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By email: showett@environment.tas.gov.au

Dear Steve,

Environmental Management and Pollution Control (Amendment) Bill 2011

Thank you for the opportunity to comment on the draft *Environmental Management and Pollution Control (Amendment) Bill 2011 (the Bill)*. In general, we believe that the proposed amendments are beneficial and will improve the implementation and enforcement of the legislation.

We strongly support the following proposed amendments:

- Including Schedule 5 as a means of providing guidance regarding the appropriate assessment class for Level 2 activities (or called-in level 1 activities). We also support projects of regional significance being assessed as 2C developments;
- Creating an offence for the provision of false or misleading information (s.43A) and;
- Increasing the maximum penalties able to be imposed under the regulations (s.102).

More detailed comments in relation to some other proposals are set out below.

Environmental Nuisance

We strongly support the proposed amendments to expand the environmental nuisance offence beyond "emissions" of pollutants. This restriction has proven problematic in a number of cases in which we have been involved.

As discussed in our previous submissions, we have also advocated for an expansion of the serious and material environmental harm offences. In particular, these offences are currently limited to harm caused by polluting the environment. Pollute is defined to include discharge, emit, deposit or disturb pollutants.

As a result of this qualification, much environmental harm resulting from vegetation loss, habitat disturbance and disruption to hydrological cycles is not caught by the offence provisions. We recommend that section 50 and 51 of EMPCA also be amended to remove the qualifying statement "*by polluting the environment*". That is, the offences should simply be unlawfully causing serious environmental harm or material environmental harm. This is consistent with the approach taken in other jurisdictions.

Contaminated Sites Notices

We support the amendment to include notices issued under Part 5A in the register to be maintained under s.22.

We appreciate that the search fees associated with s.22 are lower than the current fee for a Property Search by the Contaminated Sites Unit, or a general title search. However, given the importance of public access to information regarding contamination, it would be preferable that such information was available without charge (such as on the LIST). While it is beyond the scope of the proposed legislation, we also recommend that contaminated sites notices be included in the information provided by planning authorities under s.337 of the *Local Government Act 1993*.

As an interim measure, we recommend that s.22 or, alternatively, r.17 of the *Environmental Management and Pollution Control (General Fees) Regulations 2007*, be amended to introduce a specific exemption from the requirement to pay a fee to search the register in s.22(1)(g).

Additional information

We strongly support amendments to s.27E to extend the power of the Board to request further information, and the suspension of assessment time-limits while the information is provided, to all Level 2 developments.

While we support the Board having power to seek additional information following the public comment period, we believe that the public should have an opportunity to comment on any significant additional information supplied. For example:

- If the additional information supplied results in any material changes in the proposed use or development, the new information should be re-advertised to ensure that any person who could be affected by the changed use (but may not have been affected by the original proposal) has an opportunity to comment;
- If the additional information responds to concerns raised regarding lack of data, inaccurate or incomplete data, anyone who made a representation should be given an opportunity to comment on and critique new data submitted in support of the development.

Allowing an additional comment period in respect of significant additional information would facilitate constructive public participation, consistent with the objectives of the legislation.

Environment Protection Notices

As noted in the Statement of Intent, EPNs are the principal mechanism for enforcement under EMPCA. We therefore strongly support amendments to improve their effectiveness and enforceability. In particular, we support:

- amending the definition of 'conditions' (which may be varied by an EPN) to include 'restrictions';
- amending the definition of environmentally relevant activities to clarify that EPNs may be issued in respect of past activities (s.43B);
- allowing a single EPN to cover an integrated operation; and
- requiring the operator to advise the Director 30 days prior to ceasing to be responsible for a regulated activity, and improving the mechanisms for transferring responsibility to new owners (s.45).

Varying and enforcing conditions

We support the power of the EPA or a Council to amend permit conditions to better manage actual or potential environmental harm. However, as identified in the previous discussion paper on proposed amendments to EMPCA (November 2010), administrative difficulties exist in managing and enforcing the various conditions imposed by planning permits and one or more EPNs issued for a site.

We acknowledge that the proposed amendments to facilitate transfer of EPNs to new owners will address some of the difficulties. However, we maintain that it would be preferable to introduce an instrument (similar to the 'Permit Condition Variation Notice' proposed previously) effectively providing for amendments to the conditions of the permit directly.¹ The new permit conditions would then run with the land, without any need for transfer of responsibilities to the new owner.

We support the proposed introduction of a specific offence for failing to comply with permit conditions imposed by the EPA, to overcome any uncertainty regarding enforcement of such conditions (s.51B).

Self-incrimination

We support the inclusion of a new provision explicitly providing that a person cannot refuse to provide information requested by an authorised officer on the basis that the information may incriminate them (s.95A). We agree that any such information provided should not be used against an individual in criminal proceedings, but believe that the information should be admissible in relation to civil enforcement proceedings.

We also maintain that investigation, prevention and management of environmental harm would be greatly enhanced by a further provision confirming that any further evidence obtained as a result of information provided under s.95A can be admitted as evidence in legal proceedings relating to the environmental harm.

An example of this approach is s.112A(3) of Western Australia's *Environment Protection Act 1986*.

The EDO appreciates the opportunity to make these comments. Please do not hesitate to contact us to discuss any issue raised in this submission.

Kind regards,

Environmental Defenders Office (Tas) Inc

Per:



Jess Feehely
Principal Lawyer

¹ This was discussed in more detail in our submission on the previous discussion paper, dated 18 February 2011