

GAME CHANGING REFORM TO NSW ENVIRONMENT PROTECTION LAWS

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Authors' Note: The Environment Legislation Amendment Bill 2021 (NSW) was passed by NSW Parliament without amendment and commenced on 4 March 2022. Accordingly, the reforms discussed in this publication have now come into effect.

The NSW Government has introduced the *Environment Legislation Amendment Bill 2021* (NSW) (Bill) which proposes wide ranging reforms to NSW environmental laws to enable the NSW Environment Protection Authority (EPA) to "crack down" on environmental offenders.

The Bill makes good on Minister Matt Kean's commitment to ensure that "the book [is] thrown at anyone who has done the wrong thing". While the EPA has made it clear that the reforms are "aimed solely at those who deliberately choose to circumvent the law", the amendments proposed by the Bill will materially increase environmental liabilities for all NSW operators.

This article outlines the key reforms proposed by the Bill which will amend a raft of environmental legislation, including the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act) and *Contaminated Land Management Act 1997* (NSW) (CLM Act) and include:

- the creation of new environmental offences;
- increasing the penalties for a number of existing offences;
- increasing the powers of the EPA and other environment regulators to hold to account those perceived to be responsible for pollution or contamination and to enforce environment protection licence conditions;
- enabling the EPA to recover profits arising from the commission of environmental offences and the cost of remediating contaminated land from related bodies corporate and directors and managers of offending corporations; and
- making it easier for the EPA to prove certain environmental offences.

The Bill is expected to be debated by Parliament in early 2022 and, if passed, will result in the largest overhaul of NSW environmental laws in over five years.

KEY REFORMS

	Description	Analysis
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<p>Greater Liability for Directors, Managers and Related Bodies Corporate</p>	<ul style="list-style-type: none"> ▪ New power for the EPA and other environment regulators to issue clean-up notices and prevention notices to: <ul style="list-style-type: none"> ▪ current and former directors and persons concerned in management; and ▪ related bodies corporate, of companies responsible pollution or contamination, if the company does not comply with notices issued to it. ▪ Making it an offence for a: <ul style="list-style-type: none"> ▪ director or person concerned in management; ▪ related body corporate; or ▪ director or person concerned in management of a related body corporate, <p>to receive or accrue a monetary benefit as a result of certain proven environmental offences by a company.</p> <ul style="list-style-type: none"> ▪ New and expanded powers for the EPA and other prosecutors to obtain monetary benefit orders requiring: <ul style="list-style-type: none"> ▪ directors or persons 	<p>If passed, the Bill will significantly increase potential liability of those concerned in the management of companies (including related bodies corporate) who commit environmental offences or fail to comply with environment protection notices in NSW.</p> <p>Managers, directors and related bodies corporate could be put on the hook:</p> <ul style="list-style-type: none"> ▪ to clean up pollution or contamination caused by a company; ▪ to carry out works required by a prevention notice to ensure that activities of the corporation are carried on in future in an environmentally satisfactory manner; and ▪ to repay "monetary benefits" received as a result of any proven offence. <p>The proposed measures are not entirely unique to NSW. Queensland passed "chain of responsibility" environment legislation in 2016 and put it to use in the long-running Linc Energy matter.</p> <p>However, the proposal for directors and related bodies corporate to be automatically</p>
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	<p>concerned in management;</p> <ul style="list-style-type: none"> related bodies corporate; and directors or persons concerned in management of related bodies corporate, <p>to repay monetary benefits accrued as a result of certain proven environmental offences by a company.</p>	<p>liable for an offence if they profit from a proven offence of a corporation under environment protection legislation is likely to be the source of significant concern. This is especially the case as the Bill does not propose any defences. This means that a director or person concerned in management could potentially be liable even if they have taken all due diligence to prevent the commission of the offence by the company, although the EPA is unlikely to commence a prosecution in such circumstances.</p>
New EPA Powers to Regulate Contaminated Land	<ul style="list-style-type: none"> New powers for the EPA to issue clean-up notices and prevention notices as soon as the EPA is notified of contamination of land, even before the EPA has determined that the land is "significantly contaminated". New power for the EPA to require financial assurances to ensure compliance with under ongoing maintenance orders, restrictions and public positive covenants. 	<p>The new reforms demonstrate the importance on engaging with the EPA at an early stage and on an ongoing basis in relation to contaminated land.</p> <p>If passed, the Bill would enable the EPA to take strong and proactive action without agreement even before it determines that the land is "significantly contaminated" and warrants contamination.</p>
New Offence of Giving False or Misleading Information to the EPA	<ul style="list-style-type: none"> The Bill includes a new general offence of giving information to the EPA that is false or misleading in a material respect. 	<p>This new false and misleading information offence is significant because it applies regardless of whether the information was provided:</p>

	<ul style="list-style-type: none"> ▪ A defence applies where the person took all reasonable steps to ensure the information was not false or misleading in a material respect. ▪ Greater penalties apply where the false or misleading information is provided knowingly. ▪ Directors and other persons involved in the management of the corporation will be liable for any offence committed by the company under the new provision if they ought reasonably to know that the offence would be committed and failed to take all reasonable steps to prevent the provision of false and misleading information. 	<ol style="list-style-type: none"> 1. voluntarily; or 2. in circumstances where the information was known to be false or misleading. <p>The new offence is an apparent response to the decision in <i>Environment Protection Authority v Eastern Creek Operations Pty Limited</i> [2020] NSWLEC 182, where the defendant successfully resisted an EPA prosecution which alleged that the provision of false or misleading information by establishing that the notice in response to which the information was provided was legally invalid.</p> <p>The new offence would create material new risks for entities regulated by the EPA, and highlights the need to take great care in taking "all reasonable steps" to ensure that information provided to the EPA is not false or misleading.</p>
Higher Maximum Penalties for Some Environmental Offences	<ul style="list-style-type: none"> ▪ Substantial increases to some maximum penalties for offences under environment protection legislation, including the CLM Act, to more than double the current maximum penalties. 	<p>The Second Reading Speech states that maximum penalties have been increased so that "they reflect the true cost of the crime"</p>
Increased Liability for Suspected "Contributors" to Pollution	<ul style="list-style-type: none"> ▪ New power for the EPA and other environmental regulators to issue a clean- 	<p>These new provisions are likely to be of significant concern, as they enable the EPA to issue</p>

	<p>up notice to persons who is "reasonably suspected of contributing", to any extent, to a pollution incident.</p> <ul style="list-style-type: none"> ▪ New powers for public authorities to recover costs and expenses of taking clean-up action from persons the authority "reasonably suspects contributed" to the pollution incident, in addition to occupiers and persons the authority reasonably suspects caused the pollution incident. ▪ New right for person issued a clean-up notice to recover costs from others who caused or contributed to pollution incidents as a debt. 	<p>clean-up notices requiring alleged contributors to pollution incidents to clean-up all of the pollution, at its cost. This has the potential to lead to the unintended result that:</p> <ul style="list-style-type: none"> ▪ suspected contributors could be made liable for clean-up costs far exceeding their actual contribution; and ▪ the EPA may seek to regulate the potential contributor with the "deepest pockets" - rather than the person most directly responsible. <p>While the Bill includes a right for a contributor to recover costs from others who caused or contributed to the pollution incident as a debt, this offers very limited protection to suspected contributors issued a clean-up notice, particularly if the person responsible or other persons responsible have limited financial capacity.</p>
Expanded Environmental Licensing Powers	<ul style="list-style-type: none"> ▪ The Bill includes a new power for the EPA to require restrictions on the use of land or public positive covenants to enforcing environment protection licence conditions (including conditions imposed on the suspension, revocation or 	<p>The proposed power to impose restrictions on use and public positive covenants to enforce licence conditions is material as, currently, licence condition only bind the holder of the environment protection licence. The changes proposed will enable the EPA to legally enforce conditions against land</p>

	<p>surrender of the licence). In line with this, the Bill also includes new provisions to enable a person other than the holder, or former holder, of a licence, to apply to vary the conditions of the suspension, revocation or surrender of the licence.</p> <ul style="list-style-type: none"> ▪ New ability for the EPA to deny environment protection licences to corporations where current or former directors of the corporation, related bodies corporate or for current or former directors of related bodies corporate have contravened relevant legislation. 	<p>owners or occupiers, even if the activity regulated by the environment protection licence was conducted by a former land owner or tenant.</p> <p>The EPA will now be able to take a deeper look at the overall environmental compliance history of an entity in licensing decisions, meaning that it will be even more important for corporations, directors and managers to maintain a strong environmental compliance history.</p>
Consistent Court Powers including for Cost Recovery	<ul style="list-style-type: none"> ▪ Additional powers for public authorities including the EPA or other persons to recover costs, expenses and compensation from offenders in the Land and Environment Court. ▪ Additional powers for the Land and Environment Court to make specific kinds of orders where environment offences are proven. 	<p>The Bill proposes to have more consistent provisions across environment protection legislation in terms of the orders a court can make in relation to offenders, and the cost recovery that the EPA can seek from the Court.</p>
New Offence to Delay Authorised Officers	<ul style="list-style-type: none"> ▪ The Bill contains a new offence of delaying, obstructing, assaulting, threatening or intimidating an authorised officer in the 	<p>This is an apparent response to the <i>McClelland</i> and <i>Turnbull</i> matters which involved the assault or delay of environment protection officers. The new</p>

	<p>exercise of the officer's powers, in addition to the existing offence of wilfully delaying or obstructing an authorised officer.</p>	<p>offence is significant because the EPA would not be required to prove that the relevant delay or obstruction was wilful, and so a person could be held liable for unintentional delays or obstructions.</p>
Expanded Prohibition Notice Powers	<ul style="list-style-type: none"> Expanded power for the Minister to issue prohibition notices to occupiers of a class of premises or to a class of persons. Expanded power to issue prohibition notices to directors, former directors or related bodies corporate of a corporation who has not complied with a prohibition notice. 	<p>Currently, the Minister can only issue prohibition notices requiring occupiers or persons to cease carrying on an activity.</p> <p>The Bill proposes to enable the Minister to prohibit occupiers of a class of premises or a class of persons from carrying on an activity. This would enable the Minister to shut down all of the premises of so-called "rogue operators", if recommended to do so by the EPA. While it is likely to be rarely (if ever) used, the expanded power could potentially be relied on by the Minister where a pattern of non-compliance is identified across a specific industry or across multiple premises of one organisation.</p>
Administrative Reforms to EPA	<ul style="list-style-type: none"> The Bill also proposes a range of administrative reforms. The most notable reform is to considerably reduce the Minister's control of the EPA so that the EPA is no longer subject to the control or direction of the Minister, and that the Minister only has a limited power to issue directions 	<p>The EPA is generally regarded as an "independent" regulator, and the proposed reform formally reduces Ministerial control of the EPA thereby increasing its independence.</p> <p>The Bill also includes some additional measures regarding board appointments to achieve greater diversity of collective</p>

	of a general nature to the EPA.	skills, including expertise in human health and Aboriginal cultural values.
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PUBLIC CONSULTATION ON POEO ACT REGULATIONS

In addition to the reforms contemplated by the Bill, the EPA is currently consulting on the following regulations under the POEO Act:

- Protection of the *Environment Operations (Clean Air) Regulation 2021* (NSW); and
- Protection of the *Environment Operations (General) Regulation 2021* (NSW).

Each of these regulations:

- were remade with only minor amendments earlier this year, to avoid automatic repeal under the Subordinate Legislation Act 1989 (NSW); and
- will be substantively amended in 2022. The EPA has committed to carrying out consultation on the proposed changes in 2022.

IMPLICATIONS

The reforms contained in the Bill demonstrate how important it is for all businesses which operate in NSW, and their related bodies corporate, directors and managers to:

- take environmental compliance very seriously; and
- work effectively with the EPA to address any pollution and contamination issues.

The K&L Gates environmental team is very experienced in assisting with environmental regulatory investigations and enforcement action, and will be carefully tracking the progress of the Bill and the proposed changes to the regulations under the POEO Act.

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