

## 6. Stopping Environmental Harm (including pollution)



The previous chapter dealt with laws aiming to prevent environmental harm from occurring in the first place, through a rigorous planning process.

But, even with 'best practice' planning in place, environmental harm will inevitably occur – either through accident, negligence or deliberate breaches of law.

This chapter deals with laws that are used to remedy pollution and other harmful activities.

### About EMPCA

The *Environmental Management and Pollution Control Act 1994 (EMPCA)* is the central piece of legislation that deals with pollution. Its aim is to prevent, reduce and undo harm to the environment.

This Act provides for a wide range of offences, including:

- causing or knowingly permitting pollution or environmental harm.
- operating in breach of licence conditions

🚫 In general, it is an offence to cause environmental harm, regardless of whether you intended to cause the harm. However, penalties are generally higher if you were aware (or should have been aware) that your actions would cause environmental harm.

There are also a range of strict offences under regulations (for example, *Environmental Management and Pollution Control (Miscellaneous Noise) Regulations 2004*) that do not require proof of environmental harm – all that is required is evidence that the restrictions in the regulations were not complied with. For example, if you operate loud machinery late at night, you could be committing an offence, even if your neighbours are not home to hear the noise.

Officers have wide-ranging powers under the Act to enter properties, ask questions, take samples and so forth. Anyone who breaches the Act or who breaches licence conditions may be prosecuted and fined. The EPA and local Councils are responsible for enforcing the EMPCA and its Regulations.

### 6.1 Environment Protection Principles

EMPCA is based around three important concepts

<b>1. Environmental Harm</b>	See Sections 3, 5, 50-53 of EMPCA
<b>2. General Environmental Duty</b>	See Sections 23A & 55A of EMPCA
<b>3. Due Diligence</b>	See Section 55 of EMPCA

## What is 'environmental harm'?

*Environmental harm* is defined in the Act as 'any adverse effect on the environment' – of whatever degree or duration.

There are three categories of Environmental Harm (listed from most serious to least serious):

<b>Serious environmental harm</b>	maximum penalty \$1,300,000 and 4 years prison
<b>Material environmental harm</b>	maximum penalty \$325,000 and 2 years prison
<b>Environmental nuisance</b>	maximum penalty \$39,000

## What is 'Serious Environmental Harm'?

- involves an actual adverse effect on the health or safety of human beings that is of a high impact or on a wide scale; or
- involves an actual adverse effect on the environment that is of a high impact or on a wide scale; or
- results in actual "**loss**" or property damage of an amount, or amounts in aggregate, exceeding ten times the threshold amount (*presently \$50,000*).

## What is 'Material Environmental Harm'?

- consists of an environmental nuisance of a high impact or on a wide scale; or
- involves an actual adverse effect on the health or safety of human beings that is not negligible; or
- involves an actual adverse effect on the environment that is not negligible; or
- results in actual "**loss**" or property damage of an amount, or amounts in aggregate, exceeding the threshold amount (*presently \$5,000*).

Note: "**loss**" includes the reasonable costs and expenses that would be incurred in taking all reasonable and practicable measures to prevent or mitigate the *environmental harm* and to make good the resulting environmental damage.



## What is 'environmental nuisance'?

'Environmental nuisance' refers to the emission of a pollutant that unreasonably interferes with, or is likely to unreasonably interfere with, a person's enjoyment of the environment.

## What is 'general environmental duty'?

EMPCA includes a concept of *General Environmental Duty* – whereby a person must show that they have taken reasonable steps to prevent environmental harm and have complied with permit conditions, State Policies and relevant codes-of-practice (see sections 23A and 55A).

🧐 What is "reasonable" will depend on the circumstances, including the financial capacity of company, the nature of the offence, the sensitivity of the receiving environment, whether the offender has been warned before and the current state of technology. In general, provided a company is complying with all relevant Codes, they will be taken to comply with their General Environmental Duty.

## What is 'due diligence'?

You cannot be prosecuted for not complying with your general environmental duty. However, if you are accused of causing environmental harm, it can be a defence if you can show that you have complied with this duty by taking all reasonable and practicable measures to:- prevent the environmental harm, or prevent or remedy the circumstances that led to the causing of the environmental harm.

For criminal charges, this is also known as the 'due diligence' defence (see section 55 of EMPCA).

➡ Go to [Chapter 5](#) for an outline of management tools that can be used by business operators to demonstrate due diligence.

## 6.2 Pollution

Pollution is a particular form of environmental harm. 'Pollutants' can take the form of:

- a gas, liquid or solid
- an odour
- an organism (whether dead or alive) including a virus
- energy including noise, radioactivity & electromagnetic radiation
- a combination of pollutants that may cause environmental harm.

## When are you polluting?

A company, person or group of people are polluting if they:

- discharge, emit, deposit or disturb pollutants which cause environmental harm or may cause environmental harm, and / or
- fail to prevent the discharge, emission, deposit, disturbance or escape of pollutants which cause environmental harm or may cause environmental harm.

## What about permissible levels?

The EPA Division uses these benchmarks when assessing what emission levels are permissible.

### Permissible Noise Levels:

The *Environmental Management and Pollution Control (Miscellaneous Noise) Regulations 2004* set out acceptable noise limits and hours of operation for a number of common 'neighbourhood' noise sources, including lawnmowers, off-road vehicles, heat pumps and power tools.

For other noise nuisance in residential areas, the police or Council will consider whether the noise is, or is likely to be, audible in a habitable room in any other residential premises.

### Permissible Smoke Emissions:

The *Environmental Management and Pollution Control (Distributed Atmospheric Emissions) Regulations 2007* set rules for emission of smoke from wood heaters, fireplaces and barbecues. Under the regulations, smoke must not be visible for more than 10 minutes and for more than 30 seconds within 10m of the point of emission.

For other smoke emissions in residential areas, the police or Council will consider whether smoke is unreasonable. The Environment Protection Authority ('EPA') has also recently implemented a Domestic Smoke Management Program. The Program aims to reduce the amount of smoke and particle matter generated from domestic wood heaters and burning activities.

### Warning Systems:

When smoke levels and particle matter in the air rise to levels that could be harmful to our health, the government can issue an 'air quality notification'. This trigger acts as an early warning signal to help advise you in intense smoke events. This notification system was developed in early 2012 in order for people to be able to make informed decisions about their health. Previously, alerts were only triggered after 24 hours of increased smoke levels. However, new evidence suggests that health can be affected even after a short time of being exposed to increased smoke levels. Therefore, the new alert is triggered after one hour, when smoke levels are elevated in a particular location.

☛ See [Chapter 8](#) for more information about domestic air quality programs.

### Permits:

Although blanket pollution limits apply in some circumstances, for individual companies they are gradually being phased out and replaced with site-specific discharge limits. These are usually set in the company's permit conditions or EPN conditions. So, if you have a concern about pollution it is important to look at the operator's permit (you can ask to see this at the local council office, or contact the EPA Division).

### State Policies:

A number of *State Policies* (such as the *NEPM for Ambient Air Quality*) are directly enforceable in relation to emission limits.

☛ see [Chapter 4](#) for further information about State Policies.

## Environment Protection Policies:

*Environment Protection Policies* (EPPs) also provide guidelines for State and Local Government regulation.

Only two EPPs have been finalised so far: the *Environment Protection Policy (Air Quality) 2004* and the *Environment Protection Policy (Noise) 2009*.

The EPP (Air Quality) provides a framework for the management and regulation of point and diffuse sources of emissions to air, while the EPP (Noise) sets objectives for measuring, monitoring and reducing noise emissions.

EPPs are **not** directly enforceable. The EPP (Air Quality), and the *Air Quality Strategy* developed under the Policy, will be implemented by State and Local governments when they develop legislation, policies and planning schemes or undertake environmental assessments relevant to air quality.

This is in contrast to the NEPM for Ambient Air Quality, which has the status of a State Policy and is directly enforceable. Similarly, the EPP (Noise) is not enforced, but its objectives are implemented through planning decisions (e.g. imposing conditions to reduce noise emissions), policy guidelines like the State Road Noise Strategy, and the Noise Measurements Manual.

→ You can download the EPPs at <http://epa.tas.gov.au/epa/tasmanian-air-quality-strategy>

## Who is responsible for environmental harm?

Under EMPCA, strict liability is attributed to:-

- the occupier: or
- a person in charge: ...of a place or vehicle at or from which a pollutant occurs.

If it is clear who caused the pollution, that person can be charged, even if they are not the occupier or person in charge of the property from which the pollution was emitted.

When land is considered to be a contaminated site or that it may be a contaminated site, responsibility for the clean-up lies firstly with a polluter(s), however, if no polluter can be found, or the polluter does not have the capacity to pay, then responsibility can fall on a non-polluter. It is therefore important to know the history of the site you are purchasing.

☛ Go to [Chapter 10](#) for more information about contaminated sites.

### **Are company directors liable?**

Yes, directors can be personally liable for the same offences as the company – even if the director was unaware of the offence. Maximum penalties for an individual director are \$325,000 plus up to four years imprisonment for promotion of or acquiescence to an offence.

⚠ Wilful blindness is no defence – if a director should have known about a pollution incident, she or he can be held liable for not having prevented, or contained, it.

## What do I do if I have witnessed or caused pollution?

If you are responsible for the activity, you (or your company) are legally obliged to report any pollution incidents to the EPA (see section 32 of EMPCA). If you witness polluting by another, you should still report it to the local Council or EPA hotline.

📞 All incidents should be reported to the EPA as soon as possible, and no later than 24 hours after the incident.

## 6.3 Enforcing environment protection laws

Environmental protection laws can be enforced in a number of ways.

They can be enforced by government agencies, including local councils. They can also be enforced by members of the public.

Environmental harm is mainly enforced using two key pieces of legislation:

### 1. Environmental Management and Pollution Control Act (EMPCA)

This law is used to prosecute breaches of environmental controls.

An *Enforcement Policy* sets out the principles, criteria and measures that the *EPA Division* uses to enforce the provisions of this Act.

➔ You can download the *Enforcement Policy* at <http://epa.tas.gov.au/epa/document?docid=587>

### 2. Land Use Planning and Approvals Act (LUPAA)

This law is used to prosecute breaches of [planning laws](#). Under LUPAA an operator can be prosecuted for:

- operating without a permit
- operating in breach of permit conditions

## What is the role of councils?

Councils have explicit duties and powers to stop a person polluting. In fact, they have a statutory obligation to issue an abatement notice (under section 200 of the *Local Government Act*) if a nuisance exists.

In addition, Councils must use their best endeavours to prevent or control acts or omissions which cause or are capable of causing pollution (see section 20A of EMPCA).

Councils are also responsible for regulating 'Level 1' activities under EMPCA and LUPAA

➔ Go to [Chapter 5](#) for details

### **Councils can satisfy this responsibility by:**

- keeping a register of Level 1 activities and regularly checking that Level 1 activities have not become level 2 activities (e.g. because of increases in production)
- conducting environmental audits
- conducting, or requiring industries to conduct, background monitoring of air, land or water
- having (and enforcing) a trade waste policy
- effectively investigating and addressing complaints

➔ Go to [Chapter 5](#) and [13](#) for more details

### **If the council is satisfied that someone is polluting, it can:**

- Issue a direction requiring the polluter to take particular action
- Issue an environmental infringement notice
- Serve an *Environment Protection Notice* on the person causing (or likely to cause) the pollution. The notice must state what the pollution is, how to stop that pollution and the time limit for stopping it.

- Take 'Civil Enforcement' action in the Tribunal (→ Go to Chapter 13 for more information about Civil Enforcement).
- Commence criminal prosecution proceedings

## What is the role of the EPA Division?

The *Department of Primary Industries, Parks, Water and Environment (DPIPWE)* is the principal agency charged with ensuring that the state's pollution control laws are upheld. Within this Department, the *EPA Division* is specifically responsible for assisting the EPA Board with the assessment of 'Level 2' activities.

➡ Go to [Chapter 5](#) for details about how these activities are regulated.

### Like councils, the Department can:

- serve the offender with a *direction*
- serve the offender with an *Environmental Infringement Notice*
- serve the offender with an [Environment Protection Notice](#)
- bring [civil enforcement](#) proceedings (section 48 of EMPCA)
- bring *criminal* proceedings

🚫 It is an offence not to comply with any notice issued by council or the EPA Division.

## How can I find information about pollution and permits?

The local Council maintains a record of all permits issued to companies in its municipal area. You can inspect these permits at the Council office.

*Environment Protection Notices* are compiled in a register which is kept by the EPA Division and is available for inspection by the public.

You may need to search broadly to identify the source of particular emissions. For example, if you are concerned about the health of a particular river system, you may need to check through the permits and EPNs relating to all premises that discharge into that watercourse.

## 6.4 How can I stop someone polluting?

**You do not have to wait until someone has polluted before taking action.**

You can also stop someone from **causing** environmental harm or from doing something that is **likely to cause** environmental harm. (This includes all forms of pollution including dust, noise, smells, smoke, radiation or chemicals).



### 1. Contact the local council

You should immediately contact the local council if you believe someone is polluting, or likely to pollute, the environment.

Apart from reporting the incident, you can also ask the council to initiate a prosecution or 'civil enforcement proceedings'

### 2. Contact the EPA Division

You should contact the *EPA Division* if the pollution is significant, or if the local council cannot be contacted or fails to act on your complaint.

If a council is causing the pollution (eg spillage from its sewage works or dust emissions for its quarry), then it is appropriate to contact the EPA Division directly.

When dealing with the council or the department, make sure that you provide sufficient information to support your complaint

☛ Go to [Chapter 13](#) for tips on how to make a complaint.

⚠ You should request that the Department or Council inform you of any action taken in relation to your complaint.

### 3. Contact the Health Department

If you consider that pollution could have an impact on human health, you should also contact the *Director of Public Health*.

### 4. Take legal action yourself

It does not cost you anything if the Council or Department takes legal action.

However, in the event that no action is taken, you have power to take action yourself to stop environmental harm from occurring.

You can do so by applying for 'civil enforcement' directly to the *Resource Management and Planning Appeal Tribunal*. The Tribunal can impose a range of orders on an offender. But note that you may be exposed to costs if you take this action

☛ Go to [Chapter 14](#) for more information.



## 6.5 Other pollution laws

Apart from EMPCA and LUPAA, pollution offences can also be prosecuted under a number of other pieces of legislation. Some examples include:

### Litter Act 2007

This Act can be used to prosecute littering offences, including littering from motor vehicles. To report a littering offence, go to the EPA Division's [Report Littering](#) website.

### Local Government Act 1993

Pollution that is a public health nuisance may be prosecuted as a statutory nuisance under Section 199 of this Act. This covers, for example, emissions of waste, noise and dust and unclean or unsafe premises. In these instances, a local authority can serve an *abatement notice* specifying what steps must be taken to remove the nuisance.

### Council by-laws

Local council by-laws also cover some potential nuisances such as dog droppings, smoke from fireplaces and BBQs, abandoned car bodies and trade waste.

### Pollution of Waters by Oil & Noxious Substances Act 1987

This act is used to prosecute discharges of oil, garbage, sewage, and noxious and harmful substances into coastal waters.

⚠ In most cases, where any of these pollution incidents occur, the [EPA Division](#) should be informed and enforcement left to that department.

## Public Health Act 1997 and the Food Act 1998

- These Acts may also be relevant where there are significant effects on the health or safety of people.
- The *Director of Public Health* has significant powers to conduct inquiries, prosecute offenders and to “take any action to reduce, remove or destroy any threat to public health”.

### 6.6 What about federal pollution laws?

Outside the jurisdiction of Tasmania (generally three nautical miles from the coast) the Commonwealth has responsibility for controlling pollution. Under new regulations, dumping of wastes in sea water is the responsibility of the federal government, except within bays and estuaries (from low water mark).

- ☛ Go to [Chapter 9](#) for information about marine laws

#### ***How are chemicals, pesticides and contaminated land controlled?***

- ☛ Go to [Chapter 10](#) for information about these issues.

### 6.7 Preventing pollution using 'common law'

Although most pollution law today is controlled via legislation, on occasion common law actions can also be useful.

- ☛ Go to [Chapter 2](#) for information about common law

These actions are available through either the *Magistrates Court or the Supreme Court*

- ☛ Go to [Chapter 14](#) for information about taking action.

Common law actions are complicated and much depends upon the facts of each case. As a general guide, people suffering from pollution should first seek to establish whether or not they have any rights or remedies under EMPCA, LUPAA or the *Public Health Act* before pursuing common law remedies.

However, if pollution interferes with your personal rights, you may be able to bring proceedings to protect those rights under common law. The types of proceedings which may be available include:

#### ***Private nuisance***

These proceedings can be brought for pollution interfering with your private property. You can seek damages (compensation for any loss you suffer), or an injunction (a court order stopping the unlawful pollution).

Only the owner or occupier of the property affected by the pollution can bring proceedings for private nuisance. To succeed, you must prove that the interference with your property is substantial and unreasonable.

#### ***Public nuisance***

You can bring public nuisance proceedings where you suffer injury in public. Again, you can get damages or an injunction. However, to succeed you have to prove that the damage which you suffered was greater than that of the public in general. In the case of pollution, this can be hard to prove.

#### ***Negligence***

Sometimes a person will owe you a duty of care to look after you. When they breach this duty and the breach causes you damage, you may have an action in negligence. If a

polluter breaches a duty of care to you, you can recover damages for any loss that you suffer, so long as that loss was foreseeable.

Examples of such events include escape of sewerage or dammed waters, or release of toxic gases as a result of a malfunction when machinery is not properly maintained.

### **Trespass**

The law of trespass may be used where the pollution is caused directly as a result of intrusion, for example, where waste is dumped on your land.

It can be very expensive to bring these sorts of actions. It can also be hard to prove that the pollution caused your loss. If you lose, you may end up having to pay not only your own legal costs, but those of your opponent as well.

For these reasons it is advisable to obtain good advice from a lawyer before commencing any proceeding using common law.

➤ Go to [Chapter 14](#) for information about using the courts and obtaining legal advice

## **Case studies**

<p><b>Case study 1:</b></p> <p><b>Dust and noise pollution</b></p>	<p>Bill lives in a small town. Under the planning scheme the area is in the Residential and Environment Protection Zone.</p> <p>A neighbour applied to Council to build a house and large shed (workshop) to restore old machinery.</p> <p>Bill made a written objection to Council. Council granted a permit allowing the workshop.</p> <p>Bill appealed to the Tribunal which disallowed the workshop as an industrial use, incompatible with the Environment Protection Zone.</p> <p>The neighbour appealed to the Supreme Court which upheld the Tribunal decision (see <i>Kempster v Manning</i> [2006] TASSC 31).</p>
<p><b>Case study 2:</b></p> <p><b>Domestic noise pollution</b></p>	<p>Fred and Flo's neighbour installed a heat pump, which could be clearly heard in their bedroom and living room.</p> <p>The noise disrupted their sleep. They spoke to the neighbour who did not respond.</p> <p>They spoke to the Council's <i>Environmental Health Officer</i> who advised them that the noise was a breach of section 53 of EMPCA and of the <i>Noise Regulations</i>. She issued an EPN on the neighbour, who then moved the heat pump and enclosed it in a baffle to minimize the noise - which was now only faintly apparent in Fred and Flo's house.</p> <p>If the neighbour had ignored the EPN, they could ask council to prosecute the neighbour, or the EPA Division, if the council was unwilling to do so. If there was argument as to the noise levels that were in breach of the <i>Noise Regulations</i>, the Council or Fred and Flo would have needed to obtain expert measurements of the noise levels in their house.</p> <p>Had Council failed to act, Fred and Flo could apply to the <i>Resource Management and Planning Appeal Tribunal</i> under section 48 of EMPCA for orders stopping the neighbour operating the heat pump.</p>

## **6.8 Environment Protection Notices**

### **What is an Environment Protection Notice?**

An *Environment Protection Notice (EPN)* is issued by the *Director of the EPA* or a local council officer. It orders an offender to take measures to prevent, control, reduce or remedy environmental harm (see Section 44 of EMPCA).

It is, in effect, a warning system which enables a polluter to remedy a damaging activity or face being prosecuted.

An EPN may require an offender to:

- discontinue, or not commence, a specified activity
- limit the times or conditions under which the activity is carried on, or
- take specified action (such as installing new biofilters at a plant, or relocating a discharge pipe).

## **When can an EPN be issued?**

**An EPN can be issued when:**

- serious or material environmental harm or environmental nuisance has occurred, is being or is likely to be caused.
- action is necessary to give effect to a state policy, or an Environment Protection Policy. (ie where a previously accepted practice needs to be stopped because it is now contrary to a State Policy)
- it is desirable to vary the conditions of a permit (ie where the permit conditions need to be updated to assist in the ongoing environmental management of the activity. This could be due to a threat of environmental harm.)
- it is necessary to get a person or operator to comply with the 'General Environmental Duty' (see sections 23A & 55A of EMPCA).

## **Can I appeal against an EPN?**

Yes, if you are served with an EPN and you believe it to be unreasonable, you can appeal to the *Tribunal*.

A person who made a representation to the EPA in relation to the activity, or a person with a proper interest in the activity and a good reason for not making a representation, can apply to join the appeal.

 **You must lodge your appeal within 14 days.**

## **What happens if an EPN is not complied with?**

**If a person does not comply with the conditions of an EPN, the Department may:**

- seek orders from the Tribunal to enforce the EPN
- prosecute the polluter, or
- do the work itself and bill the polluter for the cost of the work.

## **What happens if an EPN is complied with?**

If all the actions required by the EPN are completed, the company is supplied with a certificate of compliance and a copy of this certificate is placed on the EPN Register.