

AUSTRALIAN ENVIRONMENT BUSINESS NETWORK

Review of the Protection of the Environment Operations Act 1997

February 2003



Sydney, Melbourne & Brisbane

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EXECUTIVE SUMMARY

The Australian Environment Business Network (AEBN) is an industry and business representative organisation operating in NSW Victoria and Queensland. AEBN is growing and has over 180 members from a broad cross section on industry and business, covering food, chemicals, metal production, petroleum, beverages, printing, waste industry, electricity, water construction, building products and consumer goods.

The *Protection of the Environment Operations Act 1997* (POEO Act) has been in operation since 1 July 1999 and is the backbone piece of environmental legislation in NSW. Overall it has operated reasonably well and as a consequence AEBN does not have any major issues with the Act. Nevertheless, fine-tuning of POEO Act is in order and a number of changes are recommended to improve the performance of the Act.

AEBN considers the objectives of the POEO Act require minor amendment and include a greater emphasis on outcome, thus focusing the EPA's approach to environmental protection in this direction.

Improvements to the way in which licences are negotiated, approved, varied and suspended are recommended including:

- Increased predictability in the requirements for surrender of a licence, especially on a site closure
- The EPA along with industry develop a policy for the process of varying a licence
- Introduce the option for licence holders to gain an accredited licence by having an approved EMS in exchange for lower fees, monitoring and inspection frequencies
- Increase the time period between licence reviews from 3 to at least 5 years.

AEBN also calls on the Government to modify the definition of tier 1 offences to be limited to serious environmental harm, as a number of prosecutions under tier 1 offences should have been at the tier 2 level. Hence AEBN recommends that the EPA Board's role to choose the level of prosecution is flawed and consequently recommends use of serious environmental harm in the POEO Act as the legislative trigger.

AEBN also calls for a new tier 2a for technical breaches that are not related to emissions or environmental harm. The new tier 2a should have a maximum fine level tied to that of noise pollution. (i.e. \$60,000 for corporations).

Many amendments have also been made to the POEO Act since its proclamation in 1997, most notably is the *Protection of the Environment Operations Amendment (Tradeable Emission Schemes) Act 2000* (TES Act) which substantially changed and added to part 9.3 Economic Measures. As a result of being now part of the Act AEBN has also commented on this amendment focusing on the lack of accountability of regulations made under this section. AEBN's 2000 submission on the TES Act is attached as an appendix and its recommendations are considered relevant to the review of the POEO Act and should be considered part of this submission.

AEBN considers that green offset schemes dealing with environmental emissions normally regulated by the EPA be administered by the EPA. To achieve this the POEO Act will require amendment.

RECOMMENDATIONS

R1 AEBN recommends that the objectives of the POEO Act be amended to:

- Include the following replacement clause for section 3 (iv):
(iv) the making of outcome focused progressive environmental improvements, including the reduction of pollution at source
- Include the following replacement clause for section 45 (d):
(d) the practical and outcome focused measures that could be taken:
 - (i) to prevent, control, abate or mitigate that pollution, and*
 - (ii) to protect the environment from harm as a result of that pollution,*

R2 AEBN recommends that the EPA provide adequate advice for licence holders on post activity licence conditions during the licence review process. A new clause covering this issue be added to POEO Act section 45 being:

(n) environmental protection measures required after the cessation of scheduled activities on that site.

R3 AEBN recommends that the EPA develop a licence negotiation policy with industry.

R4 AEBN recommends that the EPA introduce the option for licence holders to gain an accredited licence.

R5 AEBN recommends that the Government increase the time between review periods of environment protection licence from 3 to at least 5 years.

R6 AEBN recommends that the Government amend Part 5.2 Tier 1 Offences and tie such offences to serious environmental harm, which should have a similar to that of Queensland's *Environment Protection Act 1994*.

R7 AEBN recommends that any tradeable emission scheme regulation made under the POEO Act be subject to the full Regulatory Review process, including a comprehensive Regulatory Impact Statement, public participation and five year repeal and review process consistent with other emission trading scheme regulations set up by the NSW Government.

R8 AEBN recommends that POEO Act be amended to bound green offset schemes to the EPA in which the schemes relate to environmental emissions normally regulated by the EPA.

1. INTRODUCTION

AEBN welcomes the opportunity to review the POEO Act and acknowledges and supports the NSW Government approach to a five year period for the review of major pieces of legislation, which is also consistent with the Subordinate Legislation Act 1989. This practice is working well and should be a standard requirement on all pieces of NSW legislation.

AEBN is an industry and business representative body specialising in environmental issues that affect our members. Our membership collectively has a turnover in excess of \$50 billion and employs well over 50,000 employees. Further information about AEBN can be found on our web site at www.aebn.com.au.

The Protection of the Environment Operations Act 1997 (POEO Act) has been in operation since 1 July 1999 and is the backbone piece of environmental legislation in NSW. Under Section 327 of the POEO Act:

- (1) *The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.*
- (2) *The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.*
- (3) *A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.*

Overall the POEO Act has operated fairly much as it was intended, subjected to a few variations since its inception. So major changes are not sought by industry, but many amendments are warranted to improve the efficiency of the Act.

AEBN looks at the objectives of the POEO Act and recommends some changes to tighten the EPA's approach to environmental protection. While the objectives of the POEO Act are not directly sought by the EPA they are, as described above an important part of the review process.

Of the amendments made to the POEO Act, the most significant is the *Protection of the Environment Operations Amendment (Tradeable Emission Schemes) Act 2000* (TES Act) which substantially changed and added to Part 9.3 Economic Measures. As a result, it is now part of the Act, consequently AEBN has also commented on this amendment. AEBN previously commented on the TES Act in 2000. For reference purposes this original submission is attached as it reflects industry's current concerns with the TES Act.

Licence issues dominate AEBN's list of issues. No major issues are considered for licences, which remains the sharpest tool the EPA has in which to manage on-site environmental issues. Consequently, industry considers that individual licence system should remain as it can take

into account local environmental issues far better than for example a regulation covering air or water emissions.

The management of penalties is another area in which AEBN considers changes could permit a more consistent approach to prosecution. For significant environmental incidents the process of selecting which level of prosecution is left to the EPA Board to decide. However, a number of tier 1 cases are highly questionable why they warranted the Tier 1 level, when many tier 2 level offences resulted in greater environmental harm.

This submission also considers new environmental initiatives that have not been considered for incorporation into environmental law. Management of green offset schemes is one example covered in this submission. AEBN's view is it lack centrality and is capable of being wielded by any government agency, in many different forms.

2. OUTCOME FOCUS

AEBN believes the EPA needs to improve on the way it implements the POEO Act especially in the development of licence conditions. An increasing trend has emerged across NSW licence holders whereby the EPA continues to push for licence conditions that relate more to monitoring, measurement and administrative actions rather than directly addressing environmental outcomes. In addition the EPA is also quick to push for a financial penalty in the courts rather than remedial actions that would result in better environmental outcomes.

The notion of environmental outcomes is contained under section 9 the definitions for the development of Protection of the Environment Policies, so AEBN believes taking the environmental outcomes goal into the objectives of the Act should provide better guidance for those officers implementing the POEO Act at the interface between the EPA and licence holders. It further believed that the interpretation *making of progressive environmental improvements s3(iv)* can be misinterpreted to include onerous measurement and administrative practices. AEBN does not wish to indicate that monitoring of unknown emissions is unwarranted, but that such monitoring be developed under a Pollution Reduction Program where cost effectiveness vs potential environmental outcomes is taken into consideration discussed and negotiated.

R1 AEBN recommends that the objectives of the POEO Act be amended to:

- **Include the following replacement clause for section 3 (iv):**
 - (iv) the making of outcome focused progressive environmental improvements, including the reduction of pollution at source**
- **Include the following replacement clause for section 45 (d):**
 - (d) the practical and outcome focused measures that could be taken:**
 - (i) to prevent, control, abate or mitigate that pollution, and**
 - (ii) to protect the environment from harm as a result of that pollution,**

3. PROTECTION OF THE ENVIRONMENT POLICIES

A Protection of the Environment Policy (PEP) has yet to be made. Nevertheless, AEBN is keen to work with the EPA in the development of the first draft PEP. Flexibility is the key issue that concerns our members. As the EPA is well aware the technical complexities of environmental impact and protection are highly variable from site to site. Consequently, any PEP, Statewide or regional level will require full consultation with industry and include where necessary, the ability to argue an alternative solution, measurement or other means in which to achieve the PEP's outcome.

4. LICENCE ISSUES

Licences represent the major area of concerns in this submission and consequently AEBN has recommended changes to the POEO Act relating to licences and EPA policy. The first issue addressed in this submission, the need for more of an outcome-focused result is a result of some EPA inspectors approach to new licence conditions and requirements.

4.1 Surrendering Conditions

A number of members are concerned over the inclusion of new licence conditions when undertaking a licence surrender for the closure of a site and sometimes in transference of a licence. Some of these conditions contain requirements to remediate and or to undertake on-going monitoring of the site post its closure. AEBN can understand, for environmental protection reasons, why such conditions may be required. This is particularly evident in the post maintenance of landfill sites.

Unlike landfill sites many licensed industrial sites are not forewarned that requirements that can be imposed on them when applying for surrender of a licence. If the site is sold and transferred to a new owner (e.g. who operates a non-scheduled activity), the ongoing monitoring will detract from the value of the land. The point being that some companies have had surrender conditions imposed at the last minute of either closing a site's activities down, without prior notification or ability to budget such caveats on the land.

R2 AEBN recommends that the EPA provide adequate advice for licence holders on post activity licence conditions during the licence review process. A new clause be added to POEO Act section 45 being:

- (n) environmental protection measures required after the cessation of scheduled activities on that site.**

4.2 Process For Licence Negotiations

AEBN is concerned that the process for negotiating a variation to an existing licence is vague and has at times causes confusion with licence holders. This is especially evident in the process of negotiations during the swapping of draft and agreed to licence changes. A number of cases have come to AEBN's attention where by confusion resulted in unclear notification of what is a draft licence and what is a final licence. Members suggested that a formal pre-licence negotiation stage be included to ensure both the EPA and the licence holder know what will be contained in the final licence.

R3 AEBN recommends that the EPA develop a licence negotiation policy with industry.

4.3 Accredited Licences

Many state environmental agencies offer a special licence or equivalent for sites that can prove to have achieved exemplary internal environmental management. While it is tough for sites to gain such a licence they are accompanied by lower administrative costs to the licence holder as well as to the EPA in the form of less frequent inspections and lighter monitoring requirements. In Victoria these are called accredited licences being analogous to being accredited under a management standard.

As a consequence AEBN believes it is time for the EPA to also consider a similar approach. Perhaps the most comprehensive model is the accredited licence scheme that the Victorian EPA offers to licence holders. AEBN foresees that NSW version is likely to have a rigorous process for gaining an accredited licence. The high standard required to gain such as licence will compensated by having, for example, a 25% reduction in licence fees and lower monitoring and inspection frequencies. The discount for the licence fees should extend to Load Based Licence fees.

If considered appropriate the accredited licence option would most likely require a change to the POEO Act.

R4 AEBN recommends that the EPA introduce the option for licence holders to gain an accredited licence.

4.4 Review of Licences

The EPA has expressed a desire to increase the time interval for the review of environment protection licences from 3 to 5 years. AEBN is fully supportive of this approach and welcomes a more realistic time frame in which to budget for future environmental capital expenditure that may result from such a review.

The apparent trade off in extending the time interval is increased public participation in the licence review process. AEBN realises the EPA is considering changing the

notification processes for public review of licences and is concerned in relation to the additional time and costs that may accompany this move. Industry accepted there will be increased public input into licence reviews, but recognises and warns this will come at a cost to industry and the Government. AEBN is concerned that some costs associated with increased public participation may be passed onto the licence holder. Public participation should be limited to general issues and the highly technical negotiations be left to the appropriate EPA and industry experts.

R5 AEBN recommends that the Government increase the time between review periods of environment protection licence from 3 to at least 5 years.

4.5 Schedule 1 Issues

Originally schedule 1 of the POEO Act was aligned with schedule 3 of the Environmental Planning and Assessment Regulation. As planning and environment protection issues, while similar also differ, the alignment has moved apart. In most cases these differences are acceptable, but generate some confusion.

AEBN considers that both the EPA and Planning NSW should publish a list of differences that is updated each time either one of the schedules are amended.

5. PENALTIES AND TIERS

5.1 Tier 1 Offences

AEBN considers the process of determining when a tier 1 prosecution is to be used is flawed. Under the *Protection of the Environment Administration Act 1991* the EPA Board has the determining power to choose whether an offence should be prosecuted as a tier 1 or a tier 2 offence. A number of tier 1 offences have been launched under this method, which should have been, in AEBN's opinion, considered tier 2 offences.

Other jurisdictions prefer to use a more predictable and concrete definition for their highest offences. For example, Queensland uses the definition of serious environmental harm in their *Environment Protection Act* to spell out the appropriate prosecution level. The Queensland definition of serious environmental harm includes:

17.(1) Serious environmental harm is environmental harm (other than environmental nuisance):

- (a) *that causes actual or potential harm to environmental values that is irreversible, of a high impact or widespread; or*
- (b) *that causes actual or potential harm to environmental values of an area of high conservation value or special significance; or*
- (c) *that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount [$> \$50,000$]; or*
- (d) *that results in costs of more than the threshold amount being incurred in*

taking appropriate action to:

- (i) *prevent or minimise the harm; and*
- (ii) *rehabilitate or restore the environment to its condition before the harm.*

To completely change the way in which tiers of offences are allocated for prosecutions AEBN realizes that the POEA Act will also require amendment. Nevertheless, the process for change can commence amending part 5.2 of the POEO Act to include tying tier 1 offences to the serious environment harm definition. At a later stage the POEA Act can be amended to remove the Board's powers over the setting of the level of prosecution.

R6 AEBN recommends that the Government amend Part 5.2 Tier 1 Offences and tie such offences to serious environmental harm, which should have a similar to that of Queensland's *Environment Protection Act 1994*.

5.2 New Tier 2a Offences

AEBN proposes that a new tier (2a) be introduced to manage technical breaches of POEO Act and environment protection licences where no environmental harm is caused or even limited to no emission, or additional emission, to the environment has occurred.

A precedent for such a new tier is already contained within the POEO Act under section 141 for noise offences. As such the tier 2a offence would have a maximum fine level of \$60,000 for corporations.

Obviously offences under this new tier would need to be prescribed as some administrative offences can relate to instances where environmental harm has occurred. For example, withholding monitoring data to cover an emission breach.

6. TRADEABLE EMISSIONS SCHEMES

The *Protection of the Environment Operations Amendment (Tradeable Emission Schemes) Act 2000* amended the POEO Act in 2000 introducing large changes to Part 9.3 of the Act. As this section is part of the POEO Act AEBN considers it subject to the 5 year review process covering the whole Act. Otherwise we would need to only review the POEO Act as it was originally proclaimed in 1997.

The introduction of the tradeable emissions scheme (TES) component of the POEO Act has to date not caused a direct concern for industry. Nevertheless, there are a number of concerns about this section of the POEO Act that make it inconsistent with the majority of the POEO Act as well as other pieces of NSW legislation relating to trading schemes.

AEBN has attached its submission made in 2000 on the *Protection of the Environment Operations Amendment (Tradeable Emission Schemes) Act 2000* as an appendix as none of the recommendations presented to the NSW Government were either taken up or answered. No public consultation was held over the TES amendment and many errors and pitfalls exist for industry.

A major issue with TES is the exemption of any regulation made under it to be subjected to the Subordinate Legislation Act 1989. The EPA's argument has been that the Regulatory Impact process, repeal and remaking of any regulation may make a trading scheme illegal, even for a short time period. This is out of step with other emission regulations for example, the NSW Government has established the *Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Regulation 2002* under the *Electricity Supply (General) Regulation 2001* which complies with the Subordinate Legislation Act 1989.

R7 AEBN recommends that any tradeable emission scheme regulation made under the POEO Act be subject to the full Regulatory Review process, including a comprehensive Regulatory Impact Statement, public participation and five year repeal and review process consistent with other emission trading schemes regulations set up by the NSW Government.

In addition AEBN's 2000 submission on TES (Appendix 1) is considered valid and current on the present sections now under Part 9.3 POEO Act.

7 OFFSET SCHEMES

AEBN has previously commented on the EPA's Green Offset Scheme proposal last year. In general industry welcomes any new regulatory mechanism, which provides greater flexibility in meeting environmental requirements set by the Government.

Nevertheless, AEBN is concerned that the use of the scheme could be overzealously applied, and the basis for triggering an offset scheme could be the driver for setting load limits and conditions rather than actual environmental impacts. In addition, use of the scheme appears to have no central control point. Consequently any government agency could apply a scheme anywhere on anyone. AEBN considers that use of these schemes should be bound to the agency that has regulatory control over the environmental issue being managed by an offset scheme.

Hence for any environmental emission AEBN believes the EPA should be the central agency. For water allocation this could extend to Department of Land and Water Conservation. As the environmental issue becomes more nebulous, such as visual amenity, heritage and cultural issues, green offsets could become imprecise and potential political tools rather than been tied down to concrete measurable mechanisms. Limiting green offset scheme use to easily measurable criteria should prevent its misuse.

R8 AEBN recommends that POEO Act be amended to bound green offset schemes to the EPA in which the schemes relate to environmental emissions normally regulated by the EPA.

8 CONCLUSION

The process of undertaking the review on the POEO Act will result in a better piece of environmental legislation for NSW.

Cementing the focus of the EPA to be firmly cemented on outcomes, rather than process and measurement should result in clearer environment protection licences and an improved environment for NSW.

Clearing up some of the issues associated with licensing issues will provide for more effective management of licensed sites through clearer goals and outcomes.

Tying down tier 1 penalties to serious environmental harm will provide certainty and deliver a clearer message as to the process of NSW environmental law.

Having a new tier 2a fine level will permit greater flexibility to the courts in establishing penalties for breaches of environmental laws and licences, which are not the result of environmental harm.

Linking the regulations made under tradeable emissions schemes to the Subordinate Legislation Act will provide consistency across NSW laws in relation to emissions schemes, thereby removing any incompatibles that could surface if there is a cross over between schemes.

Green offsets will be firmly bedded into respective government agencies with the expertise and resources in which to manage them. The EPA will be a leading agency taking up the central role of managing schemes that deal with environmental emissions otherwise regulated by the EPA.