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Melinda Murray
Department of Environment and Conservation
PO Box A290
SYDNEY SOUTH NSW 1234

Dear Melinda

The Australian Environment Business Network (AEBN) welcomes the opportunity to comment on the *Protection of the Environment Operations Act Amendment Bill 2005* (the bill). The bill makes many changes some of which are positive and others that will impact on industry.

The bill has introduced some welcome changes, such as extending the licence review periods to 5 years. AEBN has particular concerns on the broadness of the new *Pollution of Land* offence as it could impact on any development action to land where harm to life occurs. This is not considered its intent, which is to criminalise the contamination of land largely through deliberate acts or failure to act, but should be changes to prevent 3rd party abuse.

AEBN has reviewed the bill and has identified the following issues:

- The scale of the fine increase
- 16 fold increase in noise fines
- Third party willful prosecutions
- Land pollution Issues

1. SCALE OF THE FINE INCREASES

AEBN is concerned over the large increase in fines proposed under the bill. Most of the fines have increased by a factor of 4 to 5. The NSW Government indicated it increased the fines to *provide a stronger deterrent to potential offenders, and a stronger financial incentive for companies to develop proactive pollution-reduction strategies.*[5] The Minister also stated *Under the current legislation it is sometimes less expensive for large companies to pay the fine than to change their equipment or practices to cut pollution. It is clearly inappropriate for an offender to profit from non-compliance with environmental laws.*

[5] Hansard Bob Debus 23 June 2005 p 17502

There is no doubt that law-abiding companies will take these increases seriously. However, merely increasing the fines will do little to deter those who are intent on breaching environmental laws. Both government and industry want an end to such practices by wayward people. Unfortunately, those striving to comply with pollution laws are more likely to improve their compliance to avoid the impact of the fine increases than those deliberately violating environmental laws. As a consequence these higher fines will deter ethical law-abiding companies from investing in NSW.

The scale of the fine increases are substantial and sets NSW environmental fines many times higher than any other state in Australia. The $1 million fine was first introduced into NSW under the *Environmental Penalties and Offences Act 1989*. At the time it was a major increase. The increase is 5 fold for willful environmental harm and 4 fold for most other tire 2 fines This compares to the CPI for Sydney from 1989 to 2005 at 148.2[6]. If just using the CPI as a yardstick the fine should be Tire 1 $1.5 million, Tier 2 $375,000. To cover the CPI changes for another 10-15 years in the future a doubling of the fines could be justified.

AEBN is concerned the reduction in the Department of Environment and Conservation's budget has undermined its policing role. This is likely to permit covert but deliberate violation of environmental laws, especially by those who would profit from it. In summary AEBN would consider an increase in the policing of environmental laws would be a bigger incentive for everyone to comply than just substantially raising the fine levels.

R1 AEBN recommends the increasing the environmental fines by a factor of 2, rather than 4 or 5 times.

2. 16 FOLD INCREASE IN NOISE FINES

The largest increase in any fine belongs to noise offences: from $60,000 to $1 million a 16.67 fold increase. The DEC has justified this increase indicated in that noise has become more of a health issue than amenity. However, offensive noise is divided into two parts, being

> *(i) is harmful to (or is likely to be harmful to) a person who is outside the premises from which it is emitted, or*
>
> *(ii) interferes unreasonably with (or is likely to interfere unreasonably with) the comfort or repose of a person who is outside the premises from which it is emitted...*

Section (i) directly refers to health issues, but section (ii) does not. AEBN considers there is a need to ensure that the heavy increase in noise fines targets health related matters only. AEBN considers a $1 million maximum fine for *interferes unreasonably the*

[6] CPI data from Australian Bureau of Statistics. !989 sets the CPI base rate at 100, the 148.2 figure comes from the CPI for the Sydney area from 1989 to march 2005.

comfort or repose of a person inappropriate use of environmental law. In addition, noise is a transient occurrence. Shortly after its emission there is no ongoing change to the environment, as opposed to other emissions of substances. This is reflected in the current fine levels, with noise having a maximum penalty of one quarter of other pollution offences.

AEBN can understand that offensive noise can result health impacts as identified and dealt with under occupational health and safety legislation. Under OH&S regulations the impact on health are based on ongoing chronic noise. Offensive noise under the POEO Act tends to deal with incidental noise. While health impacts can occur from the emission of offensive noise, these are considered rare, which is also reflected in the low number of offensive noise prosecutions under section 129 of the POEO Act.

AEBN subsequently believes the only justification to use the tier 2 fines on offensive noise is where health of a person is detrimentally affected. While splitting this within the POEO Act may be impractical, there should be an amendment to the *Prosecution Guidelines* or other appropriate instrument, that actions made under s129 only be used where health of person/s are adversely affected. This will also provide guidance to other government agencies in how to use s129 when its maximum penalties increase to $1 million.

R2 ***AEBN recommends the DEC prepare or update guidelines that limit the use of s129 noise pollution to incidents where adverse health impact on person/s has occurred.***

3. THIRD PARTY WILFUL PROSECUTIONS

There appears to be a drafting error in the way in which Tier 1 offences are split between negligence and willful which is unclear under s115 and s116.

The bill amends s119 to split tier 1 offences into willful and negligent offences. However, as s115 and s116 contain joint and several liabilities, it is unclear that if one party undertakes willful violation this willfulness could transfer to the related parties, who are not directly involved in the incident. Common sense dictates the person carrying out the willful act is guilty of being willful, but the other parties involved are at the most only negligent if culpable at all. Under the amendment it appears that all parties could be made liable for a willful act, even if it was undertaken willfully by one person.

R3 ***AEBN recommends that section 115 and 116 be amended to require that each person to be prosecuted are separately considered as to their willfulness or negligence in the actions that led to the incident being prosecuted.***

4. LAND POLLUTION ISSUES

Broader interpretation of the Pollution of Land section

The scope of section 142A is so broad that applying anything, roads, buildings, erections, dwellings, pavements, railways etc or land clearing could be considered to be detrimental to the land. Virtually any development process could be considered to *likely to cause degradation of the land, resulting in actual or potential harm to the health or safety of animals or other terrestrial life or ecosystems.*

Very little variation to land will result in causing harm to other terrestrial life or ecosystems. For example:

- Placing any earth moving equipment (*any matter*) on the site that *causes harm to terrestrial life*[7] such as any land clearing.
- Reaping a crop, could be construed as lowering the land value or causing detriment as it transfers to the truck which collects the crop. The matter, which is placed on the land, is the agricultural machinery.
- Sowing crops could be construed as harming other terrestrial life and the seed would fit the description of *any matter*.
- Developers who demolish a building, which lowers the value of the land:
  - By removing a building considered to have heritage value
  - From building rubble which remains (If the developer is suffering financial difficulties demolition wastes may be not be removed for some time. There is little difference, under s142A between cleaning up a demolished building and site remediation, both of which can be cleaned up given enough time).

AEBN can see this section being used or abused by opponents to any development citing that any land clearing or building demolition is detrimental, especially if native vegetation or ecosystems are harmed or likely to be harmed. This could be embarrassing for the government, if not rectified prior to the commencement to this section.

In short the section is far too broad in its proscriptive approach. A better approach would be to tie it to the prescriptive and list appropriate types of undesirable applications of substances to land.

It appears the DEC's intent is to prevent poor environmental practices in relation to the application of wastes or other materials on land that pose harm if ingested by terrestrial life. Suggested improvements to this section would include:

- Limiting it to deliberate actions, to prevent for example criminalising increasing the salinity of land, spreading of plant disease through omission. (e.g. failure to plant trees or control weeds)

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[7] Terrestrial life would cover all life, plants, animals, fungi, insects bacteria etc…

- Ensuring that the trigger of harm to life must occur along with damage to the land resulting in actual or potential loss or property value (note market forces which result in a lowering of property values must be excluded).
- Harm to life should be limited to ingestion, which should eliminate physical harm from, say, land clearing.

AEBN considers the bill must be amended to prevent the abuse of s142A onto any proposed land development, regardless if consent has been made or not.

R4 AEBN recommends the pollution of land provisions include:

- ***A list of exemptions preventing its application to legitimate changes, such as developments, to land.***
- ***The exemptions to include contamination of land from naturally occurring contaminants in the land or ground water/s.***
- ***Exemptions to include beneficial improvements to the land.***

Contaminated Land Issues

The new section 142A Pollution of Land introduces a major philosophical change in the manner in which the NSW Government deals with contamination of land. Currently there is no criminality if an organisation pollutes its own land. It is only a criminal offence if the contamination of land pollutes water (including ground water/s) or triggers the *Contaminated Land Management Act 1997 (CLM Act) or s 120 POEO Act.* The basis for having no criminality in terms of land contamination is that:

- The costs of remediation are exceedingly high and are sufficient deterrence for causing land to be contaminated.
- Land contamination is a historical issue that prior to the late 1970s early 1980s there was no government guidance on prevention of land contamination.
- Many organisations including government agencies have contaminated land legacies.
- Transference of land ownership is an effective mechanism in which land contamination is investigated and if present remediated.

This section will make the contamination of ones' own land a criminal offence.

AEBN is concerned the definition of land pollution sets a much higher standard than the *significant risk of harm* trigger used in the CLM Act. It would appear that a leaking underground tank would trigger s142A merely because it will *cause or is likely to cause property damage that is not trivial.*

Another issue resulting from the new land pollution offence is its retrospectively on existing contaminated land sites. For example:

An organisation in 2006 has an underground storage tank which as been leaking. This was identified by the management and is scheduled to be cleaned up. Preliminary investigations indicate that about 250 m^3 has been contaminated and will

require special treatment as it exceeds all landfill acceptance criteria. The cost estimate is the order of $150,000 at this stage. The pollution plume is slowly moving within the site and will take over 20 years to reach the site boundary.

An authorised officer visits the site and decides it violates section 142A. While the leakage occurred up to late 2003 when the problem was identified and the tank was then emptied, but the contamination remains in the ground. The officer decides to continue with a prosecution under s 142A as the pollution plume, according to an investigation report on the tank undertaking in 2003, is likely to expand and cause increasing detriment and property loss to the land.

The officer uses the investigation report as evidence of breach of s142A of the POEO Act. DEC proceeds with a successful prosecution.

AEBN considers section 142A retrospective as it captures any increase in the scale of the land pollution after the section is gazetted. As most existing land contamination areas are likely to move each can be liable under this new section.

AEBN considers the broad scope of the land pollution offence will have a detrimental impact on investigating land contamination and undermine the ability of transference of land. Unless investigations of land contamination, used in pre-acquisition audits are made voluntary audits, they will become legally dangerous documents. This may stifle commercial land transactions undermining the states revenue from properly transfers.

Many private and public organisations may be affected such as:

- Councils responsible for old landfill sites
- Any site which has triggered the CLM Act for site investigation
- Farmers who through omission permitted salinity degradation of their land

The CLM Act adequately controls movement of contamination resulting from existing contamination. Cleanup Notices and use of s120 have also proved successful legal approaches to manage expanding contamination zones. It is also believed the intent of section 142A is to largely prevent new contamination of land, rather than criminalise existing contamination. As a consequence AEBN considers the failure to act (the omission part in the definition) should be removed as it is unnecessary redundant given the other environmental legislation the DEC has available.

In addition, the broadness of the section can make any contamination through action or omission liable even if it meets all the *Assessment of Contaminated Site NEPM* triggers for investigation. The concern here is there is no discrimination between land uses. So the NEPM day-care centre standards could apply to industrial land. A means in which to provide guidance to the public on what is regarded as contamination of land likely to trigger this section is to relate it back to the land use. If guidance on this area fails to accompany the enactment of s142A then following the Contaminated Site NEPM would be criminal act in NSW.

R4 AEBN recommends that

- ***The definition of land pollution be amended to*** *'land pollution or pollution of land means placing in or on, or otherwise introducing into or onto, the land (**through a deliberate act**) any matter, whether solid, liquid or gaseous:'…*
- ***Regulation be developed to clarify the extent of the use of section 142A.***
- ***The detriment of the land should be based on its land use or intended use.***

6 CONCLUSION

The amendments to the POEO Act will benefit from suitable modifications either directly to the amending legislation or to regulations to clarify the extent at which the broadness of the changes will make.

Modification to the pollution of land offence is particularly warranted, especially if the loop hole to block developments by third parties is closed.

Should further details or explanation regarding this submission be required please contact me.

Yours sincerely

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