NSW Legislative Council Hansard

Protection of the Environment Operations Amendment Bill

Extract from NSW Legislative Council Hansard and Papers Tuesday 8 November 2005.

Second Reading

The Hon. HENRY TSANG (Parliamentary Secretary), on behalf of the Hon. John Della Bosca [8.12 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Protection of the Environment Operations Act, introduced by the Labor Government in 1997, revolutionised pollution control legislation in this State. The Act replaced various outdated and overlapping pollution laws, some dating back to the early 1960s. It was introduced with the backing of industry groups, environment groups, local councils and the wider community. New South Wales now has modern, powerful, effective and innovative legislation, which deals with the complex environmental issues of today. It continues to be used as a benchmark for environmental legislation across and beyond Australia. In particular, the Act introduced streamlined, innovative licensing arrangements and the use of economic instruments such as load-based licensing, tradeable credits and financial assurances to complement existing environment protection measures.

These changes have ensured that New South Wales is well positioned for the coming years with respect to the protection of our environment and a prosperous economy. The Act has already resulted in the successful prosecution of hundreds of polluters, and has provided a creative set of powerful tools to fix pollution problems faster and more cheaply than before. We now have streamlined legislation that industry and the community can easily understand. Most importantly, air and water quality have both improved because of this landmark legislation. Sydney now has the cleanest beaches in more than a century, and a number of harmful air pollutants have been slashed.

Since 1999, the Act has been used to require polluting industry to invest over $1.2 billion in pollution reduction programs, or PRPs as they are known. These programs are responsible for directly cutting air, water and noise pollution. In 2004-05, PRPs were negotiated to a total value of $86 million, including a $65 million project to commission BlueScope Steel's Port Kembla briquetting plant, which will result in much reduced air and water emissions. Work has also finished on another of the States largest pollution reduction programs, the $93 million plan to clean up air emissions at Blue Scope Steel's Port Kembla sinter plant. These major projects would not have been possible without the Protection of the Environment Operations Act.

In 2004-05, the Environment Protection Authority [EPA] also completed 127 prosecutions under the Act and other related legislation. In the past five years, fines collected by the Environment Protection Authority have averaged close to $1 million each year. In addition, courts are increasingly making use of the alternative sentencing order provisions in the Act, including clean-up orders and environmental works orders. Another example of the innovative tools introduced to protect the environment under the legislation is the Hunter River Salinity Trading Scheme, which continues to lead the world in the use of an economic instrument to protect the health of one of our State's most important rivers. The scheme allows agriculture, mining and electricity generation to operate side by side while minimising impacts on the Hunter River. The scheme has facilitated the creation of 800 new jobs while at the same time it has reduced the level of salinity in the river.

The Government is committed to continuing to drive down air and water pollution. This bill is the result of a thorough review of the Protection of the Environment Operations Act, including an extensive consultation process involving industry associations, environment and community groups, government agencies, local councils and individuals. This review concluded that the Act is an overwhelming success and effectively protects the State's environment. However, some amendments were suggested, and have been proposed in this bill, to ensure that New South Wales remains at the forefront of environment protection and regulatory innovation.

The bill introduces some significant new provisions and makes a number of smaller amendments that will improve the day-to-day operation of the Act. The House will recall that the Minister for the Environment tabled an exposure bill on 29 June 2005. The bill was simultaneously released for public comment. The feedback on the exposure bill was generally extremely positive. A number of minor amendments were made to the original bill to reflect the comments received. Some of the main changes relate to the following areas further specifying the definition of "waste", clarifying the defence for providing false or misleading information about waste, inserting various factors the Environment Protection Authority must be satisfied of before imposing green offset

requirements on licences.

For a detailed explanation concerning each of the various amendments proposed in the bill, I refer honourable members to the Minister for the Environment's 29 June tabling speech. However, I will take this opportunity to highlight two of the more significant changes being proposed by the Government. These relate to waste regulation and higher fines and penalties for polluters. Smarter regulation of waste transport and disposal is necessary to keep ahead of those fly-by-night waste operators who choose to flout the law. The bill will significantly change the current Act's waste regulatory framework. These amendments are also necessary to prevent environmental harm caused by the dangerous re-use of waste, particularly as fill, fertiliser or fuel.

For example, there have been incidents where unscrupulous operators have told landholders in Western Sydney and the Hunter region that they are offering "clean" fill, when in fact the waste is contaminated with building and demolition waste and in some cases asbestos. The operator dumps the waste and disappears, leaving the innocent landholder with a contaminated site and significant clean-up costs. We need to improve the way we protect the environment from the inappropriate use of waste as fertiliser or landfill. The bill makes it clear that "waste" includes any processed, recycled, reused or recovered material produced from waste that is applied to land or used as fuel in certain circumstances. This will stop the inappropriate re-use of waste that may be harmful to the environment or human health.

To balance this, it is also very important that the appropriate or beneficial re-use and recycling of waste is actually encouraged. The Government is committed to encouraging the safe, beneficial re-use of resources. In order to achieve this, the Environment Protection Authority will use the existing powers in the Act to exempt wastes that are being recycled or re-used appropriately. These exemptions will be made by separate regulations. Landholders, particularly farmers, can suffer serious property damage from the inappropriate or harmful application of waste or other substances to their land. The bill introduces a new strict liability offence for polluting land in a way that causes degradation of the land, human health or the environment.

The person who causes or permits land to be polluted will also be liable. For example, where contaminated fill or toxic waste is supplied to an unsuspecting farmer, proceedings will be able to be brought against the supplier. Unlike existing waste offences in the Act, this offence focuses on the potential of the substance to cause material harm. This will ensure companies will no longer be able to get off on a technicality by arguing that a harmful substance is not waste. I must stress that farmers will be fully protected by defences for common agricultural activities such as the application of fertiliser which can be lawfully sold under the Fertilisers Act, pesticides which are regulated under the Pesticides Act, and other agricultural substances including manure and non-hazardous agricultural or crop waste.

The bill also introduces a new strict liability offence for a person who supplies false or misleading information about waste. The consultation process revealed strong support for this offence from both waste industry and environmental groups. Stakeholder feedback from the waste industry has confirmed that the failure to accurately identify waste is a widespread problem. Enforcement action by the Environment Protection Authority has revealed numerous incidents where wastes are deliberately being falsely described to avoid the cost of proper disposal and make a quick profit. For example, solvents and hydrocarbon oils mixed with food wastes have been applied to grazing land on a dairy farm without the landowner being aware of the harmful presence of the solvents and hydrocarbons. It is critical that waste is properly described so that people know what licences to obtain, what precautions to take, what uses the waste can be lawfully put to and where the waste can be lawfully taken.

Fines and penalties underpin the successful operation of the Protection of the Environment Operations Act. The Act currently has three tiers of penalties applying to criminal pollution offences. Tier 1 offences involve wilful or negligent conduct, and are the most serious. Tier 2 offences involve strict liability and tier 3 offences are less serious and are capable of being managed with an on-the-spot fine. This bill will increase the fines and penalties in the Act to maintain their original deterrent value. When the tier 1 penalty amounts were originally enacted, they were at the forefront of Australian environmental legislation. They rightly established environmental crimes as serious criminal offences. However, since then, the penalty for tier 1 offences has not changed, and a further increase is now justified. These amendments will also establish a new distinction between penalties for wilful and negligent conduct in tier 1 offences.

Wilfulness, which shows deliberate intent, will have a higher penalty than negligent conduct. For companies, the maximum financial penalty for tier 1 offences will be $2 million for negligence and $5 million for wilfulness, and for individuals $500,000 for negligence and $1 million for wilfulness. For tier 2 strict liability offences, the maximum penalty will be $1 million for companies and $250,000 for individuals. Daily penalties for continuing offences will also be increased. These increased fines will send a strong message to potential polluters that they will be caught and they will be punished. The enactment of the Protection of the Environment Operations Act in 1997 also ushered in a range of innovative alternative sentencing options which courts can use when sentencing offenders. These options, including environmental works orders and publications orders, have been increasingly used by the courts. For example, in 2004-05 courts imposed environmental works orders on offenders totalling over $100,000.

The bill further expands these alternative sentencing orders to provide more options for courts to make the most appropriate orders in the circumstances. For instance, courts will be able to order an offender to provide funds to a third party to carry out works or projects, or to establish or attend training courses. Courts will also be able to order offenders to pay financial assurances to the EPA where the offender has been ordered to carry out an environmental restoration project. The bill will also allow the EPA, for the first time, to accept court enforceable undertakings, like the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission.

Court enforceable undertakings are administrative resolutions to breaches or potential breaches of the Act that, if not adhered to by the person given the undertaking, can be enforced in court. They represent a quicker, more cost-effective alternative to litigation in appropriate cases. The EPA will be developing publicly available guidelines on when it will be appropriate for it to accept court enforceable undertakings, to ensure such undertakings are entered into in a transparent and accountable way. The bill will also remove the defence of "no knowledge" currently available to directors prosecuted for an offence committed by their corporations. The "no knowledge" defence can undermine what are otherwise effective pollution control laws by encouraging directors and other managers to deliberately turn a blind eye to environmental offences being committed by their corporations. It is out of touch with modern principles of corporate responsibility.

However, defences will still be available where ever a person exercises due diligence to prevent the contravention by the corporation, or where the person could not influence the conduct of the corporation. This change is intended to provide a further incentive for managers and directors to ensure appropriate systems are in place to protect the environment from the potential harmful effects of their activities. The bill represents a range of significant, well-considered reforms to the key environmental legislation in our State. Public consultation on the exposure bill showed that these reforms are generally welcomed by industry and environmental groups. These reforms will ensure that our environment continues to be protected by the best possible world-class environmental laws. I commend the bill to the House.