

## FACT SHEET

### ***Environmental Management and Pollution Control Amendment Bill 2012***

The *Environmental Management and Pollution Control Act 1994* [EMPCA] is Tasmania's principal pollution control legislation. The Act establishes the Board of the Environment Protection Authority and the statutory role of the Director.

A major role of the Board is to conduct formal environmental impact assessment of proposed level 2 activities, which are generally larger scale industrial, extractive or waste management activities which have significant potential to cause serious or material environmental harm, and all of which are listed in Schedule 2 of EMPCA. Principal roles of the Director include the enforcement of the Act to prevent or address major pollution incidents, and the ongoing environmental regulation of Board-approved level 2 activities.

The Act also confirms a duty of care for local government in the prevention of pollution from level 1 activities or those that are not level 2 or level 3 activities.

The EPA Division has kept the Act under review since it was last amended in 2007. Late in 2010, a Statement of Intent, proposing new amendments, was submitted to key industry and community stakeholder groups and local government for comment.

In August 2011, approval was received for the drafting of a Bill to give effect to the recommended amendments.

A copy of the consultation draft of the Bill has been reviewed by the key stakeholder groups and local government, and changes made wherever appropriate.

The Bill included a broad range of amendments, many of which were relatively minor in nature and significance. However, there were a number of other more substantial changes that will contribute significantly to improving the administration and enforcement capacity of the Act.

In the course of identifying the amendments, an error was found in another Act that could limit the ability of EMPCA to deal with oil pollution from small ships and recreational vessels in Tasmanian waters. The Bill therefore also included a consequential amendment to correct the error in the *Pollution of Waters by Oil and Noxious Substances Act 1987* [PWONSA].

For ease of review, the amendments may be grouped as follows –

#### General amendments

These “machinery” amendments were minor changes designed to improve the effectiveness of the Act, to better deliver or clarify its intent, to take account of changes to other legislation, or to correct errors or anomalies.

They include -

- Section 22 [*Environmental Registers*] was amended to require the Registers to include notices issued under Part 5A [*Contaminated Sites*].
- Section 24 [*Assessment of level 1 activities*] was amended to clarify that level 1 activities called-in under that provision are to be assessed as if they were level 2 activities.

- Section 25 [*Assessment of level 2 activities*] was amended to confirm that planning authority approval time limits for level 2 applications re-commence on completion of the Board's assessment.
- Sections 25 and 25A [*Assessment of joint permit and scheme amendment applications*] amend references to "assessment under this Act".
- Section 27I [*Additional information*] was amended to confirm that the Board's power under this section to require further information only applies following the public submission period.
- Section 32 [*Incident notification obligations*] was amended to account for a 2007 amendment relating to options for regulating called-in level 1 applications.
- Section 35 [*Financial Assurance to secure compliance*] was amended to clarify that financial assurances may be sought for notices issued under Part 5A [Contaminated Sites].
- Section 44 was amended to clarify that EPNs [*environment protection notices*] to vary permit "conditions" may include varying "restrictions".
- Section 44A was inserted to allow the correction of minor errors on an EPN.
- Section 45(1) [*Duties arising under an EPN*] was amended to correct a minor error in the reference to whom the section applies.
- Section 46 [*Registration of EPNs*] was amended to correct a reference in subsection (3).
- Section 70 [*Service of EINs*] was deleted to allow Environmental Infringement Notices to be served in person or by post, as provided by s.29AB of the *Acts Interpretation Act 1931*, and section 109X of the *Corporations Act 2001 (Cwth)*.
- Section 74D [*Content of Notices*] was amended to clarify that the content of contaminated sites notices may refer to the taking of actions, as well as to the conducting of works.
- Section 74T [*Action if person to be served cannot be found*] was substituted to clarify that the "reasonable enquiry" the Director makes in relation to contacting certain persons means advertising in the press.
- Section 100A [*Listening Devices Act 1991 not to apply*] was amended by clarifying that interview recording equipment may include audio as well as video.
- Schedule 2 [*Level 2 activities*]
  - Item 1(b) was amended to correct a minor error in the definition of "coal processing works".
  - Item 3(d) was amended to include "anaerobic digesters" as "Resource Recovery" activities, instead of being classified as "Waste Depots" under Item 3(b).
  - Item 4(d) [*milk processing works*] was amended to confirm industry's existing understanding that evaporated milk may be included as a raw material in milk processing operations.

- Item 7(e) [*Sea dumping in Tasmanian waters*] was amended to give level 2 status to the most common activities that require permits from the Commonwealth in Australian waters.
- Clause 6 of Schedule 3 [*Provisions with respect to membership of the Board*] was amended to confirm that the Governor may appoint a deputy for the Director.
- Provision 3(4) of Schedule 6 [*Transitional and Miscellaneous*] was amended to correct a reference to the Director.
- Sections 35(1)(e), 55A(1)(a)&(1)(b) and 92(1)(j) were amended to include reference to “special permits” to reflect new provisions in the *Land Use Planning and Approvals Act 1993* for the assessment and approval of Projects of Regional Significance.

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### Substantial amendments

The Bill also included a range of more significant amendments, some of which constitute substantial progression in the administration and enforcement of pollution control policy. In summary -

- Section 3 [*Interpretation*]: The definition of “environmental nuisance” was amended to clarify that nuisance may be caused by the discharge, depositing or disturbance of pollutants, and is not restricted to the “emission” of pollutants.
- Section 9 [*Interaction with other Acts*]: Subsection 9(2) was deleted to allow action to be taken under EMPCA in relation to oil spills in Tasmanian coastal waters, instead of under the *Pollution of Waters by Oil and Noxious Substances Act 1987* [PWONSA], where appropriate.

The amendment will allow EMPCA to apply to such incidents, particularly those of a minor scale, and those involving smaller boats and recreational vessels, which is not what PWONSA is intended to focus on. Also, for any sized ship the amendment will enable much less onerous and less expensive enforcement action to be taken under EMPCA via [for example] environmental infringement notices [EINs] for minor incidents, rather than seeking summary conviction in the courts, as is the only option under PWONSA.

- Section 27A [*Classes of assessment*] was substituted, and a new Schedule 5 was inserted to clarify the criteria that the EPA Board uses to determine the appropriate environmental impact assessment class for applications. The amendments did not change what developments must be assessed, only the criteria used to determine the appropriate time-limited process a development proposal is required to be assessed under.
- Section 27B [*Notice of Intent*] was amended to clarify that the information included in a Notice of Intent must be to the satisfaction of the Board.
- Section 27C [*Board to advise of assessment class*] was amended to confirm that notification by the Board of its choice of assessment class is linked to receipt of a satisfactory Notice of Intent [if one is submitted before a DA is lodged].
- Section 27E [*Board may require further information*] was amended to provide that where the Board requires further information from an applicant to assist it in the compilation of site and project specific guidelines, the time limit for provision

of those guidelines is suspended, for all three assessment classes, not just Class C assessments as the original section allowed.

- Section 28 [*Environmental Agreements*] was amended to delete subsection (6), thereby removing the requirement for the EPA Board to seek Ministerial approval before entering into an environmental agreement to reward industry that operates beyond the basic environmental performance requirements of the Act.
- Section 43A was inserted into Part 4, Division 1 [*Information to be supplied*] to provide that it is an offence to submit false or misleading information.
- Section 43B was inserted to confirm the existing intent that, for the purposes of Environment Protection Notices, “environmentally relevant activities” can include activities that are no longer being conducted, but that may have caused, or still be causing environmental harm.
- Section 44 was amended in respect of notices issued under(1)(d)/(2)(d) [*EPNs to vary permit conditions*]. The amendments -
  - clearly set out what “vary” may include, and
  - confirm that a single such EPN may be issued to vary the operating conditions of multiple permits, where these relate to activities that function as an integrated whole, provided that the variation and consolidation does not compromise any of the activities authorised by the individual permits [eg a sawmill and a woodchip mill, or a quarry and a crusher].
- Section 45 [*Duties arising under an EPN*] was amended to clarify the notification obligation where a person ceases to be responsible for, or ceases to conduct, an activity that is subject to an environment protection notice.
- Section 45A is inserted to provide that an EPN may be transferred from one person to another where a notification is received under section 45.
- Section 46 [*Registration of EPNs*] was amended to clarify the intent of section 44(6) in relation to an owner of land that is subject to an EPN that has been registered on the land title.
- Section 51B was inserted into Part 4 - [*Enforcement Provisions*], Division 4 – [*General Offences*] to create an offence provision for contravention of conditions or restrictions that the Board has required to be imposed on a permit, or that the Director has varied by EPN under s.44(1)(d).
- Section 95A was inserted into Part 7, Division 1 [*Powers of authorised officers*]. The new section provides that it is not an excuse for a person to refuse or fail to answer a question or provide information when required by an authorized officer or council officer under section 92 on the grounds that to do so might incriminate the person.

The need for the amendment results from recent Magistrate Court decisions that have successfully challenged section 95. [*Offence to refuse or fail to comply with a requirement under section 92*].

The intent of the new provision is to challenge the “right to silence” in order to ensure that an officer can readily gather sufficient information to enable an informed and accurate assessment to be made of the nature of any non-

compliance, and also of the potential for environmental harm resulting from an incident.

However, the provision upholds the common law privilege against self incrimination in respect of individuals, in that it states that the answer or document or information, is not admissible in evidence against a natural person. This protection does not extend to corporations, which is consistent with s187 of the *Evidence Act 2001*.

- Section 102 [Regulations]: Subsection (7)(d) was amended to allow more substantial fines to be prescribed for offences under Regulations

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As stated in the introduction, during the course of considering the amendment to section 9 to allow EMPCA to deal with coastal waters oil spills, an error was found in the offence provision [s.8] of the *Pollution of Waters by Oil and Noxious Substances Act 1987* [PWONSA], relating specifically to oil spills from vessels under 400tonnes.

The Amendment Bill therefore included a consequential amendment to PWONSA to rectify the problem, as follows –

- Section 8 of the *Pollution of Waters by Oil and Noxious Substances Act 1987* [PWONSA] has been amended to correct an error in the provisions that establish a defence against the offence provision, and to bring the provisions of that section into line with the corresponding section of the current version of the Commonwealth *Protection of the Sea [Pollution from Ships] Act 1983*. [for which PWONSA is “mirror” legislation for the purposes of Tasmanian waters];
  - The wording of subsection 8(4)(i) of PWONSA was deficient. Unlike the corresponding provision in the Commonwealth Act [s9(4)(c)], it did not limit the defence to a maximum concentration [15 parts per million] of oil in any discharge from small vessels. This means that the protection of the defence could have been claimed, regardless of volume or concentration of oil in any discharge or spill, and the defence could have also been claimed in any action taken under EMPCA. The consequential amendment has rectified this by inserting the concentration limit;
  - In addition, the Commonwealth Act has been progressively amended over the years to significantly clarify and simplify the provisions relating to the offence of discharging oil, and to the defences.
  - Consequently, the Bill substituted the original wording of section 8 of PWONSA, with wording and form that closely mirrors section 9 of the current version of the Commonwealth Act.
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