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***Proposed New Pollution Control
Legislation in NSW: Background
and Commentary***

by

Stewart Smith

Briefing Paper No 5/97

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NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE

Dr David Clune (9230 2484), Manager

Ms Honor Figgis (9230 2768) Research Officer, Law

Dr Gareth Griffith (9230 2356) Senior Research Officer, Politics and Government

Ms Fiona Manning (9230 3085) Research Officer, Law/Social Issues

Mr Stewart Smith (9230 2798) Research Officer, Environment

Ms Marie Swain (9230 2003) Research Officer, Law

Mr John Wilkinson (9230 2006) Research Officer, Economics

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EXECUTIVE SUMMARY

This paper presents a brief history of pollution control enforcement and the development of public welfare offences (pages 3-5).

Section 2.1 describes some modern approaches to pollution control, including command backed by threat, long stop and fundamental values. The long stop regime is typical in regard to environmental offences. This regime acts within a system of administrative regulation which relies on licences or permits to pollute. Enforcement agencies are able to issue directions to individual licence holders and in consultation with licence holders establish the pollution licence limits. Within this administrative complex, prosecution and sanctioning are rarely used tools, commonly used as a last resort (page 6).

In 1991 the *Protection of the Environment Administration Act* heralded the beginning of a new era of environment protection. The State Pollution Control Commission, which tended to focus on 'end of pipe' pollution control strategies, was replaced by a revamped and more powerful Environment Protection Authority (page 7).

The reform of pollution control in NSW was to be done in two stages. The first was the creation of the EPA, the second was the reform of the State's pollution control legislation. This became known as the EPA Stage II legislation, and a draft exposure bill was released by the government in December 1996.

The Protection of the Environment Operations Bill replaces the *Clean Air Act 1961*, *Pollution Control Act 1970*, *Noise Control Act 1975* and the *Environmental Offences and Penalties Act 1989* (page 8).

The Bill includes protection of the environment policies (pages 9-12), reforms pollution licensing (pages 12-14), continues provisions for environment protection notices (page 15), reforms and introduces new environment protection offences (pages 15-22), introduces a new section on environmental auditing (page 22), reforms pollution control enforcement procedures (page 23) and attempts to integrate the pollution licensing process with the development assessment process (page 25).

Whilst all commentators agree that the reform of pollution control legislation is necessary, there have been both positive and negative comments about aspects of the Bill. However, the introduction of the proposed reforms is likely to lead to a greatly enhanced ability for the EPA to protect our environment. Comments on the draft exposure bill are invited until mid-April, and it is expected that the government will present a final bill to Parliament in the second half of 1997.

1.0 Introduction

In 1994 a NSW community survey assessed public opinion on environmental issues. When those surveyed were asked (unprompted) to nominate the most important environmental issue in NSW, 28% nominated air pollution, 27% nominated water quality/pollution and 10% nominated issues relating to waste.¹ Clearly, pollution is an important issue for the community.

There are two main sources of pollution, known as source and ‘non-point source’ or diffuse pollution. Source pollution is typically regarded as ‘end of pipe’, and the Environment Protection Authority (EPA) and its predecessor the State Pollution Control Commission have traditionally controlled these discharges through regulation. This regulation has involved applying direct controlling measures on industry, for instance in specifying allowable levels of pollution or regulating the production process that creates pollution. Approvals to pollute, the licensing of this pollution and the imposition of licence fees to cover administration costs are part of this present day regulatory method to control pollution. In contrast, diffuse pollution such as storm water is much harder to control. It is hoped that elements of the new *Protection of the Environment Operations Bill 1996* will be able to help control diffuse pollution.

This Briefing Paper outlines some of the historical influences of modern day pollution control, describes approaches to pollution control and explains the workings of the *Protection of the Environment Operations Bill 1996*.

2.0 Pollution - a crime?

Modern day pollution legislation has been influenced by many factors, including early factory legislation in England in the 1800's; the development of public welfare offences through the later half of the nineteenth century; and more recently the worldwide formulation of the concept of ecologically sustainable development. These factors have combined to create a legislative pollution control system that regards pollution as crime, but has a history of de-criminalising this crime.

Inheriting the laws of England has had a strong influence on the development of modern day pollution legislation. For instance, in England in the early 1800's, there was much concern about factory working hours for children and the oppressed. Regulators campaigned for a ‘Ten Hour Act’ to restrict working hours in the factories, and proposed criminal sanctions against manufacturers who disregarded the reforms. After Commission of Inquiry, the government passed the *Factories Regulation Act 1833*, which introduced some reforms but did not impeach on the legitimacy of the manufacturing system, nor did it shift towards a criminal status for those manufacturers who breached

¹ EPA, *Who Cares About the Environment. Benchmark study on environmental knowledge, attitudes, skills and behaviour in NSW*. April 1994, at 16.

the regulations. Significantly, a Factory Inspectorate was created under the same atmosphere of accommodating the manufacturing system.²

This brief historical analysis is important because the ramifications of the *Factories Regulation Act 1833* are felt through to this day. Although a law regulating industry was passed, it failed to provide any form of criminality for infringement. Furthermore, it created industry's first 'inspectorate'. However, some historians consider that from the very beginning the inspectorate never really considered any infringement to be of a criminal form.

2.1 The Decriminalisation of crime - public welfare offences.

Traditionally, the definition of crime has depended upon the proof of wrongful intent. The classic definition of crime is "to constitute a crime against human laws, there must first be a vicious will, and secondly an unlawful act consequent upon such vicious will."³ Thus an essential part of the prosecution in a court of law is to prove *mens rea*, that the crime was committed knowingly and with intent.

The development of a distinct group of offences punishable without any regard to 'intent' began in England in the mid nineteenth century. The decision in *Regina vs. Woodrow (1846) 15 M&M 404* found a tobacco dealer guilty of having adulterated tobacco in his possession, even though he had no knowledge or cause to suspect its adulteration.⁴ The court found that it would be extremely difficult to prove *mens rea*, the punishment did not involve a prison sentence, and that the prohibited conduct caused a very direct and widespread public nuisance.

By 1895 Wright J in the case *Sherraz vs De Rutzen (1895) 1 Q.B. 918 at 922* suggested three groups of cases in which no guilty mind need be proved. These were "One is a class of acts which ... are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty ... Another class comprehends some, and perhaps all public nuisances ... Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right."

Sayre notes the increasing use of the criminal law machinery to enforce not only true crimes, but also the new type of twentieth century regulatory measures involving no moral delinquency.⁵ Pollution legislation has developed in the form of regulations and

² Carson, W.G. "Symbolic and instrumental dimensions of early factory legislation: a case study in the social origins of criminal law" in Hood, R (Ed) *Crime, Criminology and Public Policy*. Heinemann, London, 1974.

³ See Sayre, F.B. "Public Welfare Offences" in *Columbia Law Review*, Vol 33, 1933, at 55.

⁴ *Ibid* at 58.

⁵ *Ibid* at 67.

licences, and can be grouped with other public welfare offences that have arisen out of the complexity of life in the twentieth century. This has had the effect that an offence against pollution legislation is not really a crime at all - an attitude reflected in the agencies responsible for enforcing environmental legislation.

As noted, a Factory Inspectorate was established in England in the early 1800's to enforce the law in regard to working hours and conditions. Carson identifies three reasons why the early factory inspectors had problems enforcing legislation under the criminal law. These were status problems, administrative difficulties and the leniency of magistrates.⁶ Carson notes that there were many employers of considerable status and growing political influence who were in breach of the law, and to charge all these people in time of economic difficulty was just not an option.

The second problem arose from the administrative difficulties enforcing the legislation. The Inspectorate overcame this problem with the development of regulations, given the force of law under the Act in which they were operating. However, the enforcement of these regulations under the auspices of the criminal law again brought the Inspectorate into conflict with the manufacturing class and its political supporters over the issue of moral culpability.

However, the 1833 Act empowered magistrates to mitigate penalties where they were satisfied that the offence was not wilful nor grossly negligent. It soon became obvious to the mill owners that it was cheaper to pay the small mitigated fine imposed rather than to incur the costs involved in obeying the law.

The Factory Inspectorate rapidly evolved routine modes of inspection, and despite its operation under the criminal law, came to accept violation of the law as a conventional feature of industrial production, only meriting prosecution under the most unusual circumstances. The Inspectorate began to incorporate an element of mens rea into their decision making processes on whether to prosecute. Court proceedings were begun only when they were satisfied that there was an element of intent in the breach, fines were much preferred. The Inspectorate advised manufacturers on the law and induced them to observe the law, and only used prosecution as a last resort.

A new Act introduced in 1844 stipulated for an offence under the Act, the employer should be held guilty in the first instance, though it provided for the defences of due diligence and that a third party had acted without their knowledge. By removing the issue of intent from the crimes of employers, this Act took a substantial step towards the doctrine of strict liability, which sets certain crimes apart from 'ordinary' crimes and has led many jurists to argue that such offences should not be really be considered criminal

⁶ Carson, W.G. "The conventionalisation of early factory crimes" in *International Journal for the Sociology of Law*, Vol 7, 1979, at 48.

at all.⁷

It can be seen from the above discussion that the factory inspectorate in England during the nineteenth century was not a police force as could be expected to enforce criminal law. Rather, the enforcement agency was co-opted by industry, so that deviant behaviour became the normal part of the industrial process. This has been referred to as regulatory capture, where an agency is co-opted by those it seeks to regulate, incorporating and reflecting their concerns into its decision making in the interests of stability and self-preservation.⁸ This history of early factory legislation and enforcement in the United Kingdom has had considerable influence on the administration of pollution laws in New South Wales.

2.2 *Modern Approaches to Pollution Control*

The above section places current pollution enforcement measures into a historical perspective. Modern approaches to pollution control continue to predominantly use the criminal law to regulate pollution and the enforcement of pollution control Acts. Farrier has identified three models of the criminal law. These are:⁹

- command backed by threat
- long stop
- fundamental values.

In the ‘command backed by threat’ regime, compliance is gained by the fear of being caught, convicted and punished. Farrier considers that crucial to the operation of such a strategy is the perception that transgressing the law will result in immediate detection and conviction, backed by successful prosecutions and significant penalties.

The second ‘long stop’ regime is typical of the criminal law in regard to environmental offences. The ‘long stop’ regime acts within a system of administrative regulation which relies primarily on licences or permits to pollute. The enforcement agencies are able to issue directions to individual licence holders and in consultation with the licence holder establish the pollution licence limits. Within this administrative complex, prosecution and sanctioning become rarely used tools, commonly used as a last resort. In this context, the use of the criminal law is to reweight the bargaining process in favour of the administrative agency and to deal with those few who choose to operate outside the

⁷ *Ibid* at 54.

⁸ Hawkins, R. *Environment and Enforcement: Regulation and the Social Definition of Pollution*. Clarendon Press, Oxford, 1984, at 1.

⁹ Farrier, D. “In search of real criminal law” in Bonyhady, T. (Ed) *Environmental Protection and Legal Change*. Federation Press, Sydney, 1992, at 99.

system.

The third possible model of the criminal law is to reaffirm fundamental values of the community, gained from areas such as religion and moral codes of conduct. Again, the main push towards compliance is not the criminal law, which instead is used as a subsidiary but symbolically significant role.

Throughout Australia, the traditional model of criminal law used to administer environmental law has been the long stop system. Under this system, for a regulatory agency to have to resort to enforcement such as prosecution, or even threaten to use enforcement, it is generally viewed as an adversarial breakdown indicative of failure by the regulatory agency.¹⁰ The specialist environmental enforcement agency not only decides when to enforce the law, it also decides precisely what the law is in the first place. This is achieved by attaching detailed conditions to licences and adjusting them on a periodical basis with no parliamentary or judicial scrutiny.¹¹ It could be argued that environmental enforcement agencies have been hamstrung by the fact that they are trying to regulate industries that are often considered an essential service or public good, crucial to our economic well being. Therefore it appears that the primary purpose of the criminal offence in the field of pollution control has traditionally been to act as a final guarantee of the effective operation of the licensing systems.¹²

3.0 Pollution Control in NSW

In 1955 the State government appointed the Smoke Abatement Committee to investigate the causes, extent and effect of air pollution, and consider the existing provisions of the law to control air pollution. Reporting in 1958, the Committee recommended that fresh legislation be enacted to provide the necessary legal machinery to abate air pollution, in the form of a *Clean Air Act*.¹³ This Act was subsequently passed in 1961, and was the first of several pollution control acts that were to follow in the next fifteen years. In 1970, both the *Clean Waters Act* and the *Pollution Control Act* were passed, and in 1975 the *Noise Control Act* was passed. The *Environmental Offences and Penalties Act 1989* introduced new penalties and offences that incorporated each of the above Acts, so that pollution control was divided between five different Acts.

In 1991 the *Protection of the Environment Administration Act* (POEA) heralded the

¹⁰ Grabosky, P and Braithwaite, J *Of Manners Gentle. Enforcement strategies of Australian business regulatory agencies*. Oxford University Press, 1986, at 191.

¹¹ Farrier, D. *op cit* at 90.

¹² *Ibid* at 91.

¹³ Smoke Abatement Committee, *Report on Air Pollution in New South Wales*. J.T. Monaghan, Chairman, 1958, at 11.

beginning of a new era for environment protection. The State Pollution Control Commission, which had tended to focus on 'end of pipe' pollution control strategies, was replaced by a revamped and more powerful Environment Protection Authority. The EPA was formed with the following objectives, as defined in the POEA:

- 1(a) to protect, restore and enhance the quality of the environment in NSW having regard to the need to maintain ecologically sustainable development and
- (b) to reduce the risks to human health and prevent the degradation of the environment, by means such as the following:
 - promoting pollution prevention
 - adopting the principle of reducing to harmless levels the discharge into the air, water or land of substances likely to cause harm to the environment
 - minimising the creation of waste
 - plus seven other objectives.

The reform of pollution control in the State was to be done in two stages. The first was the creation of the Environment Protection Authority, the second was the reform of the State's pollution control legislation. This became known as the EPA Stage II legislation, and the draft exposure bill on this Stage II legislation is explained below. It is with this legislation that the EPA is to achieve its objectives as explained above.

4.0 *Protection of the Environment Operations Bill 1996*

The NSW Government released an exposure draft of this Bill in December 1996. The Bill updates and replaces the *Clean Air Act 1961*, *Clean Waters Act 1970*, *Pollution Control Act 1970*, *Noise Control Act 1975* and the *Environmental Offences and Penalties Act 1989*. These Acts have been developed in an ad hoc way over a period of thirty years as a response to pressing environmental problems of the day. As a result, coordination of these Acts has been difficult and time consuming for companies seeking licences to pollute and for public authorities to administer the different Acts.

The Bill has the following objects:

- to rationalise, simplify and strengthen the regulatory framework for environment protection;
- to improve the efficiency of administration of the environment protection legislation
- to provide mechanisms to protect the environment, consistently with the objectives of the EPA as set out in section 6 of the *Protection of the Environment Administration Act 1991*
- to assist in the achievement of the objectives of the *Waste Minimisation and Management Act 1995*.

Chapter 2 Protection of the Environment Policies

Chapter 2 of the Bill provides for the introduction of Protection of the Environment Policies (PEPS). Currently, the EPA has a range of environment protection mechanisms available to protect the environment, including: regulation and enforcement; community education; economic instruments and environmental reporting. However, existing legislation does not provide any formal means for establishing plans, policies and strategies to secure positive environmental outcomes.¹⁴

PEPS are similar in concept to those introduced in Queensland under the *Environmental Protection Act 1994*. Under this Act, the Queensland government may introduce an Environmental Protection Policy on:

- a contaminant
- an industry or activity
- a technology or process
- an environmental value
- waste management
- contamination control practice
- land, air or water quality
- noise
- litter.

The Queensland Act outlines that if a national environment protection measure commences under the *National Environment Protection Council Act 1994* (Cth), the measure is taken as an approved environmental protection policy. As of early 1997, draft Environmental Protection Policies have been released on air, water, noise, waste and mining.¹⁵

In NSW the draft bill states that a PEP must specify one or more of the following:

- an environment protection goal (including a program in which the goal may be achieved)
- an environment protection standard
- an environment protection guideline
- an environment protection protocol.

a policy may be made for the whole or part of the State, the environment generally or any part of it; any activity that will or may impact detrimentally on the environment; any form of pollution; any aspect of waste; any kind of technology or process; any kind

¹⁴ NSW Government, *Protection of the Environment Operations Bill 1996. Public Discussion Paper*, 1996, at 7.

¹⁵ "EPPS set to proceed" in *Environment Business*, January 1997, at 6.

of chemical or substance that will or may impact on the environment; and any matter to include a national environment protection measure. Examples of possible PEPS include water quality objectives for a specified river catchment, or ambient air quality objectives and air quality management plans to meet those objectives.

As can be evidenced from the above list, the potential impact of PEPS on the administration of environment protection in NSW is very large. PEPS provide a flexible tool to assist in environment protection programs to an extent not available to the government beforehand. They can be targeted to any industry, activity or section of the environment, providing a means for the EPA to target specific areas of the environment that need specialised programs to protect it. The EPA has had the ability to classify waters before under the Clean Waters Act 1970, and a number of waterways have been classified. However, as the EPA notes, the system proved to be too rigid and cumbersome.¹⁶ For instance, the Cooks River in Sydney is classified as Restricted Waters, meaning that the water quality will be safeguarded for recreational purposes - clearly an objective which has failed.¹⁷

The draft Bill includes the procedure by which a draft PEP is to be made, including the preparation of an impact statement and public consultation. However, an interim PEP can be made if directed by the Minister if s/he is satisfied that there are special reasons why the policy should be made without delay. These interim PEPS can last for a maximum of 12 months.

Part 2.7 of the Act deals with the implementation of PEPS by the EPA and other regulatory authorities. The EPA must have regard to PEPS when making a decision on whether to issue a pollution licence or an environment protection notice, or any function under the Act. PEPS are to be integrated into the *Environmental Planning and Assessment Act 1979* in terms of cross referencing. For instance, local councils preparing local environmental plans must take into account any PEPS, as must the Department of Urban Affairs and Planning and the responsible Minister when making State Environmental Planning Policies and acting as consent authorities. Public authorities must take into account PEPS when going about their business.

Perhaps limiting their effectiveness, a PEP may not create an offence for a contravention of a policy. It is not clear therefore how the EPA may administer any PEP if it has no 'big stick' to threaten with if required.

The validity of a PEP may be questioned in the Land and Environment Court within three months of the date of its publication in the Gazette.

¹⁶ NSW Government, *Protection of the Environment Operations Bill 1996. Public Discussion Paper*, 1996, at 9.

¹⁷ For more information in this area see: Smith, S. *Water Quality in NSW - An Overview*. NSW Parliamentary Library Briefing Note 004/95.

Comment

A major issue in relation to PEPS is their enforceability. Many people regard the requirement for public authorities only having to 'take into account' a PEP as inadequate.¹⁸ In Queensland, s31 of the *Environment Protection Act 1994* provides for; 'on approval of an environment protection policy, the administering authority must give effect to the policy.' Section 124(1) states that a person must not wilfully contravene an environment protection policy, and s 124 (2) states that a person must not contravene an environment protection policy.

Under the Queensland legislation, an environment protection policy may specify if an offence against it is a class 1, 2 or 3 offence. Wilful contravention of a class 1 environment protection policy attracts a fine of up to \$99,900, class 2 up to \$50,100 and class 3 up to \$5,100. Contravention (as distinct from wilful contravention) attracts penalties of \$5,100, \$9,900 and \$3,000 for the three classes respectively.

In Victoria, under the *Environment Protection Act 1970*, State environmental protection policies may be made. The wording of these policies are stronger than the proposed Bill. For example, in regards to water pollution, s 38 states: 'The discharge or deposit of wastes into waters ... shall at all times be in accordance with declared State environment protection policy specifying acceptable conditions... and shall comply with any standards prescribed...'. In other words, an environment protection policy carries the force of the law.

In South Australia, an Environment Protection Policy can be made for any purpose securing the objects of the Act. They can include matters to be considered by the EPA when deciding environment or development applications. They can include mandatory provisions enforceable as offences and set out policies that can be given effect to by the issuing of environment protection orders (s.27(b),(c)).

In comparison, the NSW proposal that PEP's must be 'taken into account' is considerably weaker. The EPA states three reasons why this approach has been taken.¹⁹ These are:

- PEPS are designed to give guidance to government decision makers when addressing environmental issues. In this context, it is not appropriate for PEPS to create criminal offences;
- Generally, making any 'breach' of a PEP a criminal offence would be

¹⁸ For instance, see Johnson,J. "The solution to pollution?" in *Pollution Perspectives*. Program and Conference Papers. 20 March 1997.

¹⁹ McElwain,S "New tools to protect the environment: Protection of the environment policies and environmental audits." in *Pollution Perspectives*. Program and Conference Papers. 20 March 1997. S. McElwain is a solicitor for the EPA.

unenforceable. For example, who should be prosecuted when an ambient air quality standard is breached?

- Any requirements, such as emission limits, can be made mandatory by requiring it as a licence condition or passing a regulation. This would mean that a breach of that standard would be a criminal offence.

Of considerable interest is the relationship between PEP's and National Environment Protection Measures. Under the *National Environment Protection Council (NSW) Act 1995*, section 7 reads: "It is the intention of the Parliament of NSW that the State will, in compliance with its obligations under the (Intergovernmental Agreement on the Environment) Agreement, implement, by such laws and other arrangements as necessary, each national environment protection measure in respect of activities that are subject to State law.... Schedule 4, Clause 18 of the Intergovernmental Agreement on the Environment states that the Commonwealth and States agree to establish a uniform hierarchy of offences and related penalty structures to apply to breaches of any requirements applied under any agreed law for the purposes of complying with the standards, guidelines or goals.

It could be argued that there is a conflict between current proposals for PEPS and the requirements for national environment protection measures to have a uniform hierarchy of offences and penalties.

Chapter 3 Environment Protection Licences

An object of this chapter is to integrate the development consent process under the *Environmental Planning and Assessment Act 1979* and the issue of licenses under the *Protection of the Environment Operations Act*. Key features of this chapter in regards to the licensing process include:

- a single licence may be issued for both scheduled development work or activities (3.1.3)
- in granting a licence the regulatory authority is to consider a wide range of issues, including any PEPS, the objectives of the EPA, any Environmental Impact Statements or Species Impact Statements.
- a licence is required to carry out scheduled work and scheduled activities (premises based and non-premises based). Schedule 1 lists those activities which are required to have a licence. Failure to have such a licence attracts a penalty of upto \$125,000 for a corporation and \$60,000 for individuals. Currently the EPA licences more than 3100 activities. Under the new Act, the EPA will licence about 2,200 activities. Local councils will be responsible for regulating those premises that are not on the EPA's Scheduled list. Local councils can issue licences for water pollution, but can only issue notices for air and noise

emissions (the next section explains these terms). The list of EPA Scheduled activities requiring an EPA licence is closely aligned with the list of designated developments that require an Environmental Impact Statement under the *Environmental Planning and Assessment Act 1979* (Schedule 3).²⁰

- currently individual licences are issued for each medium such as water, air or noise, in the form of a ‘licence to pollute’. The Bill enables the EPA to tailor a licence for an activity to meet a specific mix of impacts on one or more media, in a form that attempts to control and minimise the combined environmental impacts of activities.
- currently licences are valid for one year. The Bill proposes that a licence remain in force until it is suspended, revoked or surrendered. Licences are to be reviewed at least once every three years, whilst an annual fee for a licence is to be paid. The Bill details criteria that may influence licence fees payable, including the introduction of load based licensing.²¹
- conditions to a licence may be attached, including requirements for monitoring, mandatory audits, tradeable emission schemes, insurance cover and pollution reduction programs.

Comment

The proposed licensing system has aroused considerable interest, especially in regard to the level of public participation. As the proposed licences are to be issued in perpetuity, it has been claimed that it is more important than ever to ensure that the public is involved in the initial application for a licence, as well as their review.²² The Environmental Defenders Office (EDO) has the following concerns about the proposed licensing system:²³

- nobody will hear that an application for a pollution licence has been lodged
- there is no opportunity to inspect an application for a pollution licence, the documents that accompany that application, or the EPA recommendation to a local council
- there is no right to make submissions, nor is there an obligation on the EPA or other licensing authority to take submissions into account when granting a

²⁰ NSW Government, *Protection of the Environment Operations Bill 1996. Public Discussion Paper*, 1996, at 12.

²¹ See: Smith, S. *The use of economic instruments to control pollution*. NSW Parliamentary Library Briefing Paper No 18/96.

²² Ogle, L. “Keeping the public in the dark” in *Pollution Perspectives*. Program and Conference Papers. 20 March 1997.

²³ *Ibid* at 3.

licence

- there is no right for a member of the public to appeal against the granting of a licence or amendment of a licence or its conditions
- nobody will hear if or when the EPA will review a pollution licence.

The EDO notes that it is incongruous that a local council must notify neighbouring people of a development application as simple as a carport, and take into account their submissions, yet for something as crucial to environment protection as pollution control licences there is no opportunity for public input. In Victoria, the EPA must publish a notice in a newspaper that an application for a pollution licence has been received and invite public submissions. Any person 'aggrieved' by the decision of the EPA may then appeal to the Administrative Appeals Tribunal. In Queensland, persons have a right to seek a review of a licence approval on the merits of the case, whilst in South Australia the EPA must notify the public, call for submissions and take these into account.²⁴

Under the *Environment and Planning Assessment Act 1979*, the appropriate consent authority has to advertise and call for public submissions for any development application that is classed as designated development (ie, those requiring an environmental impact statement). Under the proposed Bill, the EPA is responsible for licensing those activities or premises that are in Schedule 1, which are similar to those activities that are classed as designated development. The theory is that members of the public will be able to have a say in those activities which are designated development, and hence have a say in the pollution licensing process as well.

However, there are difficulties with this public consultation process. Firstly, about 90% of the activities on the EPA Scheduled list are also on the EPAA designated development schedule. This leaves around 10% of the EPA Schedule which will escape this public scrutiny procedure. Secondly, local government may also licence non-scheduled activities or premises, and there is no requirement or opportunity for public consultation for this process.

The devolution of licensing powers to local councils for water pollution in non-scheduled premises or activities has also aroused considerable attention. The biggest fear is that there are 170 councils, each of whom could make their own standards and conditions on their licences. This has the potential to create a lack of uniformity in these water pollution licences across the State. Some commentators believe that councils could compete with each other to drop their pollution control standards in an attempt to attract industry to their region.²⁵ The trouble with this approach is that pollution does not respect local government boundaries.

²⁴ See Environment Defenders Office, *Balancing the Public Interest in Pollution Laws*, July 1996.

²⁵ Connor, J. "Back to the void? Public participation in licensing" in *Pollution Perspectives*. Program and Conference Papers. 20 March 1997.

The Australian Chamber of Manufacturers believes that local government should not be given the power to issue water pollution licences. Their concerns include the potential lack of uniformity across the State, as well as the ability and skills of councils to be able to issue and police licences efficiently.²⁶

Chapter 4 Environment Protection Notices

This chapter details three different types of environment protection notices that the EPA or local councils can issue. These are: clean up notices; prevention notices; and prohibition notices.

The appropriate regulatory authority (ie, EPA or local councils) can issue a clean up notice to an occupier or polluter of a premises suspected of causing a pollution incident. This continues provisions as outlined in the Clean Water Act s. 27A(1). The EPA is also entitled to direct public authorities (not including State owned corporations) to take clean up action.

A regulatory authority may also issue a prevention notice when they reasonably suspect that an activity has been or is being carried out in an environmentally unsatisfactory manner. Examples may include an order to install or repair pollution control equipment. If a person does not comply with a prevention notice, the regulatory authority is permitted to take action to cause the direction to be complied with by itself. The regulatory authority may then recover amounts spent both in the issue of the above notices and any costs incurred in carrying them out.

The EPA may also report to the Minister that the discharge or emission of pollutants from an activity is likely to cause harm to the environment, or likely to be 'so injurious' to public health, or likely to cause discomfort or inconvenience to any persons not associated with the operation of the activity. The Minister may then issue a notice to cease carrying on the activity, for such period as specified in the notice.

Failure to comply with any of the above notices is an offence, which attracts a maximum fine of \$125,000 for a corporation, (+\$60,000 for each day the offence continues) or \$60,000 for an individual (+\$30,000 for each day the offence continues).

Chapter 5 Environment Protection Offences.

This chapter includes many of the provisions of the *Environmental Offences and Penalties Act 1989*. The Bill continues the classification of offences that are in current operation; Tier 1, Tier 2 and Tier 3.

²⁶ Doig, A. "Pollution Perspectives. Industry Response." in *Pollution Perspectives*. Program and Conference Papers. 20 March 1997.

Part 5.2 Tier 1 Offences

It is the Tier 1 offences that attract penalties of upto \$1,000,000 for corporations, or in any other case \$250,000 or 7 years imprisonment or both for those found guilty of an offence against this section. This section is substantially the same as the corresponding sections from the *Environmental Offences and Penalties Act 1989*.

Offences under this section come under three main headings. These are: disposal of waste without lawful authority; leaks, spillages and other escapes into the environment and emission of ozone depleting substances. Each of these will be discussed in turn.

Clause 5.2.1 states: If a person, without lawful authority, wilfully or negligently disposes of waste in a manner that harms or is likely to harm the environment,²⁷ the person and if the person is not the owner, the owner are each guilty of an offence. A definition of ‘owner’ is prescribed, so that ‘owner’ of waste also includes, in relation to waste that has been disposed of, the person who was the owner of the waste immediately before it was disposed of. This inclusion is designed to stop owners of waste contracting out waste disposal services to ‘shonky operators’ who may illegally dispose of waste.

The *mens rea* (knowledge of wrongdoing) required to establish an offence under this section is intention or negligence, and a considerable body of case law has evolved under the *Environmental Offences and Penalties Act 1989*. In *SPCC v Hunt (1990) 72 LGRA 316 at 332*, Bignold J held that *mens rea* applies to both the “act comprising the conduct charged” and “to achieve the purpose of disposing of waste”(at 322).

Considerable uncertainty arose as a result of conflicting decisions in the Land and Environment Court as to whether the *mens rea* applied not only to the act of disposal, but also to harm to the environment. The matter was finally resolved by the Court of Criminal Appeal in *EPA v N (1992) 26 NSWLR 352*, where it was held by Hunt CJ at CL that in a prosecution for an offence under s5(1) of the EOPA, the prosecution must prove “that the defendant wilfully (or deliberately) disposed of waste in a manner which harmed the environment or was likely to harm the environment either intending or with an awareness of such consequences or likely consequences of his action.” (at 359). Hunt CJ at CL also held that actual knowledge of harm to the environment was not essential, and that it would be sufficient to show “wilful blindness” (at 358). This means that a person not making inquiries, deliberately not thinking or caring about the results of an action, may for some purposes be treated as having the equivalent of knowledge, or reckless disregard for the facts.

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Harm to the environment includes any direct or indirect alteration of the environment that has the effect of degrading the environment and, without limiting the generality of the above, includes any act or omission that results in pollution. See the Dictionary at the end of the Exposure Draft.

If the EPA as the prosecution authority does not want to prosecute somebody under the ‘wilfulness’ part as described above, an alternative is to charge for the negligent discharge of waste. The Act does not define negligent nor what the relevant standard is, ie, either the criminal standard “recklessness or gross negligence” or the lesser civil standard.

Again there has been considerable debate in the courts on what the appropriate standard should be. The EPA has argued for the civil standard to apply (and hence an easier prosecution), whilst industry has argued for the criminal standard to apply. In *SPCC v Kelly* (LEC, Hemmings J. Nos 50190/93 and 50226/90, 21 June 1991, unreported) Hemmings J rejected the argument that only gross departures from appropriate standards of conduct should lead to conviction. Instead, the standard of care will be determined for each case. Hemmings J continued “Negligence in this context in my opinion is the failure to exercise such care, skill and foresight that would be expected of a reasonable person in the particular situation of the person charged.” (at 15).

In *NSW Sugar Milling Co-op Ltd v EPA (NSW) 75 LGRA 320*, Enderby J stated that “the negligence which is required to be proved by the prosecutor in such a case, is the negligence of the criminal type” (at 325). To resolve the doubts created by these conflicting decisions as to which is the appropriate level of negligence for a tier one offence a case was put for determination to the Court of Criminal Appeal (*EPA v Ampol Ltd (1993) 81 LGERA 433*). The Court determined that “negligence” in this context is to be determined independently of traditional common law concepts of negligence (such as recklessness), instead standard statutory construction must be applied. This means that the purpose of the statute must be determined, in this case protecting the environment, and a standard of negligence to achieve this can then be found.

Upon return of this judgment to the Land and Environment Court, Pearlman CJ adopted a statutory standard of negligence based on the Act to avoid and minimise environmental harm. She stated “...it is necessary to have regard to the purpose and intention of the legislation to determine whether Ampol was negligent in its failure to do acts, such failure constituting the contribution to the conditions giving rise to the commission of the primary offence... Clearly the purpose and intention of the Act is to cast upon all persons the obligation to avoid or minimise environmental harm.”²⁸ In this case, Ampol had complied with all relevant industry codes, standards and practices, but this had still not protected it from liability. It appears that Pearlman CJ applied the civil standard of negligence required for a successful tier one prosecution.²⁹

The Bill continues other tier one offences from the EOPA, including wilful or negligent

²⁸ See *EPA v Ampol Ltd (1994) 82 LGERA 247 at 255*.

²⁹ See Lipman, Z “Environmental Controls and Liabilities” in *Local Government Planning and Environment New South Wales*, Volume C, Commentary, Butterworths 1993.

leaks, spillages or other escape of substances which is likely to harm the environment and the emission of ozone depleting substances.

It is a defence to a tier one prosecution if the person establishes that:

- the commission of the offence was due to causes over which the person had no control, and
- the person took reasonable precautions and exercised due diligence to prevent the commission of the offence.

The inclusion of these sections in the EOPA has resulted in many industries and manufacturing plants introducing environmental management systems. These are systems and processes identifying a company's environmental responsibilities and responses.

Under section 10 (1) of the EOPA, if a corporation contravenes any section of the Act, each director of the corporation is also liable to have contravened against the Act, unless they can prove to the court that:

- the corporation contravened the provision without the knowledge actual, imputed or constructive of the person; or
- the person was not in a position to influence the conduct of the corporation
- the person, if in such a position, used all due diligence to prevent the contravention by the corporation.

The inclusion of this section has also been an extra incentive for directors of corporations to ensure that their company has appropriate environmental management systems in place, to ensure that they can satisfy the due diligence requirements. The new Bill includes these provisions under section 7.8.2.

Tier Two and Three Offences

Under Division 2 of the EOPA, offences under the *Clean Air Act 1961*, the *Clean Waters Act 1970*, *Noise Control Act 1975* and the *Pollution Control Act 1970*, are classified as Tier 2 offences. Under the EOPA, Tier 2 offences have always been assumed to be offences of strict liability. This means that the prosecution does not have to demonstrate *mens rea* in proving the crime. Strict liability offences allow a defence of honest and reasonable mistake of fact.³⁰ The Bill proposes that all offences that do not come under Part 5.2 (ie, tier 1 offences) are tier 2 offences. Tier 3 offences are tier 2 offences that may be dealt with by way of penalty notice. The EPA states that the government is willing to consider increasing the maximum penalty for a tier 2 offence from \$125,000

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See *He Kaw The v R* (1985) 157 CLR 523; 60 ALR 449.

to \$250,000.³¹

³¹ NSW Government, *Protection of the Environment Operations Bill 1996. Public Discussion Paper*, 1996, at 26.

Part 5.3 - Water Pollution

This section replaces and greatly simplifies the *Clean Waters Act 1970*. The new Bill makes it an offence to pollute any waters, to cause any waters to be polluted and to permit any waters to be polluted. Both waters and 'pollute of waters' is very widely defined in the dictionary. The Bill states that an offence against this section is one of strict liability, with penalties the same as under the *Clean Waters Act* (\$125,000 for a company, \$60,000 for an individual). Pollution of waters is permitted if a licence is held.

Part 5.4 - Air Pollution

This section replaces and also greatly simplifies the *Clean Air Act 1961*. The new Bill is in two divisions: General and Air pollution from Fires. Air pollution is defined as the emission into the air of any air impurity, which includes smoke, dust (including fly ash), cinders, solid particles of any kind, gases, fumes, mists, odours and radioactive substances. In the general division, sections of the *Clean Air Act 1961* have been incorporated into six main areas, including: operation of fuel burning equipment and industrial plants causing air pollution; the carrying out of maintenance work on pollution control equipment, fuel burning equipment or industrial plant in a manner to cause air pollution; and dealing with any materials to cause air pollution. Each of the above three areas are offences if the pollution is a result of the occupiers failure to carry out the work in a proper and efficient manner.

The Bill states that regulations may be prescribed which determine standard concentrations and rates of emissions. Where a standard or rate has not been prescribed, the occupier must carry on work by such practicable means as may be necessary to prevent or minimise air pollution.

The regulation of odours from premises is also fraught with difficulty, especially when attempting to define odourous conditions or offensive odours. Currently the *Clean Air Act* makes it an offence if any odour is detected outside the boundary of a scheduled premises, regardless of its isolation or proximity to communities. Section 5.4.6 of the Bill changes this to make it an offence to emit offensive odour from scheduled premises. An offensive odour is defined in the dictionary to the Bill as one that is harmful to, or interferes unreasonably with, the comfort or repose of a person who is outside the premises from which it is emitted, or as prescribed by the regulations.

Offences against the above sections attract a penalty upto \$125,000 for a corporation, or \$60,000 for an individual.

Division 2 includes air pollution from fires. The EPA may prohibit the burning in open air or incinerators where it is considered that weather conditions will contribute to air pollution to such an extent that the making of the order is warranted. An offence against

this section attracts a penalty upto \$1,500.

Part 5.5 Noise Pollution

Currently, the *Noise Control Act 1975* is divided into several parts, the most important being: Part 3 - Scheduled Premises, deals with licensing requirements and controls of noise from scheduled premises; Part 4 - Prohibition of Sale of Articles, deals with prescribed noise and noise control equipment in relation to articles; Part 5 - Noise Control Notices, notices which can be issued relating to articles, scheduled and non-scheduled premises and time constraints; Part 6 - Noise Abatement Orders, deals with the issue of, commencement and operation of these orders; Part 7 - Noise Abatement Directions; deals with the issue and restrictions on noise; Part 8 - Regulation, deals with the making of regulations generally and with motor vehicles.

In contrast, the new Bill divides noise pollution into six areas. These are:

- Prohibition of sale of articles - deals with equipment emitting noise greater than prescribed in the regulations. An offence against this section attracts a penalty up to \$30,000 for a corporation or \$15,000 for an individual;
- Noise control notices - deals with notices that prohibit the occupier from causing or permitting a specified activity or article to be used or operated at specified premises within set hours. Penalties are as above;
- Noise abatement orders - where a person may apply to a Justice of the Peace alleging that their premises are affected by noise amounting to a nuisance. The Justice may summon before the Local Court the person alleged to be making or have made the noise, and direct that the noise be abated or prevented. A person who contravenes a noise abatement order is guilty of an offence with a penalty up to \$1,500;
- Noise Abatement Directions - if it appears to an authorised officer (includes a police officer) that offensive noise is being or has been at any time in the last seven days emitted from any premises, the officer may direct the occupier of the premises or the maker of the noise to cease doing so. Failure to adhere to a direction is an offence with a penalty up to \$1,500.
- Police powers regarding noise - if a police officer has been denied entry to any specified premises that they believe offensive noise is being or has been omitted, they may apply to a Magistrate for a warrant to enter those premises and give a noise abatement direction. a police officer may seize or secure any equipment that is being used to contravene a direction. This equipment must be returned or released after 28 days;
- Particular offences regarding noise - if noise from any (machinery) plant is created by the occupant's failure to maintain the plant in an efficient condition or it is not operated in a proper and efficient manner it is an offence. Maximum penalties are \$30,000 for a corporation or \$15,000 for an individual.

Part 5.6 Land Pollution

The Bill includes a new section on land pollution. The Bill makes it an offence to dispose of waste on any land without lawful authority. The maximum penalty is \$125,000 for a corporation or \$60,000 for an individual. It is a defence under this section that the commission of the offence was due to causes over which the owner had no control, and that the owner took reasonable precautions and exercised due diligence to prevent the commission of the offence.

Similarly, the Bill makes it an offence for the owner or occupier of any land who causes or permits the land to be used as a waste facility without lawful authority. Penalties are as above.

The Bill takes provisions from the EOPA in regards to littering in public places, which attracts a maximum fine of \$1,000. This includes litter deposited from a motor vehicle.

Comment

One of the problems of the *Environmental Offences and Penalties Act 1989* is that a person charged with dumping waste can only be prosecuted under the Tier 1 level of the Act. As noted, this requires proving the *mens rea*, not as easy for the prosecution to prove than a Tier 2 offence. Whilst the proposed Bill maintains this Tier 1 land dumping offence, it will make it considerably easier for the EPA to successfully prosecute waste dumpers with a Tier 2 offence. Many commentators have recommended the introduction of a Tier 2 land pollution offence.

Part 5.7 Motor Vehicles

Presently the *Clean Air Act* provides for the regulation and pollution control of motor vehicles. The new Bill includes many of these provisions under Part 5.7. For instance, it is an offence to sell a car if it emits excessive air impurities, or without anti-pollution devices, or to adjust those devices.

Part 5.8 Other Offences

This part is divided into three main areas. The first relates to pollution control equipment. Failure to maintain and operate such equipment in a proper and efficient manner is an offence, attracting a penalty upto \$125,000 for a corporation or \$60,000 for an individual.

The second division of this part relates to the notification of pollution incidents, a new provision. A pollution incident causing or threatening material harm to the environment must be notified to the appropriate regulatory authority. Material harm is defined in the Bill as: it involves harm that is not trivial; it involves actual or potential harm to the health or safety of human beings or to ecosystems that is not trivial; it results in actual

or potential loss or property damage of an greater than \$5,000. Both the person carrying on the activity and the occupier of the premises to which the incident occurs must notify the relevant authority. Failure to do so is an offence, with a maximum fine of \$125,000 for a corporation and \$60,000 for an individual. A person is required to notify the appropriate regulatory authority of a pollution incident even though to do so might incriminate the person or make them liable to a penalty.

Chapter 6 Environmental Audits

The Bill defines an environmental audit as: a periodic evaluation of an activity (including management practices, systems and equipment) for either or both of the following purposes: to provide information to the persons managing the activity on compliance with legal requirements, codes of practice and relevant policies relating to environment protection; to enable those persons to improve the way the activity is carried out in order to protect the environment and to minimise waste. Environmental audits can be a very useful management tool, as they can identify potential problem areas before they cause a pollution incident. However, corporations have been wary of their use since the High Court found that they do not have privilege against self incrimination.³² This means that the EPA can subpoena emissions monitoring data obtained by a company's environmental audit and use that data in a prosecution. As a result, companies have an incentive not to conduct a voluntary environmental audit.

To rectify this, the Bill provides for a level of protection for the data arising from a voluntary environmental audit. Documents prepared for the sole purpose of a voluntary audit are termed protected documents. A protected document is not admissible in evidence against any person in any proceedings connected with the administration of the Act; and may not be seized or obtained by the EPA or any other person for any purpose connected with the administration of the Act. The onus of establishing that a document is protected lies on the person asserting that it is protected. This satisfies many of the problems canvassed above.

In contrast, the EPA may also demand that a mandatory environmental audit be undertaken, and can only do this by attaching this condition to a licence. This condition may only be applied where the regulatory authority reasonably suspects that: the holder of the licence has on one or more occasions contravened the Act, the regulations or the conditions on the licence; and that the contravention or contraventions have caused, are causing or are likely to cause harm to the environment.

The holder of the licence must declare that they have not knowingly provided any false

³² See *Environment Protection Authority v Caltex Oil Refining Co Pty Ltd (1994) 68 ALJR 127*. In this case, Caltex refused to hand over documents to the EPA and claimed privilege against self incrimination. The matter went before the High Court, which found that the privilege against self-incrimination is not available to corporations.

or misleading information to the auditor. Similarly, the auditor must certify that the report is accurate, and that the auditor has not knowingly included any false or misleading information, or failed to include any relevant information. The holder of a licence must retain for at least five years all written documentation in relation to their mandatory environmental audit. Offences against the above provisions incur a fine up to \$125,000 for a corporation or \$60,000 for an individual.

The Bill clearly states that the information contained in a mandatory audit as provided to the regulatory authority may be taken into consideration and used for the purposes of the Act. This includes prosecutions, and any particulars in an audit are admissible evidence in any prosecution of the holder of a licence for any offence. Self-incriminatory particulars are not exempt from this provision.

Chapter 7 Enforcement

This chapter includes sections on the appointment and scope of authorised officers (which may include local council officers), and their enforcement powers. Similar to provisions in the *Pollution Control Act*, the EPA may conduct an inquiry into any matter relating to environment protection (Part 7.3).

Chapter 7 also includes proceedings in relation to offences. The provisions in the Bill are similar to those in the EOPA. The EPA may commence proceedings in the Land and Environment Court for an order to restrain a breach (or a threatened breach), in which the Court is permitted to issue orders restraining the breach or other conduct of the person who is committing the breach. Presently, any person may also bring proceedings before the Land and Environment Court to restrain a breach (or threatened breach) of the EOPA, if they first have the leave of the Court. The Bill includes provisions to continue this right, but it is no longer necessary to have to seek the leave of the Court first.

Section 7.5 of the Bill proposes innovative mechanisms to deter potential polluters. For instance, section 7.5.7 allows the Court to fine an offender an additional penalty of an amount estimated to be the monetary benefits acquired by the offender as a result of the commission of the offence. Section 7.5.8 allows the Court to make additional orders, including:

- order the offender to publicise the offence and its environmental and other consequences.
- order the offender to notify specified persons of the offence (eg, publication in an annual report or any other notice to shareholders).
- order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit.
- order the offender to carry out a specified environmental audit of activities carried out by the offender.

If the offender fails to comply with either of the first or second orders as above, the prosecutor is permitted to publicise the offenders original contravention and their failure to obey the order, and then recoup the costs involved in doing so. Currently, the only sentencing options available to Courts are the imposition of financial penalties or gaol convictions (in the case of Tier 1 offences), or to make orders requiring the defendant to take steps to control harm to the environment. Options available to the Courts in the case of those unable to pay fines are few. Section 7.5 is an attempt to rectify this, and makes it possible for Courts to impose alternative orders.

Comment

As noted in other sections of this paper, under the proposed reforms local councils have new duties of licensing and enforcement of non-scheduled premises. Of some concern to many people is the ability and resources of local government to be able to achieve this effectively. Concerns include the lack of technical knowledge or skills and a lack of money to employ additional inspectors. Peter Woods, President of the Local Government and Shires Associations of NSW writes: “What council is going to employ five additional ordinance inspectors in the hope that they can recoup their investment next financial year through their inspection/licensing program? And the argument that councils can fund their regulatory role through the ‘keeping of fines’ is fundamentally flawed. Simple logic dictates that if the system is working, there are no fines.”³³

Cr Woods would like to see the implementation of a training program to be conducted by the EPA to assist councils in the implementation of their new duties.

Chapter 8 Miscellaneous

This chapter includes a range of issues, including the exemption from the Act for fire brigades and other emergency services.

Part 8.3 provides for the use of economic measures to regulate the environment.³⁴ The Bill specifically lists tradeable emission schemes, and provides that the regulations may make provisions for the development and implementation of other economic measures.

Part 8.4 provides for the implementation of financial assurances by way of a licence to secure or guarantee funding for or towards the carrying out of certain works or programs (such as remediation work or pollution reduction programs). Financial assurances may be in the form of a bank guarantee, a bond or another form of security considered appropriate. If the holder or former holder of a licence fails to carry out work in

³³ Woods,P. “Protection of the Environment Operations Bill 1996, presentation by Cr Peter Woods” in *Pollution Perspectives*. Program and Conference Papers. 20 March 1997.

³⁴ See: Smith,S. *The use of economic instruments to control pollution*. NSW Parliamentary Library Briefing Paper No 18/96.

accordance with the conditions imposed by the licence, the appropriate regulatory authority can direct those works to be carried out by themselves or other contractors, and then call on or use the money from the financial assurance.

Part 8.6 states that the Act binds the Crown, and that any dispute between the EPA and other public authorities is to be resolved by the Premier. The Act is to be reviewed after five years of operation, and the report tabled in Parliament.

Schedules to the Bill

Schedule 1 presents a list of activities that are required to be licensed by the EPA. Of note is the requirement for logging operations by the Forestry Commission to be licensed, especially in areas at risk of soil erosion or water pollution. In contrast, logging operations on a timber plantation do not need to be licensed. It could be argued that the social costs of soil and water pollution are just as important from a timber plantation as they are from public native forestry operations.

Schedule 2 lists the regulation making powers of the EPA, whilst schedule 3 lists those Act to be repealed.

Schedule 4 lists the amendments to other acts. Of interest are proposed amendments to the *Protection of the Environment Administration Act 1991*. These amendments include: requiring the EPA to produce a State of the Environment Report every three years rather than the current two; and extending the functions of the Minister to include giving directions to the EPA in regard to licensing of functions, which includes determining the issue, transfer, amendment, suspension or revoking of a licence if the Minister considers it is in the public interest to do so.

The Bill proposes amendments to the *Environmental Planning and Assessment Act 1979*. When a consent authority receives a development application for an activity listed in Schedule 1 of this Bill, the authority must forward a copy of the application to the EPA. Within 30 days the EPA is required to provide advice to the authority on: environment protection issues raised by the development application; and whether an application for a licence for the scheduled activity is likely to be granted or refused. The consent authority is then required to take into consideration this advice when determining the development application.

Clause 52 of the Environmental Planning and Assessment Regulation is amended, so that when the Director of the Department of Urban Affairs and Planning is deciding on the requirements for an environmental impact statement, if a proposed activity is on Schedule 1 the Director must consult with the EPA about those requirements.

Conclusions

The Protection of the Environment Operations Bill finalises the process of reforming the old State Pollution Control Commission. The *Protection of the Environment Administration Act 1991* established the Environment Protection Authority and its administrative procedures. The complexity of the pollution legislation and the numerous issues and stakeholders involved has resulted in the considerably longer time period to formulate the 'EPA Stage II' legislation.

The draft exposure bill presents wide ranging reforms to control pollution. As can be expected, commentators have identified many positive aspects about the reforms, as well as several 'disappointments'. The positive aspects include the commitment to ecologically sustainable development principles, protection of the environment policies, new sentencing options and the general simplification of the pollution laws. Some of the disappointments include the lack of enforceability of PEPS, lack of public participation in the licensing process and the role of local government. However, it is apparent that the introduction of reforms will lead to a greatly enhanced ability for the EPA to protect our environment.