

New Environmental Legislation: Implications and Issued for Coal Mining in NSW

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INTRODUCTION

In December 1997, a series of new environmental legislation was enacted including:

- *Environmental Planning and Assessment Amendment Act 1997*;
- *Contaminated Land Management Act 1997*;
- *Protection of the Environment (Operations) Act 1997*;
- *Native Vegetation Conservation Act 1997*; and
- *Pollution Control (Load Based Licensing) Act 1997*.

These new Acts will have varying degrees of impact on the coal mining industry in New South Wales when they commence later this year.

Some of the changes will have minimal or no impact on the coal mining industry. For example, although the *Native Vegetation Conservation Act* has extensive provisions to provide tight protection of the State's native vegetation, the Act does not apply to clearing that is authorised under the *Mining Act 1992*.

However, other changes and initiatives are likely to have significant consequences for the coal mining industry. This paper will focus on the pivotal new laws set down in the *Contaminated Land Management Act*, and in the *Protection of the Environment (Operations) Act*. It will also briefly address the recent Parliamentary Review of the *Threatened Species Conservation Act*.

CONTAMINATED LAND MANAGEMENT ACT 1997

Introduction

This Act is designed to promote better management of contaminated land and to harmonise the current piecemeal legislation on contaminated land. It amends the *Environmentally Hazardous Chemicals Act 1985*.

The Act identifies the Environmental Protection Authority (the "EPA") as the regulatory body with jurisdiction over the management of contaminated land. In carrying out its functions, the EPA must have regard to the principles of ecologically sustainable development, defined in section 10(2) to include, among other things, the prevention of serious or irreversible environmental damage and the conservation of biological diversity.

The Act links principles of ecologically sustainable development with a "polluter pays" system, in which, in theory, those who generate pollution and waste bear the cost of containment, avoidance, or abatement of that pollution or waste (section 10(2)(d)(i)).

The Act is of particular interest to the coal mining sector because it operates retrospectively. In other words, the Act covers any contamination or risk from contamination that was present prior to the commencement of the Act. A person or company will be responsible for land contamination even if the contamination occurred indirectly, or the activity was lawful at the time of contamination, or if the risk arose from a change of use of the land.

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This section will address the following issues:

- The EPA's new powers;
- What land is affected?
- Who can receive an order? and
- Evidence: who contaminated the land?

The EPA's new powers

Section 6 identifies the general duties of the EPA which include:

- to examine and respond to information and reports it receives of land contamination;
- to address any significant risk of harm that the contamination presents; and
- to record its actions and the reasons for those actions.

Where the contamination presents a significant risk of harm, the EPA has the power to:

Keep records

The EPA may:

- make records (or ensure that records are made) of the evidence of the contamination, risk and harm; and
- maintain records of any current declaration and investigation or remediation order.

Full details of the contamination must be available for public inspection at the EPA's principal office and any other place the EPA thinks fit. In addition, if any person applies for a copy of the record of contamination, the EPA must provide that information (section 58(2)).

Employ community awareness strategies

The EPA may employ community-based strategies to minimise the contamination, risk or harm through education and public awareness (section 7(c)). It may also generate any kind of publicity about a particular type or source of contamination that it feels would improve public awareness or understanding (section 104). The possibility (or threat) of a company being identified publicly as a perpetrator of a pollution incident may encourage companies to further develop and refine their environmental risk management policies and procedures.

Order investigation

The EPA may declare land to be an "investigation area" if it has reasonable grounds to believe that the land is contaminated (section 15). Once the land has been declared an investigation area, the EPA must "with reasonable expedition" either investigate the land or order persons to investigate it (see Part 3). Orders to investigate must be made by written notice (section 17).

Order remediation

The EPA has broad powers to declare land to be a remediation site, and order persons to remediate it (in accordance with Part 3).

"Ordering remediation" may include the following actions:

- (a) erecting a fence,
- (b) erecting a wall or bund or other barrier,
- (c) either treating, storing or containing soil (or other solid or liquid) on the land, or removing that substance from the land and treating it elsewhere,

- (d) vacating the land or ceasing all and any activities upon the land,
- (d) erecting appropriate warning signs,
- (f) refraining from disturbance or further disturbance of the land or at least below a specified depth,
- (g) monitoring the effectiveness of remediation or the risk of harm presented by the contamination of the land,
- (h) informing the EPA of any change in the ownership or occupancy of the land, to the extent that the person subject to the requirement is aware of the change.

This is not an exhaustive list. The EPA's broad powers to contend with contamination are coupled with a strict onus placed on landowners and occupiers to report contamination to the EPA as soon as it is discovered (discussed below).

What land is affected?

Land that comes within the ambit of the Act is land that is:

1. contaminated; and
2. presents a significant risk of harm (section 9(1)).

Relevantly, "**contamination**" is defined as the presence in, on or under the land of a substance at a concentration above that normally present in the same environment that presents a risk to human health or the environment.

"**Harm**" means harm to human health or any aspect of the environment. It includes direct or indirect alteration of the environment that degrades it. It is a broad definition. However, as "degrades" is not defined, it may be that the mere existence of a substance may not be enough if it does not actually degrade the land.

To assess the land, the EPA must consider a number of factors:

- (a) whether the contamination has already caused harm;
- (b) the toxicity and quantity of the substances present;
- (c) whether there are exposure pathways between the substances and human beings and other aspects of the environment;
- (d) whether the current or approved use of the land and adjoining land is likely to increase the risk of harm being done (eg. where the land is being used for child care);
- (f) whether the substances have migrated or are likely to migrate from the land; and
- (g) any guidelines made or approved by the EPA on contamination and remediation.

Who can receive an order?

As discussed, the EPA has wide powers to declare investigation areas and remediation sites and to order appropriate persons to investigate or remediate land.

Persons who may be issued with an order include (section 12):

- the person who caused the contamination, or, if that is not practical;
- the current owner of the land, whether or not that person had any responsibility for the contamination, or, if that is not practical;
- a notional owner of the land (whether or not the person had any responsibility for the contamination). A "notional owner" is defined as a person who has some kind of freehold interest in the land, and includes a mortgagee in possession (Section 14).

Under section 68, it is up to the recipient of an order to prove that they are *not* the owner of the relevant land. Furthermore, the burden placed on land owners is considerable as land owners must give the EPA written notice of

contamination as soon as the contamination is discovered. The financial penalties for failure to report are steep (see section 68: 1,250 penalty units [one penalty unit is \$110] for a corporation and 600 penalty units for an individual)

In addition, orders may be made against directors and companies to investigate or remediate contaminated land at their own expense (Part 7). The Land and Environment Court may order a director personally, or a holding company, to comply with orders made if:

- a company was wound up without having complied with an investigation or remediation order, or
- if the company disposed of the land within 2 years before the Court made the order.

Evidence: who contaminated the land?

The Act addresses the difficult issue of proving who actually contaminated land. While an innocent landowner may be ordered by the EPA to investigate or remediate land, the Act gives the landowner rights of recovery in court of the costs of compliance with the orders. The onus of proof of innocence lies on the person who circumstantially was most likely to have caused the contamination. Section 67 says:

In any proceedings under this Act to recover from a person the cost of carrying out an investigation or remediation order in relation to any land, the person is taken to have responsibility for contamination on that land if:

- (a) *the person carried on activities on the land, and*
- (b) *activities of that sort generate or consume the same substances as those that caused the contamination.*

Protection of the Environment Operations Act 1997 ("PEO Act")

Introduction

The PEO Act represents a fundamental re-writing of pollution regulation in New South Wales. It repeals the following pieces of pollution legislation:

- (a) *Pollution Control Act 1970;*
- (b) *Clean Air Act 1961;*
- (c) *Clean Water 1975; and*
- (d) *Noise Control Act 1975;*
- (e) *Environmental Offences and Penalties Act 1989;*
- (f) *parts of the Waste Minimisation and Management Act 1995.*

The PEO Act contains many innovations of potential significance for the coal mining industry. It replaces the numerous different licences and approvals under separate legislation with a single licensing arrangement that seeks to cover:

- all forms of pollution; and
- the development and operational stages of controlled activities.

The Act represents welcome, but long overdue, reform. This "Stage 2" legislation has been heralded for a number of years, yet the lack of real consultation with other States and Territories during its preparation means that businesses whose enterprises straddle borders will still spend time needlessly checking compliance under a variety of systems. The EPA has also been very quick to trumpet the Act as a "streamlining" of regulation, but the added burden of the wide-ranging conditions which can be applied to the new integrated licences, together with the new EPA investigative powers, mean that any streamlining will be enjoyed more by the EPA than by business. There are still more sticks than carrots for business. The question remaining is "Can't business be trusted yet?".

This section will address:

- The EPA's new investigative powers;
- Environmental audits;
- Integrated planning approvals;
- Protection of the Environment Policies;

- Integrated licensing; and
- Penalties.

Investigative powers of the EPA

The PEO Act provides the EPA with broad powers to:

- require, by written notice, any person to provide the EPA with any information and/or records in connection with any matter that comes within the ambit of the Act (section 191);
- enter premises (see section 196) and "*do anything that in the opinion of the authorised officer is necessary to be done for the purposes of this Part...*" (section 198(1)); and
- search premises, where a search warrant has been issued under the *Search Warrants Act 1985*.

Upon entering any premises in accordance with this Part, an authorised officer may take any number of actions, which may include:

- examine and inspect any works, plant, vehicle, or article;
- take and remove samples;
- make any necessary examinations, inquiries, and tests;
- take any necessary photographs, films, audio, or other recording;
- require production of any records for inspection;

- copy any records; and

seize anything an officer believes is connected with an offence.

The PEO Act makes clear that this list is **not exhaustive**. One slight limitation, however, on the EPA's powers under Part 7 appears to be in section 201:

*"Care to be taken
In the exercise of a power of entering or searching premises under this Part, the authorised officer must do as little damage as possible."*

Authorised officers of the EPA are also empowered to require a person to give any information in relation to a matter that comes under the Act (section 203(1)). The EPA or any other regulatory authority can also issue a notice in writing to a corporation and require that a director or officer be nominated to answer questions (section 203(2)). Those answers will be binding on the corporation (section 203(3)).

Environmental audits

The PEO Act introduces voluntary and mandatory environmental audits. The explanatory note to the Bill explains: "*Information obtained by licensees in the course of voluntary audits are protected from official inspection or use in proceedings, but those obtained in the course of mandatory audits directed by the EPA are not so protected.*"

A **mandatory audit** may be required by a licence condition if the appropriate regulatory authority reasonably suspects that:

- (a) the holder of a licence has on one or more occasions contravened the Act, regulations, or licence conditions; and

- (b) the contravention or contraventions have caused, are causing, or are likely to cause, harm to the environment.

Chapter 6.3 provides that documents prepared for the sole purpose of a **voluntary audit** are "*protected documents*" for the purposes of the Act, that is, the documents:

- (a) are not admissible in evidence against any person in any proceedings connected with the administration or enforcement of the Act; and
- (b) may not be seized or obtained by the EPA or any other person for any purpose connected with the administration of the Act.

Integrated planning approvals

The *Environmental Planning and Assessment Amendment Act 1997* was enacted in December 1997. It introduced a system of integrated development assessment intended to avoid the duplication of approvals between the EPA Act and approvals granted by other regulatory authorities.

"Integrated development" is development which requires a development consent and one or more of the approvals under ten "primary" Acts listed in the Act. For example, development which requires development consent as well as a licence under the PEO Act will be integrated development.

Integrated development is intended to encourage a coordinated approach by consent authorities and approval bodies to ensure that approval bodies are involved in the development application assessment process, thus avoiding the prospect that a project will receive development consent but that subsequent approvals will either be refused or granted in terms inconsistent with the development consent.

For example, the consent authority for a mining operation must liaise with the EPA before granting development consent, and obtain from the EPA the "general terms of any approval proposed to be granted" by the EPA in relation to the development. Any development consent granted by the consent authority must be consistent with those general terms, and if the EPA indicates that it will not grant the relevant approval then the consent authority must refuse the development application.

Once a development consent is granted, the discretion of approval bodies will be restricted in two important respects:

- (a) the approval body cannot refuse to grant an approval in respect of the development; and
- (b) the initial approval must not be inconsistent with the development consent.

These restrictions only apply to an approval sought within three years after the development consent is granted.

If a dispute arises between the consent authority and an approval body, that dispute may be referred to the Premier under an existing dispute resolution mechanism in the EP&A Act.

For State significant development which is also integrated development, similar coordination must occur between the Minister (as consent authority) and other approval bodies, although the Minister has an additional power to refer to the Premier a dispute where the Minister considers that any proposed "general terms" of an approval are inappropriate.

PEPs (Protection of Environment Policies)

The Act introduces PEPs as a means of setting environmental goals, standards, guidelines, and protocols that must be taken into account (section 30) by government decision-makers (including the EPA). A PEP may be prepared by the EPA in respect of the following (section 11(4)):

- the whole or any part of the State;
- the environment generally or any part of it;
- any activity that may impact, or has impacted, on the environment;

- any form of pollution;
- any aspect of waste;
- any kind of technology or process;
- any kind of chemical or other substance that may impact, or has impacted, on the environment; and
- any matter in respect of which national environment protection measures may be made.

A PEP is made by the Governor on the recommendation of the Minister. The Minister for the Environment may also direct the EPA to prepare a draft PEP in certain circumstances, for example, to implement a national environment protection measure.

The PEO Act provides for public consultation on draft PEPs and the accompanying impact statement, which is to include a full assessment of the economic and social impact on the community (including industry) that the policy will have (section 16(2)(d)).

The creation of PEPs is of importance to the coal mining industry and industry in general because:

- the EPA must take PEPs into account before issuing an environment protection licence or notice under this Act;
- similarly, a consent authority must consider PEPs when determining a development application, and
- so must a determining authority when considering whether an activity will have a significant impact on the environment under Part 5 of the EPA Act.

Integrated licensing

Introduction

One integrated schedule

The PEO Act introduces one integrated schedule of EPA licensed activities which will replace the various schedules under the former air, noise, and water legislation. All activities to be regulated by licence are listed in Schedule 1 to the PEO Act.

Schedule 1 relevantly includes:

"Coal mines that mine, process, or handle coal and are:

- (1) underground mines, or*
- (2) open cut mines that:*
 - (a) have an intended production or processing capacity of more than 500 tonnes per day of coal or carbonaceous material, or*
 - (b) disturb or will disturb a total surface area of more than 4 hectares of land by:*
 - (i) clearing or excavating, or*
 - (ii) constructing dams, ponds, drains, roads, railways or conveyors, or*
 - (iii) storing or depositing overburden, coal or carbonaceous material or tailings."*

and:

"Coal works that store or handle coal or carbonaceous material (including any coke works, coal loader, conveyor, washery or reject dump) at an existing coal mine or on a separate coal industry site, and that:

- (1) have an intended handling capacity of more than 500 tonnes per day of coal or carbonaceous material, or*
- (2) store more than 5,000 tonnes of coal or carbonaceous reject material except where the storage is within a closed container or building."*

The inclusion of coal mining activities as scheduled activities in the PEO Act means that those activities will be subject to EPA regulation, primarily through the issue of an Environment Protection Licence to authorise and to control those activities.

One Environment Protection Licence ("EPL")

Chapter 3 of the Act provides for the issue of "environment protection licences". This is the equivalent of the former "pollution control licence" under the soon-to-be-repealed *Pollution Control Act 1970*. Under section 44, EPLs are required for:

- the authorisation of either or both scheduled development work and scheduled activities;
- the regulation of all forms of pollution emanating from that work or activities; and
- any water pollution.

As discussed above under 2.1, coal mining is a "scheduled activity" and will require an EPL.

It is likely that "schedule development work" will also apply to coal mining. "Scheduled development work" is defined as follows:

"Scheduled development work means work in or on any non-scheduled premises that is designed to enable scheduled activities to be carried out at the premises."

A coal mining company should ensure that any proposed scheduled development work will be authorised by the operation's EPL.

The maximum penalty for conducting scheduled coal mining activities without a licence is, in the case of a corporation, \$125,000. Where the offence continues, there is a further penalty of \$60,000 for each day the offence continues.

What's new about an EPL?:

Wide ranging conditions

An EPL can include wide ranging conditions which will be discussed in some depth below. By way of example, however, the conditions can require a company to undertake mandatory environmental audits or to develop a pollution reduction program.

No expiry date

A single EPL remains in force until it is suspended, revoked, or surrendered (section 77). By contrast, under the current *Pollution Control Act 1970*, a pollution control licence has a maximum duration of 12 months. Although an EPL would be subject to EPA variation and review, it is possible for one licence to apply over the life of a particular mine. This is a significant change in NSW's pollution regulatory regime.

Can impose a load-based licensing fee

The new *Pollution Control Amendment (Load-Based Licensing) Act* provides for a new load-based fee structure for EPLs. Fees will be calculated based largely on the quantity or harm caused by emissions from the activity. This is an example of the "polluter pays" principle underlying much of the new environmental legislation.

Holder must be "a fit and proper person"

Before the EPA grants an EPL, it must consider whether the person concerned is a "fit and proper person" (section 45(f)). This is defined as meaning, primarily, whether the applicant has breached any environment protection legislation previously, and if the person who is to manage the scheduled activities or works is technically competent (see section 83).

A close look at EPL conditions:

As mentioned briefly above, EPL conditions may require the holder of the licence to undertake:

- (a) the "usual" things, like monitoring and certification of activities and works regulated by the licence;
- (b) mandatory environmental audits;
- (c) studies into any aspect of the environmental impact of the activity or work authorised or controlled by the licence, and the development of pollution reduction programs, which may require the acquisition of land as a buffer zone around a coal mine;
- (d) tradeable emission schemes. This is a new initiative, the regulation and workings of which may require some fine tuning as companies attempt to put such a scheme into practice. The PEO Act only loosely explains the scheme as including the following elements, though this list is not exhaustive:
 - i) the determination of aggregate limits on any form of pollution;
 - ii) monitoring and reporting levels of pollution;
 - iii) the creation and cancellation of tradeable emission permits or credits;
 - iv) the rights and duties of holders of tradeable emission permits or credits; and
 - v) the initial sale or allocation and further sale or allocation of tradeable emission permits or credits.
- (e) financial assurances in the form of a bank guarantee or a bond, for example;
- (f) remediation work;
- (g) maintenance of an insurance policy for the payment of costs of any clean-up work, and for claims for compensation for damages resulting from pollution related to the activity authorised by the EPL;
- (h) arrangements for the registration of a positive covenant, which will ensure that specified requirements of an EPL condition will run with the land, binding subsequent landowners;
- (i) any condition requiring that waste generated by the activity be dealt with in a particular way. This might include the preparation of an environmental waste management plan, for example. Such a condition might also address the issue of transport of waste.

The list of possible conditions is non-exhaustive.

The aim of the new environment protection licensing system is to control more effectively the whole activity (coal mining, in our circumstances), and not simply to regulate some final discharge point, and allowable concentrations and volumes of pollutants.

EPLs -comments

While EPLs do not expire, companies should be aware that the EPA maintains some powers over the provisions of an EPL.

Firstly, the EPA is required by the Act to review each licence every 3 years (section 78(1)).

Secondly, the EPA also may suspend or revoke a licence, but only if the EPA has grounds for doing so. The EPA must give the licence holder prior notice and a reasonable opportunity to make submissions in relation to the licence. Grounds for suspension or revocation of a licence may include:

- the licence was obtained improperly;
- a condition of the licence was breached; or

- the licence holder failed to pay the annual fee on time.

Finally, the EPA has broad powers to vary a licence and its conditions at any time (section 58(1)). A licence is varied by notice in writing to the licence holder. However, an aggrieved licence holder may appeal to the Land and Environment Court within 21 days after being given notice of the variation.

Penalties for offences

Like the *Contaminated Land Management Act*, the thrust of the PEO Act is also that "polluters should pay." The PEO Act creates a tiered system of offences with particularly stiff penalties for corporations. For example, a tier 1 offence is the wilful or negligent disposal of waste in a manner that harms or is likely to harm the environment. It carries a maximum penalty of a \$1,000,000 fine and/or 7 years' imprisonment. However, it is a defence if the person establishes that the offence was due to causes over which the person had no control, and the person took reasonable precautions and exercised due diligence to prevent the commission of the offence. Tier 2 offences involve water, air, noise, and land pollution, and carry a maximum \$125,000 penalty for corporations.

Significantly, the PEO Act provides the Court with broad powers to order more than the payment of a fine and any costs associated with investigating and remediating the contamination, and compensating someone for damage related to the contamination. A Court may also order the offender to pay, as part of the penalty, the amount of the economic benefit that the polluter received from the commission of the offence (section 249(1)), as estimated by the Court.

Furthermore, the Court may order the offender to take specified action to publicise the offence and its environmental and other consequences (section 250(1)). This publicity could be in a newspaper, in an annual report, or any other notice to shareholders of a company.

REVIEW OF THREATENED SPECIES CONSERVATION ACT

The Parliamentary Joint Select Committee on the *Threatened Species Conservation Act* released its report in December 1997.

This review made the following recommendations which should be welcomed by the coal industry:

- National Parks and Wildlife Service to review the operation of the Eight Part Test. The current Test was deemed too difficult to operate. The review should be available for comment by mid-1998.
- A review of requirements relating to Species Impact Statements, in particular the accreditation of persons who prepare the statements and the development of guidelines for the preparation of statements.
- National Parks and Wildlife Service to place the emphasis of its efforts on community education, consultation and co-operation rather than on the prosecution of offenders.

Under the new environmental regime in New South Wales, coal mining operations will need to be careful to comply with the requirements of their EPLs, as well as with general legislative requirements, such as mandatory disclosure of pollution incidents. The legislation's focus on public accountability also calls for an ongoing commitment to transparency in a company's environmental management, and most likely, to ongoing public relations work.