay any or all of the reasonable costs and expenses incurred by the Chief Health Officer in connection with that analysis.
- (4) The Chief Health Officer may make use of the staff or facilities of the Ministry of Health, or engage agents or consultants, for the purposes of carrying out an analysis under this section.

295ZD Conduct of environmental risk analysis

- (1) If the EPA reasonably suspects that a pollution incident has occurred or is occurring, the EPA may undertake an analysis of:
 - (a) the nature and extent of the pollution incident, including actual or likely harm to the environment, and
 - (b) the actual or likely pollution resulting from the pollution incident.
- (2) If the EPA undertakes such an analysis, the EPA may, by notice in writing, require any or all of the relevant persons in relation to the pollution incident to pay any or all of the reasonable costs and expenses incurred by the EPA in connection with that analysis.
- (3) The EPA may engage agents or consultants for the purposes of carrying out an analysis under this section.

295ZE Recovery of costs of analysis

- (1) If the Director-General of the Ministry of Health or the EPA issues a notice requiring payment under this Part, the Director-General or the EPA, as the case requires, may recover any unpaid amount specified in the notice as a debt in a court of competent jurisdiction.
- (2) The reasonable costs and expenses incurred by the Chief Health Officer of the Ministry of Health or the EPA in connection with an analysis are not recoverable if the person to whom a notice has been issued under this Part establishes to the satisfaction of the court that the nature and extent of the analysis conducted by the Chief Health Officer or the EPA was not reasonably necessary to respond to the potential public health or environmental concerns arising out of the pollution incident or was not otherwise in the public interest.

295ZF Recovery from responsible persons

If the person given a notice requiring payment under this Part complies with the notice but was not the person who caused the pollution incident, the amount of the payment may be recovered by the person who complied with the notice as a debt in a court of competent jurisdiction from the person who caused the pollution incident.

295ZG General provisions

A notice may be given, and action may be taken, under this Part:

- (a) whether or not the EPA is the appropriate regulatory authority with respect to the pollution incident, and
- (b) whether or not a clean-up notice has been given under Part 4.2 with respect to the pollution incident.

[20] Section 308 Public register

Insert after section 308 (2) (d):

- (d1) details of each mandatory environmental audit under Part 6.2 undertaken in relation to a licence issued by that authority,
- (d2) details of each pollution study required by a condition of a licence issued by that authority,
- (d3) details of each pollution reduction program required by a condition of a licence issued by that authority,

[21] Section 308 (2) (j1)

Insert after section 308 (2) (j):

(j1) details of each penalty notice issued by that authority,

[22] Schedule 5 Savings, transitional and other provisions

Insert at the end of clause 2 (1):

Protection of the Environment Legislation Amendment Act 2011—to the extent it amends this Act

[23] Schedule 5, Part 13

Insert after Part 12:

Part 13 Provisions consequent on enactment of *Protection of the Environment Legislation Amendment Act 2011*

35 Obligation to publish results of monitoring

- (1) Subject to subclause (2), the obligation under section 66 (6) to publish results of monitoring does not apply to any monitoring conducted before the commencement of that subsection.
- (2) A person who held an environment protection licence immediately before the commencement of section 66 (6) does not commit an offence under that subsection during the first 3 months after that commencement.

36 Duties to prepare and implement pollution incident response management plans

A person who held an environment protection licence immediately before the commencement of Part 5.7A does not commit an offence under that Part during the first 6 months after that commencement.

37 Obligation to include matter on register

The obligation to include matter on the public register:

- (a) created by section 308 (2) (d1) applies only to mandatory environmental audits undertaken after the commencement of that paragraph, and
- (b) created by section 308 (2) (d2) applies only to pollution studies undertaken after the commencement of that paragraph, and
- (c) created by section 308 (2) (d3) applies only to pollution reduction programs undertaken after the commencement of that paragraph, and

(d) created by section 308 (2) (j1) applies only to penalty notices issued after the commencement of that paragraph.

[24] Dictionary

Insert in alphabetical order:

Chairperson means the Chairperson of the EPA appointed under Division 3 of Part 5 of the *Protection of the Environment Administration Act 1991*.

Schedule 3 Consequential amendment of other legislation

3.1 Contaminated Land Management Act 1997 No 140

[1] Section 4 Definitions

Insert in alphabetical order in section 4 (1):

Chairperson of the EPA means the Chairperson of the EPA appointed under Division 3 of Part 5 of the *Protection of the Environment Administration Act 1991*.

[2] Section 4 (1), definition of “Director-General”

Omit the definition.

[3] Section 69 Proof of certain matters not required

Omit “Director-General” from section 69 (a). Insert instead “Chairperson”.

[4] Sections 71 (1) and 92A (9)

Omit “Director-General” wherever occurring.

Insert instead “Chairperson of the EPA”.

3.2 Pesticides Act 1999 No 80

Sections 102, 105 (1) and 106 (1)

Omit “Director-General” wherever occurring.

Insert instead “Chairperson”.

3.3 Protection of the Environment Administration Regulation 2007

Clause 21 Inspection of register

Omit “Director-General” from clause 21 (2). Insert instead “Chairperson”.

3.4 Protection of the Environment Operations (General) Regulation 2009

[1] Clauses 43 (2) (a) and (b) (iv) and 95A (2)

Omit “Director-General” wherever occurring. Insert instead “Chairperson”.

[2] Clause 101

Omit the clause. Insert instead:

101 Notification of pollution incidents

- (1) For the purposes of section 149 of the Act, a pollution incident that is required to be notified under section 148 of the Act:
 - (a) is to be notified verbally to each relevant authority, and
 - (b) is to be followed by notification in writing within 7 days of the date on which the incident occurred.
- (2) For the purposes of section 149 of the Act, notification of the EPA may be achieved by telephoning the EPA environment line.

Note—

Section 150 (2) of the Act provides that the information contained in a notification is to be the information known when the notification occurs. Therefore, if information becomes known between the immediate notification given verbally and the time when written notification is required to be given, that new information will be required to be notified immediately after it becomes known and to be included in the written notification.

[3] Schedule 6 Penalty notice offences

Insert after the matter relating to section 66 (4) of the *Protection of the Environment Operations Act 1997*:

Section 66 (6)	3	\$500	\$1,000
Section 66 (7)	3	\$500	\$1,000

[4] Schedule 6

Omit the matter relating to section 152 of the *Protection of the Environment Operations Act 1997*.

Insert instead:

Section 152	1, 2	\$1,500	\$5,000
Section 153A	3	\$750	\$1,500
Section 153B	3	\$750	\$1,500
Section 153D	3	\$750	\$1,500
Section 153E	3	\$750	\$1,500
Section 153F	3	\$1,500	\$5,000

3.5 Public Sector Employment and Management Act 2002 No 43

Schedule 2 Executive positions (other than non-statutory SES positions)

Insert at the end of Part 3:

Chairperson of the Environment Protection Authority

3.6 Radiation Control Act 1990 No 13

[1] Section 4 Definitions

Insert in alphabetical order in section 4 (1):

Chairperson of the Authority means the Chairperson of the Authority appointed under Division 3 of Part 5 of the *Protection of the Environment Administration Act 1991*.

[2] Section 25 Proceedings for offences

Omit “Director-General” from section 25 (4). Insert instead “Chairperson”.

[3] Section 29 Radiation Advisory Council

Omit “Director-General” from section 29 (2) (a).

Insert instead “Chairperson of the Authority”.

3.7 Radiation Control Amendment Act 2010 No 91

[1] Schedule 1 Amendment of Radiation Control Act 1990 No 13

Omit the definitions of **Department** and **Director-General** from item [2].

[2] Schedule 1 [4]

Insert “and of the Chairperson of the Authority” after “Authority” in proposed section 5A (2).

[3] Schedule 1 [9]

Omit the item.

[4] Schedule 1 [20]

Omit “Director-General” from proposed section 36 (2).

Insert instead “Chairperson of the Authority”.

3.8 Radiation Control Regulation 2003

[1] Clauses 3 (definition of “approved”), 16 (1), 17 (3), 19 (1) and (3), 23 (1) and (3), 27 (1), 30 (1), 30Q (1) and (3), 31 (2)-(5) and 33 (1)

Omit “Director-General” wherever occurring. Insert instead “Chairperson”.

[2] Clause 3 (1), definition of “Director-General”

Omit the definition.