



27 August 2001

Caroline Strange
Principal Legal Officer, Legal Services Branch
Environment Protection Authority
PO Box A290
SYDNEY SOUTH NSW 1232

Dear Caroline

I refer to the *Summary Of Proposed Amendments To Environment Protection Laws* the EPA is proposing to introduce to a variety of Environmental laws it enforces.

The majority of these changes, are considered by the Australian Environment Business Network to be minor and should assist the EPA and the NSW Government in the application and enforcement of NSW environmental legislation. However, a number of the proposed changes raise some issues and concerns with industry and business. These changes include:

1. Enable a licensee's notification to the EPA of a pollution incident to be used as evidence in the prosecution of the licensee if the notification was required under a licence condition.
2. Clarify and fill gaps in the existing provision (section 109A) which validates regulatory action taken under the Act by a regulatory authority (eg a local council) in the mistaken but reasonable belief that it was the appropriate regulatory authority for an activity; and ensure that a local council and its staff (and not just the EPA and its staff) have sufficient powers of investigation to be able to determine whether the council is the appropriate regulatory authority for an activity or incident.
3. Ensure that a licence application cannot be deemed to have been refused until the EPA has had time to consider any submissions which it is required by law to invite in relation to the application and any necessary development consent has been granted.

The last proposed change is the most concerning issue for AEBN.

1. Non-Licence Holders Only to Receive Protection Of Evidence

AEBN understands the original intent, under section 153, was that by protecting persons reporting environmental incidents it would encourage reporting of environmental incidents. As the requirements under section 148 extend to employees and other individuals, and small companies or sole traders (agents and principals) individual exposure to liability is of concern. Section 152 clarifies that individuals, like corporations can be prosecuted for failing to report. So the incentive for individuals to report must be higher than not reporting. Hence the section 153 makes the reported information inadmissible evidence in court to encourage reporting.

AEBN considers that the protection for individuals must be continue and doubts that if this part of the POEO Act is changed to only protect non-licenced sites, employees and agents and principals may still be liable for the information they report in relation to licenced sites. This may distract from the incentive to report incidents by individuals at licenced sites.

It is important to clarify that evidence, which is made inadmissible under section 153, is only the reported information to the EPA. Primary concern is for individual self-incrimination at this reporting

stage. As pointed out by the EPA, most companies do not have a privilege against self-incrimination. So the question is how much information can be protected via the reporting process? AEBN can see a potential for abuse by a company in reporting all the information it can in relation to an incident to make this inadmissible in court. It is noted that the EPA has stated this has not occurred to date. A major disincentive for such abuse is that if the same or similar information can be easily obtained via other means—an EPA investigation—and this alternative information would be admissible in court.

On receiving a report of an incident the EPA has the opportunity to investigate the outcomes of the incident. The POEO Act has many powerful sections to launch a prosecution on direct evidence, including strict liability for pollution of waters. This applies for licenses and non-licensed sites. So making reported information inadmissible is a minor piece of the evidence required for the EPA in considering launching a prosecution. .

Licensed sites are under additional liabilities as they must also comply with their licence conditions, which allows the EPA to choose other prosecutorial paths for breaches of conditions.

AEBN has difficulty in understanding how changing this area of the POEO Act will assist the EPA in securing prosecutions against licensed sites. As the details of the changes have not been provided the full implications cannot be completely assessed.

R1 ***AEBN recommends that any changes to sections 148 through to 153, should continue to protect the reporting individual, regardless if the report implicates a licensed or non-licensed site.***

2. Regulatory Action By Inappropriate Regulatory Body

This proposal seeks to clarify section 190A, which relates to clean up and prevention notices, to permit local governments and other bodies to issue these notices, even though they are not the appropriate regulatory body. In addition it proposes to, increase the powers of local government to determine whether the council is the appropriate regulatory authority.

AEBN is concerned about increasing the powers of local government in the area of environmental law. In many instances the local government is not well trained nor understands the complexity of industrial sites and their environmental issues, especially licensed sites. Concern is high among some companies of the lack of expertise and the potential for major expense, such as in educating such inspectors, that some have forced their sites to become licensed under the POEO Act. AEBN does not recommend becoming licensed due to the increased liability under environmental protection licence conditions. Nevertheless, some companies believe this is a lower risk course than being subjected to local government inspectors with substantial powers, but little expertise. A comment often heard 'At least with the EPA you can discuss the issues.'

Given this level of concern with the lack of expertise of local government and other agencies, AEBN is concerned at permitting local government inspectors to police and issue notices on licensed sites.

AEBN appreciates the enormity of the task the EPA has to police environmental laws across NSW. Permitting other regulatory agencies to, in part, undertake the policing role of the EPA must be attractive and may appear an efficient use of scarce NSW Government resources. However, the level of expertise by these other agencies, especially local government is considered poor, albeit improving. As a consequence AEBN opposes the use of any other agency, other than the EPA in the issuing of any action, above a penalty notice, on licensed sites. This leaves the current s109A, which at least has a requirement to reference the EPA with the issuance of such notices.

After the addition of all the POEO licences as a special website, AEBN fails to see the need for increased investigative powers to local government to identify if a site is licensed or not.

R2 ***AEBN recommends that local government not have its powers extended to inspect or issue notices against licensed sites.***

3. Deemed Refusal on Licences

There are two possible interpretations on this proposed change to the POEO Act:

- Deemed refusal applies to the assessments of licences for new sites [designated developments] undergoing development consent
- Licences undergoing a renewal, application, variation or approval of the surrender of a licence

All planning consent agencies have a time period imposed on them to the processing of development applications. The EPA should be treated no differently. AEBN considers the EPA's current 60 day time period for a new licence to be issued generous compared to other time lines imposed on other Government Agencies in the planning process. Response time by Government agencies is a common right of applicants requiring appropriate permission to operate.

On no account should a time period be left open. Both the Department of Planning and Urban Affairs and Local government have 40-day periods imposed on their decision-making processes. These time periods were set to ensure certainty and provide confidence for industry. An open time period would permit the EPA to sit on important developments indefinitely. The EPA's claim that it requires 'time to consider any submissions which it is required by law to invite in relation to the application' is contrary to the time limits imposed on consent authorities assessing environmental impact statements, which have similar, perhaps with more intense public input.

While the EPA has not yet demonstrated poor performance in this area, other government agencies have. The EPA should not set such a precedent for other less efficient NSW government agencies to follow.

If permitted this proposed change will undermine investment and certainty in the development of NSW industry and infrastructure.

The proposed changes appear to target section 287 *Appeals regarding licence applications and licences*. Removal of the 60 day period for deemed refusal will also undermine the current ability of licence holders to proposed variations to their licence conditions, as well as new licence applications and surrenders.

R3 *AEBN recommends that the proposal to increase the time period for deem refusal on all aspects of environment protection licences be abandoned.*

AEBN welcomes the opportunity to comment on the *Summary Of Proposed Amendments To Environment Protection Laws*.

Should the EPA wish to discuss the issues in this submission please contact Andrew Doig on 9924 7515.

Yours Sincerely

ANDREW DOIG
Director
AUSTRALIAN ENVIRONMENT BUSINESS NETWORK