

MAIN AMENDMENTS: DETAIL

The Protection of the Environment Operations Act 1997 has been in force for just over 2 years. There are several minor improvements that the EPA considers could be made to the Act in light of its experience of administering it over that period. The EPA proposes to recommend to the Government that a Bill making the changes be introduced into Parliament in the Spring 2001 session. The Bill would also include a few minor amendments to some other environment protection laws.

This document details the main changes proposed. They are all changes to the Protection of the Environment Operations Act 1997. A summary of these changes and the proposed changes to the other laws is in Attachment 1.

Protection of the Environment Operations Act 1997

No. 1 *Make it an offence to falsely represent that services are endorsed or provided by the EPA.*

The amendment

There has been a number of occasions when an organisation has made public statements that have given the false impression that a service, product or other aspect of the business is endorsed by the EPA.

The amendment would introduce a new offence to discourage these sorts of statements. The provision would probably be based on s.59B of the Environment Protection Act 1990 (Vic), which makes it an offence to falsely suggest, or do anything that is calculated to falsely suggest, that goods or services are approved or used by the Victorian EPA.

Reasons for the amendment

It is not the EPA's policy or function to endorse services, products or other any aspect of a business, particularly where the endorsement might be used by the business to try to obtain a business advantage. The endorsement could be seen as compromising the EPA's impartial performance of its functions and duties.

Nos. 2 & 3 *Offensive noise from vehicles and vessels*

The amendment

The offences concerned relate to matters such as a car stereo being played too loudly or a motorcycle being revved up too close to residences or in passive recreational areas. It is proposed to enforce the offences via a regime similar to the littering from vehicles regime.

The amendments will provide for the owner of a noisy vehicle or vessel to be liable for the relevant "offensive noise" offence unless there is a statutory declaration from

the owner saying that the owner was not in charge of the vehicle at the time. In that case, the person who was in charge will be liable for the offence.

Under the littering from vehicles provisions, the owner of the vehicle is guilty of the littering offence under the littering from motor vehicles provision (s.146 of the Act). This facilitates enforcement because it is easy to observe the number plate of the vehicle and then, via the RTA, find out the name of the registered owner and issue the owner with a penalty notice. However, where the owner was not in the vehicle at the time, the provision allows the owner to nominate the driver and the driver is then liable (unless the driver, in turn, nominates the actual litterer).

Reasons for the amendment

The amendments address comments received from councils during the recent making of the Protection of the Environment Operations (Noise Control) Regulation 2000 and are consistent with the approach taken to littering from vehicles. They will help councils and the EPA to deal with regarding unnecessary noise from vehicles and vessels (in particular, by issuing penalty notices).

This noise is a common cause of complaints but, for several reasons, it is currently difficult to take action to deal with it. Councils do not have the power to stop vehicles, and obtaining the details of the vehicle owner and attempting to find out who the driver was by interviewing the owner is time-consuming, often fruitless and can be dangerous. The amendment is fair because, if the owner was not in the vehicle or vessels at the relevant time, liability will be able to be transferred to the person who was at the wheel or the helm.

No. 4 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.

The amendment

Section 148 of the Act imposes a duty on various people to notify the appropriate regulatory authority of the occurrence of pollution incidents that cause or threaten material harm to the environment. A notification given under this section cannot be used as evidence in a prosecution against the notifier (s.152).

The amendment would:

- (a) ensure that, despite s.148, a licence can have a condition that imposes a duty to notify pollution incidents; and
- (b) provide that the duty to notify provision in the Act (including the protection that it gives to notifications) does not apply to the licensee in relation to notification under a licence condition.

Reasons for the amendment

The main rationale for the statutory duty to notify is to impose a duty on *non*-licensees so that action could be taken to protect the environment.

There are several reasons why it is appropriate for licensees not to receive any protection for reports made under a licence condition:

- (a) Their activities require a licence precisely because of their potential to cause significant environmental damage.
- (b) Their licence gives them certain benefits (eg it generally makes lawful what would otherwise be unlawful) and with benefits come obligations.
- (c) At the moment, the Act makes it plain that monitoring results and statements of compliance can be used against licensees. Any monitoring which discloses a breach, and statements of compliance which disclose a breach, can be used against them. In that context, it makes little sense that a notification under s.148 is protected.
- (d) Most licensees are companies and, under the common law, companies do not have a privilege against self-incrimination. The protection under s.152 is inconsistent with this.
- (e) Enforcement of environment protection laws necessarily relies significantly on self-reporting by licensees.

No. 5 Ensure that, under a search warrant, an authorised officer can enter and search premises where evidence is located, although the offence may have been committed elsewhere.

The amendment

Evidence of an offence will sometimes be at premises other than where the offence has been or is being committed. The amendment would make it clear that a warrant can authorise an authorised officer to enter and search these premises, and not just of the premises where the offence has been or is being committed.

Reasons for the amendment

If it were successfully argued that the powers of entry and search under a warrant are restricted to the premises where an offence is believed to be occurring, or to have occurred, this could result in investigators not obtaining important evidence, and prosecutions being jeopardised. Investigators have powers to enter and search (non-residential) premises without a warrant that are not subject to this restriction. However, entry under warrant is preferred because it adds an important independent and corroborative element to search and seizure.

No. 6 Enable all people who are authorised to issue penalty notices for offences to be given powers under the Act to investigate those offences so that they have adequate information to decide whether to:
(a) issue a penalty notice; or
(b) prosecute where the notice recipient elects to have the matter dealt with in court.

The amendment

Currently, authorised officer investigatory powers under the Act can only be exercised by people who have been appointed authorised officers under section 187. Only the EPA and other appropriate regulatory authorities (ARAs) have that appointment power. However, most of the authorities whose staff can issue penalty notices are *not* ARAs (eg National Parks and Wildlife Service, Forestry Commission and NSW Fisheries). So, their staff can only exercise these investigatory powers in relation to offences if the EPA has appointed them as authorised officers.

The amendment would enable an authority that has authorised its staff to issue penalty notices to also authorise appropriately qualified or trained staff to exercise authorised officer investigatory powers in relation to the offences concerned.

Reasons for the amendment

It is important that, before a person issues a penalty notice they have adequate information on which to make their decision to issue the notice. At present people who are authorised by some public authorities to issue notices cannot use the investigatory powers under the POEO Act to make sure that they have all that information.

If a person issued with a penalty notice elects to have the matter dealt with by a court, the person who issued the notice or, if that person is on the staff of a public authority, that authority, can prosecute the offence in court (see s.221). If court proceedings have to be brought, it would be anomalous for a prosecutor not to be able to avail him/herself of the full range of investigatory powers that might be necessary to effect a conviction. That is the position currently.

No. 7 Make the owner of a vehicle emitting excessive smoke liable for the "smoky vehicle" offence unless the owner can prove that the owner did not cause or allow the vehicle to be used when it was emitting the smoke.

The amendment

Clause 27 of the Clean Air (Motor Vehicles and Motor Vehicle Fuels) Regulation - the 'smoky vehicle' offence - makes the owner of a motor vehicle who uses the vehicle, or causes or allows it to be used, guilty of an offence if the vehicle emits excessive air impurities. The fact that the owner "caused" or "allowed" the vehicle to be used is generally taken to be a given, particularly in the case of commercially operated vehicles where an employee is the driver.

The amendment would provide that if a vehicle emits excessive air impurities while it is being used the owner is taken to have caused or allowed the vehicle to be used unless the contrary is proved.

Reasons for the amendment

It can be very difficult to collect the kind of evidence necessary to prove that the owner has caused or allowed the vehicle to be used. The amendment would ensure that significant resources do not routinely have to be devoted to establishing that the owner caused or allowed the smoky vehicle to be used, while providing a safeguard for the innocent vehicle owner.
