



Tasmania

DEPARTMENT *of*
PRIMARY INDUSTRIES,
WATER *and* ENVIRONMENT

REPORT

on the

10 year Statutory Review

and the

Legislation Review Program Review

of the

Environmental Management and Pollution Control Act 1994

September 2005

**Report on the Statutory Review and the LRP Review of the
Environmental Management and Pollution Control Act 1994
September 2005**

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President
Legislative Council
Parliament of Tasmania
HOBART

Speaker
House of Assembly
Parliament of Tasmania
HOBART

Dear Mr President
Dear Mr Speaker

**Report on the 10 year Statutory Review and the Legislation Review Program
Review of the *Environmental Management and Pollution Control Act 1994***

This Report I present to Parliament is the combined result of two major reviews of the *Environmental Management and Pollution Control Act 1994*.

The first of these was the Statutory Review under section 108 that requires the Act to be reviewed within ten years of its commencement. The Act was made in late August 1994, but only a limited number of provisions commenced in January 1995. The bulk of the Act commenced early in 1996. To comply with the requirements of section 108, the Act has been subject to this review, with a view to its completion during 2005.

The Review was conducted in accordance with Terms of Reference, issued by me in 2004.

This Report of the Statutory Review of EMPCA makes recommendation for a number of amendments to the Act. In recognition of the integration of the assessment, approval and regulatory provisions of EMPCA with those of the *Land Use Planning and Approvals Act 1993*, under the Resource Management and Planning System of Tasmania, amendments to that Act are also recommended.

The second review involves the critical examination of specific provisions of the Act and subordinate legislation, required by the Tasmanian Legislation Review Program. The Report includes recommendations arising from the examination of these provisions.

Yours sincerely

Judy Jackson MHA
MINISTER FOR ENVIRONMENT AND PLANNING

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ABBREVIATIONS & ACRONYMS

Board	Board of Environmental Management and Pollution Control
Director	Director of Environmental Management
DED	Department of Economic Development
Department	Department of Primary Industries, Water and Environment
DIER	Department of Infrastructure, Energy and Resources
DPEMP	Development Proposal and Environmental Management Plan
EDO	Environmental Defender's Office
EIA	Environmental Impact Assessment
EIN	Environmental Infringement Notice
EIP	Environmental Improvement Program
EMPCA	<i>Environmental Management and Pollution Control Act 1994</i>
EPN	Environment Protection Notice
EPP	Environment Protection Policy
HT	Hydro Tasmania
IOP	10yr Statutory Review of EMPCA Issues and Options Paper (Dec '04)
LGAT	Local Government Association of Tasmania
LRP	Legislation Review Program
LUPAA	<i>Land Use Planning and Approvals Act 1993</i>
RMPATA	<i>Resource Management and Planning Appeal Tribunal Act 1993</i>
RMPS	Resource Management and Planning System
RPDC	Resource Planning and Development Commission
SEA	Strategic Environmental Assessment
SPPA	<i>State Policies and Projects Act 1993</i>
Tribunal	Resource Management and Planning Appeals Tribunal

SUMMARY OF RECOMMENDATIONS

CHAPTER 1 - INTRODUCTION

The *Environmental Management and Pollution Control Act 1994* (hereinafter called "EMPCA") is part of the Tasmanian Resource Management and Planning System (RMPS). This system aims to ensure that all decisions about the use of land and natural resources in the State are made in pursuit of common objectives.

The Statutory Review of EMPCA is required by section 108 of the Act, which provides that –

“The Minister must ensure that this Act is reviewed within 10 years from the day on which it commenced.”

The Review was conducted under Terms of Reference issued by the Minister in 2004 –

The review will consider the appropriateness of provisions of EMPCA dealing with:

- *environmental management, including the assessment and permitting system;*
- *administrative matters, including the roles of the Board of Environmental Management and Pollution Control, the Director of Environmental Management and councils;*
- *enforcement provisions; and*
- *miscellaneous matters including the powers of authorised officers and council officers, and the role of environment protection policies.*

The Review has been overseen by a Steering Committee, and assisted by a Reference Group. Local councils are co-administrators of EMPCA in respect of level 1 activities, and so, to inform the development of the Review, all 29 councils were surveyed. An Issues and Options Paper was then produced, and this was made available for a two month public comment period. Submissions were taken into account in the development of this Report.

This Report of the Statutory Review of EMPCA makes recommendation for a number of amendments to the Act. In recognition of the integration, under the RMPS, of assessment, approval and regulatory provisions of EMPCA with those of LUPAA (the *Land Use Planning and Approvals Act 1993*), amendments to that Act are also recommended.

For many of these recommendations, further consultation with all stakeholders will be essential following the drafting of a comprehensive Amendment Bill. Stakeholders will include local government, state government agencies, and representative industry and community organisations. A period of further consultation on the proposed amendments is therefore recommended.

Further, this Review recommends that improvements to the working of the Act may be had by administrative means. These will need to be worked through with local government in particular to ensure mutually satisfactory outcomes.

Finally, a number of other issues concerning EMPCA are already being reviewed under other government initiatives. While the Statutory Review did not address these issues, care has been taken to ensure that any amendments recommended through this Review will integrate with, and compliment, their expected outcomes.

In particular, recommendations in relation to the preferred options for specific issues examined over recent years under the Tasmanian Legislation Review Program are presented in this Report, and it is expected that a combined Amendment Bill will be presented to Parliament in due course.

CHAPTER 2 – ENVIRONMENTAL MANAGEMENT

2.1 – Referral and Assessment of Level 1 activities

Issues:

- Should the Act include an explicit provision for councils to refer level 1's for formal environment impact assessment by the Board;
- Should the Director's call-in power be subject to a time limit?

Findings:

Amendments to the Act are recommended.

1. Amend section 24 by the insertion of a time limit in section 24(1).
Time limits for s.57 applications should be aligned with expiry of the public submission period, and 14 days from lodgement for s.58 applications.

Administrative action is also recommended

2. In consultation with local government and individual councils, progress the development of an appropriate list of level 1 activities, and an associated set of standard environmental operating conditions. Representative industry groups should also be consulted.
-

2.2 – Level 1 Activities treated as level 2's

Issue:

- Should Board-assessed level 1 activities automatically be regulated as level 2 activities?

Findings:

Amendments to the Act are recommended.

3. Amend the Act to provide that unless the Board determines otherwise, level 1 activities assessed by it under the Act would subsequently be treated as level 1's for the purposes of regulation under the Act – ie. they would revert to the responsibility of councils for regulation.
 4. The Review recommends that the regulation of all level 2 activities, as defined in Schedule 2 of the Act, should remain under the jurisdiction of the Director.
-

2.3 – Environmental Authorisations

Issues:

- The environmental conditions imposed by the EMPC Board on an assessed activity are operational, and require regular updating, whereas LUPAA permits (in which those conditions are contained) are not amenable to subsequent frequent amendment.
 - An EPN issued under section 44 of EMPCA is currently used to vary permit conditions.
 - An EPN does not change conditions on the permit itself, the changes only apply to the person responsible for conducting the land use on the land to which the permit pertains, and they only apply for as long as that person remains responsible for the activity.
-
-

- There is a definite need to provide a mechanism to allow the conditions that were originally imposed by the Board to be changed, and for those changes to apply to the permit, not merely to the person responsible for the activity.

Findings:

Amendments to both EMPCA and LUPAA are recommended.

5. Progress the adaptation of the Queensland model for amending both LUPAA and EMPCA to address this issue in a manner that preserves and enhances the integrity of the RMPS.

This will be done in close consultation with local government and other relevant parties, and should ensure that the final result is able to take account of the identified benefits of the originally proposed concept of environmental authorisations.

2.4 – Timeframes for Level 2 referrals

Issue:

Section 25(1D) provides that the Board has 14 days in which to determine whether it needs to formally assess an application for a level 2 activity referred by a council. This may erode the statutory timeframe under LUPAA for council decisions.

Findings:

Amendments to EMPCA are recommended.

6. Amend section 25(1). Insert an additional subsection providing that during the period specified in subsection (1D), the time periods specified in sections 57 (6) and 58(2) of LUPAA do not apply.
-

CHAPTER 3 - ADMINISTRATION

3.1 – Administration of EMPCA

Issues:

The Act is administered by councils and council officers in respect of level 1 activities and those which are not level 2 or level 3 activities.

- Are councils in particular able to fulfil the functions assigned to them by EMPCA?
- Should councils have access to all of the EMPCA tools that are available to the Board.

Findings:

Amendments to EMPCA are recommended.

7. Insert a new clause into the Act confirming the currently unstated capacity for councils to request the Board to use its powers under Part 3, Divisions 2,3,4 and 6 in respect of an activity that is not a level 2 or 3 activity.

Administrative action is also recommended

8. It is recommended that the Department should approach LGAT with a view to stimulating debate between all parties on the resourcing and administration issue.
-
-

3.2 – Cost Recovery by Councils

Issue:

Sections 103 and 44 of EMPCA provide that councils may charge fees or recover costs in respect of functions performed under the Act. For a range of reasons, these capacities have remained under-utilised.

Findings:

No specific changes to the Act are recommended at this time.

9. However, the Department should seek to address the cost recovery issue in the context of the recommended action under section 2.1 above (Recommendation 2).
 10. Nuisance noise issues should continue to be discussed in close consultation with residents' groups in the context of the development of the Noise Policy and any associated amendments to the Act.
-

3.3 – Roles and Responsibilities

Issues:

The Act places responsibility on councils for its administration in respect of activities that are not level 2 or 3 activities. However, there remains a level of confusion among councils of exactly what their roles are, and how they should fulfil those roles.

Findings:

No changes to the Act are recommended under this heading, but

Administrative action is recommended

11. The Department should factor in the development of effective guidance notes and explanatory materials in all stages of the finalisation of any changes decided upon as a result of this review.
-

3.4 – The EMPC Board

Issue:

The Board comprises three non-government members, the Departmental Secretary and the Director of Environmental Management.

While its functions are listed in broad terms in section 14, its principal role is to assess level 2 activities, and impose operating conditions that are subsequently enforced by the Director.

- Is the composition of the Board appropriate, and is its operation sufficiently transparent?

Findings:

The Review makes no recommendation on this issue.

12. However, the Review finds that there is general support for the Board to have an independent chair. The Review also concludes that there would be merit in re-defining the Board's functions to more clearly align them with the current roles of high level decision-maker and provider of policy advice to government.
-
-

CHAPTER 4 – ENFORCEMENT

4.1 – The use of EPNs to vary permit conditions

Issues:

EPNs are an important enforcement tool in EMPCA, used by both councils and the Director. They are also used to vary the conditions of a LUPAA-issued permit, but this has encountered significant difficulties. There is also an issue regarding whether third parties should have appeal rights in respect of permit condition variation via EPNs.

Findings:

Amendments to the Act are recommended

13. Progress options for adapting the Queensland model to rectify identified problems with EPNs as they relate to permits, while ensuring that the use and effectiveness of EPNs is not diminished.
 14. Provide for limited third party appeal rights for EPNs issued under s.44(1)(d) and(2)(d), if this capacity is retained in the Act. Amendments should limit appeals to persons who made submissions to the original permit.
-

4.2 – Issuance of EPNs

Issues:

The Director may issue EPNs to any environmentally relevant activity, including level 2's and 3's, and also to level 1's and activities that are not level 2's or 3's. Councils can issue EPNs only in relation to these last two classes of activity. Potential exists for inconsistencies and conflict between EPNs issued by the two authorities.

Findings:

Amendments to the Act are recommended.

15. Progress options for the improvement of the issuance and notification of EPNs – amendments are likely to s.44(4); with new subsections inserted to -
 - require that councils shall notify the Director of the issuance of an EPN on an activity that is not a level 2 or level 3 activity -
 - as soon as practicable, and in any event,
 - within a specified time; and to
 - require that the Director shall advise councils of the issuance of an EPN on an activity that is not a level 2 or level 3 activity
 - in advance where practicable; or
 - as soon as practicable, and in any event,
 - within a specified time.
-

4.3 – Enforcing Environmental Infringement Notices

Issues:

EINS are “on the spot” enforcement tools for less serious offences. They are deemed to have been accepted by the person on whom they are served by the payment of the fine. If it is not “accepted”, the person may be prosecuted.

- Should the Act be amended to make the acceptance of an EIN more effective, and so that fines are actually paid?

Findings:

Amendments to the Act and to the *Justice Rules 2003* are recommended.

16. Pursue options to rectify this situation.

- Option one will result in a change to the “acceptance” regime. It will put the onus on the person to challenge the EIN if they choose not to accept it.
 - Option 2 will result in a range of simple EIN offences inserted into Schedule 2 of the Rules.
-

4.4 – Service of EINs

Issues:

Section 70 provides that EINS must be served on a person by delivery directly to them in person.

- Should the Act be amended to make the service of EINs less constrained ?

Findings:

Amendments to the Act are recommended.

17. Pursue amendments to section 67 to allow for service of notices by mail (including by courier) to company, council business and government agency addresses.
 18. The definition of “persons” can be broadened to include both natural persons in its ordinary sense as well as individuals in their capacity as executives of bodies in/corporate.
-

4.5 – Prosecutions

Issues:

EMPCA provides for prosecution for offences against the Act, and for civil action. However for a variety of reasons, there have been relatively few prosecutions undertaken by either the Department or councils, particularly under the civil action provisions. Access to the Appeal Tribunal may also be seen as restrictive.

- Should the Act include explicit provision for cost recovery ? Should access to the Appeal Tribunal be broadened?

Findings:

Amendments to the Act are recommended.

19. Pursue amendments to achieve the goal of cost recovery in relation to prosecutions; but
 20. do not amend the Act to remove the “proper interest” test from s.48.
-

4.6 – Environmental Nuisance Offences

Issues:

EMPCA provides that unlawful environmental nuisance is an offence (s.53).

As demonstration of environmental harm is not necessary, prosecution should be relatively easy. However, provision to deal with nuisance “on the spot” is limited in the Act.

- Should the Act include more explicit provision than currently, directly targeting nuisance abatement?

Findings:

Amendments to the Act are recommended.

21. In close consultation with all relevant stakeholders, progress the development of a new enforcement instrument dealing specifically with nuisance.
The new instrument should deal with all nuisance emissions, including noise, and it should ensure that action taken under the provision results in cessation of the nuisance.
22. Amendments are also recommended as necessary to section 53 to clarify “unlawful”, to re-define “residential premises” and “habitable room”, and to clarify that proof of nuisance is not solely dependent on technical measurements.
23. As already recommended in this Review Report, the Department should continue to work closely with Noise Tas Inc, and other relevant stakeholders in the development of any EMPCA amendments dealing with nuisance noise issues. The process should be closely coordinated with the development of the new draft Noise Environment Protection Policy.

4.7 Notification

Issues:

EMPCA provides (s.32) that the person responsible for an activity must notify the relevant authority in the event of incidents that cause or may cause environmental harm.

- Should the Act include explicit provision to extend the notification obligation to employees or contractors?

Findings:

No amendments to the Act are recommended.

CHAPTER 5 – MISCELLANEOUS ISSUES

5.1 – Public Participation

Issues:

Impact assessment processes in EMPCA (ss.25,27) provide for public participation in accordance with the s.74 principles of environmental impact assessment.

Level 2 assessments under s.25 are clearly linked to the LUPAA process, including notification and submission periods. S.27 processes are only linked to the EMPCA s.74 principles of Environmental Impact Assessment. Further, unlike LUPAA processes, the Board is not specifically required to take account of public comment.

- Should the assessment provisions of the Act be more explicitly reflective of the standard RMPS provisions, as contained in LUPAA?

Findings:

Amendments to section 27 of the Act are recommended for -.

24. the placing of public notification of s.27 applications, calling for submissions within a period of 28 days; and
 25. subsection (6) to require that the Board's notification of both the applicant and persons who made representations, should include reasons for the decision and for any conditions imposed by it.
-

5.2 – Diffuse land uses

Issues:

EMPCA is aimed at the assessment and regulation of polluting activities on discrete sites (industrial, mining etc.). There is an increasing awareness of the impact of diffuse land uses, such as farming and forestry.

- Should the Act include explicit provision to take account of the environmental impact of diffuse land uses?

Findings:

An amendment was recommended under 3.1 of this Review Report

“ 7. Insert a new clause into the Act confirming the currently unstated capacity for councils to request the Board to use its powers under Part 3, Divisions 2,3,4 and 6 in respect of an activity that is not a level 2 or 3 activity.”

5.3 – Waste management

Issues:

While EMPCA is aimed at pollution control policy and the management/regulation of waste streams, there have been significant advances in waste management policy and practice over the past decade.

- Should the Act be amended to reflect new approaches to waste management?

Findings:

No amendments to the Act are recommended at this time.

However, the Review does recommend that -

26. The Department should continue to monitor developments in waste minimisation concepts and legislation nationally and in other States, with a view to determining applicability to Tasmanian conditions.
-

5.4 – Environment Protection Policies

Issues:

EMPCA provides for the development and making of Environment Protection Policies. These potentially powerful tools are subject to a transparent and consultative development and approval process.

- Should the Act be amended to limit the period within which an EPP must be finalised?

Findings:

While no amendments are recommended to impose a time limit on the process at this stage,

Other amendments to the Act are recommended with respect to the Panel.

Amendments should provide that

27. the EPP Review Panel should include the RPDC Chairperson and two other members with appropriate skills, qualifications and experience, chosen by the Chairperson as required for the assessment of each draft EPP.
 28. the Panel Chair may delegate his responsibilities to another member, or to another suitably qualified person;
 29. the Panel may appoint specialists to assist it in the assessment of draft policies; and to provide that
 30. the current provisions EMPCA regarding the inclusion of regulatory tools within EPPs are removed.
-

5.5 – Strategic environmental assessment

Issues:

EMPCA provides for formal environmental impact assessment of discrete developments. New concepts have now emerged that assess a program of developments, and can be used where traditional EIA processes are inadequate.

- Should the Act be amended to introduce such concepts as Strategic Environmental Assessment?

Findings:

No amendments to the Act are recommended at this time.

5.6 – Environmental bonds

Issues:

EMPCA provides for the Board to require the lodgement of financial bonds, but only in limited circumstances relating to high environmental risk or to contraventions of the Act.

- Should the Act be amended to broaden the application of bonds?

Findings:

An amendment to the Act is recommended.

31. Section 35(1) should be amended to clarify that financial assurances may be sought to ensure compliance with permit conditions imposed by the Board following environmental impact assessment under section 25.
-

CHAPTER 6 – GENERAL AMENDMENTS

In the course of examining the provisions targeted as issues, both during this Review, and also during the LRP Review, a number of additional amendments have been identified. These do not involve significant policy changes, but will correct errors, inconsistencies and anomalies, or clarify, or facilitate the enforcement of, the original intent of the provisions.

Amendments to the Act are recommended.

32. The Review recommends that amendments, to address minor errors and to provide clarification, are included in the development of the draft Amendment Bill.
-

CHAPTER 7 – OTHER ISSUES RAISED IN SUBMISSIONS

In addition to the issues put forward for review in the Statutory Review Issues and Options Paper (IOP), a number of other issues were raised in submissions.

Many of them can be, or are already being addressed through other initiatives, such as the LRP Review, contaminated sites amendment program, the review of the *Litter Act 1973*, or development of the new draft Noise EPP.

Others can be addressed in the course of developing amendments recommended by the Statutory Review under the IOP headings. This will involve further consultation, recommended as necessary in the course of the development of the draft Amendment Bill.

CHAPTER 8 – THE LRP PREFERRED OPTIONS

8.1 – Schedule 2 – Level 2 activities

8.1.1 Regulation of “low risk” Activities

Amendments to the subordinate legislation are recommended.

33. That the EMPC (General Fees) Regulations should be amended to provide for low risk regulation.

Development of the amendments and procedures should be conducted in consultation with all relevant stakeholders.

8.1.2 Current Level 2 activities not considered in detail

Amendments to the Schedule are not recommended in respect specified activities

34. The activities listed in Table 1¹ of this Report should remain on Schedule 2 of EMPCA, to be assessed, approved and regulated by the EMPC Board and/or the Director of Environmental Management, in accordance with the Act.

8.1.3 Racing and Testing Venues (Item 7[b])

Amendments to Item 7[b] of the Schedule are recommended.

35. Item 7[b] of Schedule 2 should be deleted from the Schedule 2 of EMPCA to remove the requirement for racing and testing venues to be regulated as a level 2 activity under the Act.

8.1.4 Laundries (Item 7[c])

Amendments to Item 7[c] of the Schedule are recommended.

36. Item 7[c] of Schedule 2 should be deleted from the Schedule 2 of EMPCA to remove the requirement for laundries to be regulated as level 2 activities under the Act.

¹ Table 1 - See page 56 of this report

8.1.5 Fish processing facilities (Item 4[c])

Amendments to Item 4[c] of the Schedule are recommended.

37. Item 4[c] of Schedule 2 should be redefined to exclude premises that freeze, chill or pack fish for sale, provided that no other forms of fish processing occur at the premises.
-

8.1.6 Wood processing works (Item 2[g])

Amendments to Item 2[g] of the Schedule are recommended.

38. Item 2[g] of Schedule 2 should be redefined to exclude firewood depots of less than 1000 cubic metres capacity
39. No change should be made to the current threshold of 1000 cubic metres per annum for wood processing works.
-

8.1.7 Sewage Treatment Works – Item 3[a]

Amendment of the definition of Item 3[a] is recommended

40. The current title of Item 3[a] should be deleted, and a new title, “Wastewater Treatment Works” be substituted.
-

8.1.8 Waste Depots – Item 3[b]

Amendment of the definition of Item 3[b] is recommended

41. Class 3 of Schedule 2 should be expanded by the inclusion of a new category 3[c] – “Resource Recovery”.

The new category will specify the inclusion of composting and mushroom substrate production, but will specifically exempt –

- Composting in backyard operations for own use; and
- Composting on agricultural land for use on own land; and
- Silage production on agricultural land.

Biosolid application classification as a level 2 activity will be limited to biosolids that are -

- defined as class 2 and class 3 biosolids in the Tasmanian Biosolids Reuse Guidelines 1999 (DPIWE); and that are
- applied to land at a rate of equal to or greater than 50 wet tonnes per hectare per 3 year period.

42. The current Item 3[b] should be redefined to exclude any activities specified in the new 3[c].
43. A fourth sub-category should be added to the exceptions from waste depots, to clarify that the deposition of clean fill does not constitute a level 2 activity. A definition of clean fill (consistent with the Regulations²) will also be needed.
44. Item 1[c] – “Oil Refineries” of Schedule 2 should be redefined to confirm that waste oil re-processing, using processes such as separation by gravity, is a level 2 activity.
-

² *Environmental Management and Pollution Control (Waste Management) Regulations 2000*

8.1.9 Quarries and Extractive Pits – Items 5[a], 5[b]

Amendment of these Schedule Items is not recommended at this time

45. The threshold levels of Items 5[a] and 5[b] should remain at 5,000m³/yr.

8.1.10 Materials Handling: - Crushing, grinding or milling works – Item 6[a]

Amendment of this Schedule Item is not recommended at this time

46. The threshold level of Item 6[a] should remain at 1,000m³/yr.

8.1.11 Wind energy facilities

Amendment of the Schedule is recommended

47. The Schedule should be amended by the insertion of a new category Item - 7[f] – “Wind energy facilities” with a threshold generating capacity of 30megawatts or more.

8.2 – Timeframes for EIA under the Act

Amendment of the Act and development of new subordinate legislation is recommended

48. Part 3, Division 1 of the Act (Assessment of environmental impacts) should be amended by the insertion of provisions to –

- introduce three levels of assessment based on a range of criteria to be set by the EMPCA Board; and
- introduce statutory timeframes³ for the critical stages of the assessment process (the time periods would have the meaning as provided by s.29 of the *Acts Interpretation Act 1931*), and hence, the same meaning as in LUPAA; and
- include “clock-stop” mechanism in these timeframes as appropriate; and
- introduce similar provisions to that contained in the *Water Management Act 1999* to allow for extension of the statutory approval timeframe by –
 - agreement with the applicant; or
 - the Minister on application by the Board; and to provide that
 - Where the Board subsequently fails to meet the extended timeframe, an approval decision and any associated conditions becomes the responsibility of the Resource Management and Planning Appeal Tribunal.
- introduce a requirement for a Notice of Intent to initiate the assessment process and associated timeframes; and
- provide that receipt of a Development Application, forwarded by a council in accordance with s.25(1)(a), is taken to be a Notice of Intent, where the latter has not previously been lodged; and

³ See Table 2 – page 68

- introduce a sunset clause for lodgement of documentation required by the Board for the assessment of the proposed activity (the DPEMP); and in addition; and
 - provide that councils must determine an application for a level 2 permit within 28 days of the notification date of the EMPCA Board's decision.
49. Associated amendments should be made to EMPCA to ensure that the above processes link with the current requirements for the overall conduct of the EIA assessment process specified in s.25 of the Act.
-
-

8.3 – General Fees under the Act

Recommended Legislative action:

- 50 Make new General Fees Regulations maintaining the current structure based on production capacity; and
- 51 introduce a two-part annual permit fee, based upon production capacity and a variable component that is payable only if permit holders have not taken extra steps to reduce the impact of their environmental risk; and
- 52 Introduce a flat fee for Level 2 activities classed as 'low risk'; and
53. Maintain the current fixed assessment fee structure with an hourly rate component for large-scale developments, but -
- with commencement of the hourly rate fee period corresponding to the lodgement of a Notice of Intent, but not including the period of guideline development; and
 - with the hourly rate capped at a maximum to be calculated on a sliding basis dependent on the scale /complexity of the development.
- 54 Allow the Environmental Management and Pollution Control (Environmental Improvement Program) Fees Regulations to lapse and be included in the new General Fees regulations.
- 55 A Regulatory Impact Statement will be required outlining the proposed new regulations as required under the *Subordinate Legislation Act 1992*. While Local government and major stakeholders have been consulted throughout the LRP process, further consultation will be essential during the RIS development process.
-
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1. INTRODUCTION

1.1 TASMANIA'S RESOURCE MANAGEMENT AND PLANNING SYSTEM

The *Environmental Management and Pollution Control Act 1994* (hereinafter called "EMPCA") was enacted in 1994 to replace the *Environment Protection Act 1973* as one plank of an integrated planning and environmental management system for Tasmania.

This Resource Management and Planning System (RMPS) aims to ensure that decisions about the use of land and natural resources in the State are made in pursuit of common objectives. These five RMPS objectives, which frame all the legislation that comprises the RMPS, aim to –

- promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity;
- provide for the fair, orderly and sustainable use and development of air, land and water;
- encourage public involvement in resource management and planning;
- facilitate economic development in accordance with these objectives; and
- promote the sharing of responsibility for resource management and planning between the different spheres of government, the community and industry in the State.

There are a number of elements which together comprise the RMPS:

- planning schemes prepared and administered by councils;
- State Policies for specific issues that apply to both levels of government;
- a single appeal system involving the Resource Management and Planning Appeal Tribunal;
- an integrated environmental management and pollution control system; and
- a suite of five key statutes supporting these elements, of which EMPCA is one.

1.2 BACKGROUND TO THE REVIEW

1.2.1 Statutory Requirements

Section 108 of EMPCA requires that –

"The Minister must ensure that this Act is reviewed within 10 years from the day on which it commenced."

The Act was made in late August 1994, but only a limited number of provisions commenced in January 1995. The bulk of the Act commenced early in 1996. Nevertheless, to comply with the requirements of section 108, the Act has been subject to this review, with a view to its completion during 2005.

1.2.2 Scope of the Review

In April 2004, the Minister issued the following Terms of Reference for the Review –

The review will consider the appropriateness of provisions of EMPCA dealing with:

- *environmental management, including the assessment and permitting system;*
- *administrative matters, including the roles of the Board of Environmental Management and Pollution Control, the Director of Environmental Management and councils;*
- *enforcement provisions; and*
- *miscellaneous matters including the powers of authorised officers and council officers, and the role of environment protection policies.*

In addressing the Terms of Reference, the Review examines a number of themes. These include –

- whether EMPCA adequately promotes integration of the planning and environmental protection frameworks;
- if the powers available to responsible authorities under EMPCA are adequate and appropriate;
- how well EMPCA's suite of regulatory tools and instruments represent best practice;
- if EMPCA provides an appropriate mix of incentives, sanctions and powers;
- whether the regulatory framework under EMPCA is flexible enough to accommodate changing circumstances; and
- does EMPCA provide a basis for efficient delivery of its intended outcomes.

Prior to the commencement of this Statutory Review, the Act and its related legislation has been subjected to a number of other review initiatives, some of which are ongoing. They include –

1. A review of the Act under the Tasmanian Legislation Review Program⁴. This recommended further critical investigation of the following aspects of the Act.
 - the structure and level of fees charged under the *EMPCA (General Fees) Regulations 1995*;
 - the content of Schedule 2 of the Act, which lists level 2 activities that must be assessed and approved by the Board and regulated by the Director; and
 - the statutory timeframes for the environmental impact assessment of activities under the Act.

While these three matters are therefore outside the scope of this Statutory Review, some issues overlap or are related, and hence, several aspects of the assessment process, such as timing and referrals of proposed activities to the EMPCA Board for assessment, are herein reviewed.

⁴ Legislation Review Program, *Environmental Management and Pollution Control Act 1994*, Regulatory Impact Statement, DPIWE1999

2. A review of the Litter Act⁵. The purpose of this project is to identify the changes to legislation required to manage litter in the State, including modernising the *Litter Act 1973*.

The future approach to managing litter is therefore being explored separately to this Review of EMPCA.

3. A third environmental management initiative is designed to improve the management of controlled waste⁶. This will provide a better understanding of how much controlled waste exists in Tasmania, and how it can best be managed, both in terms of transportation and storage. The subject of controlled waste is therefore not being examined in this Review.
4. Since the enactment of EMPCA, there have been considerable advances in the management of contaminated sites in Australia, including the preparation of the National Environment Protection (Assessment of Site Contamination) Measure. A separate project to amend EMPCA in accordance with contemporary approaches to site contamination is being undertaken within the Department.
5. The Department has also released a discussion paper reviewing the planning system in Tasmania⁷. The paper discusses improvements to the land use planning system within the context of the RMPS, and does not propose to overhaul the system.

Core planning and land use issues are being considered in this other process, and are therefore not addressed in the Statutory Review of EMPCA

In addition to the above initiatives of the Tasmanian Government, the Commonwealth Government is proposing to take over the “end-use” regulation of ozone depleting substances in Australia. This would mean that Part 6 of EMPCA, which deals with this issue, will be repealed, and is not considered in the Review.

While the Statutory Review does not address the above issues, care has been taken to ensure that any amendments recommended through this Review will integrate with, and compliment, their expected outcomes.

In particular, the results of the LRP Review have been integrated with the results of this Statutory Review, and it is expected that a combined Amendment Bill will be presented to Parliament in due course.

1.3 THE REVIEW PROCESS

The Review has been overseen by a Steering Committee with representation from –

- The Environment Division of the Department;
- The Strategic Policy and Projects Division of the Department; and
- The Local Government Association of Tasmania.

The role of the Steering Committee was to provide broad oversight and guidance to the review process, in line with the Terms of Reference.

⁵ Litter Management in Tasmania – Legislative Reform. Issues and Options Paper. Department of Primary Industries, Water and Environment. June 2004

⁶ Controlling Waste: A six-point action plan for managing controlled waste 2004-05. Department of Primary Industries, Water and Environment. September 2004

⁷ Better Planning Outcomes. Department of Primary Industries, Water and Environment. November 2004

A Reference Group comprising EMPCA practitioners was established to complement the Steering Committee. Membership of the Group included the Department, other government agencies, industry sectors, councils, and non-government peak bodies knowledgeable of the operation of the legislation.

To inform the development of the Review, a written questionnaire was provided to the twenty-nine Tasmanian councils. As co-administrators of the legislation, considerable experience of EMPCA exists within local government. A formal survey of councils was undertaken over June and July of 2004 to extract and evaluate this experience by asking some of the questions raised in the Terms of Reference. A high rate of return was achieved, with responses being received from twenty-one of the councils.

These views contributed significantly to the development and structure of an Issues and Options Paper⁸ which was released for a two month public comment in December of 2004. The Paper (hereinafter called the "IOP") was drafted with the direct input of the Reference Group, and endorsed by the Steering Committee.

The IOP was designed to stimulate debate on the substantive issues identified under the Terms of Reference as needing review, by canvassing achievable approaches or solutions. Comments on both the issues and possible options were invited.

A total of 34 submissions were received during the comment period, with an additional two being delivered informally after the period closure. Submissions comprised –

- 13 from councils (including a consolidated submission from LGAT);
- 10 from private citizens;
- 4 from residents' groups, incorporated community associations, or progress associations;
- 3 from government agencies or departments;
- 2 from industry associations or representative bodies; and
- 2 from legal or planning bodies.

The IOP specifically invited responses to the following issues –

- the introduction of environmental authorisations;
- referrals of level 1 and level 2 activities;
- proposed changes to the enforcement of EINs; and
- a new instrument for addressing environmental nuisance.

The issues raised in the submissions in relation to these matters, and to the IOP in general, were briefly summarised under the headings of the IOP, and the Summary document was posted on the Department's Internet site. A response document was compiled, taking account of the issues raised in submissions. The response paper was endorsed by the Steering Committee.

Having now considered the submissions, and the issues reviewed under the Terms of Reference, this Report of the Statutory Review of EMPCA makes recommendation for a number of amendments to the Act.

In recognition of the integration, under the RMPS, of assessment, approval and regulatory provisions of the Act with those of the *Land Use Planning and Approvals Act 1993* (LUPAA), amendments to that Act are also recommended.

⁸ 10 Year Statutory Review of EMPCA: Issues and Options Paper, Department of Primary Industries, Water and Environment. December 2004

For many of these recommendations, further consultation with all stakeholders will be essential following the drafting of a comprehensive Amendment Bill. Stakeholders will include local government, state government agencies, and representative industry and community organisations. A period of further consultation on the proposed amendments is therefore recommended.

Further, this Review recommends that improvements to the working of the Act may be had by administrative means. These will need to be worked through with local government in particular to ensure mutually satisfactory outcomes.

1.4 THE LRP PREFERRED OPTIONS

As briefly alluded to previously, EMPCA and its associated subordinate legislation has been subjected to an examination in accordance with the Tasmanian Legislation Review Program (LRP). This program is a requirement of an inter-governmental agreement under the National Competition Policy. The purpose of the review was to:

- Identify restrictions on competition in the legislation;
- Identify the broader impact on business, and assess whether this impact is warranted in the public interest; and
- Where restrictions on competition are identified, to ensure that the objectives of the legislation cannot be met other than by such restrictions.

The LRP Review Panel recognised that many of the Act's provisions fall within the scope of "community standards legislation", where the overall public benefits outweigh the economic cost to society of an activity or restriction. The Panel found that there are no restrictions on competition within the provisions of EMPCA. However, it found that under some provisions of the Act and regulations, there may be a negative impact on business that warranted further critical examination. The following aspects were therefore examined in detail –

- the content of Schedule 2 of the Act, which lists level 2 activities that must be assessed, approved and regulated by the Board and the Director;
- the statutory timeframes for environmental impact assessment of activities; and
- the structure and level of fees under the General Fees Regulations;

Subsequently, an Issues Paper⁹ addressing all three LRP recommendations was released. Comment was sought from government agencies, councils and industry groups, and the general public was invited to comment through press notices. A number of stakeholder and public information forums were held around the State. Resulting feedback was taken into account in the development of a Preferred Options Paper¹⁰, which was released for comment in mid 2004.

Further consultation has occurred as a result of the submissions received in relation to the 2004 Paper, and the results have been taken into consideration in the decisions regarding the final preferred options.

⁹ Review of Level 2 activities, the Time-Limit for Assessment of Level 2 Activities, and the Fees Charged under EMPCA: Issues Paper, DPIWE, 2000

¹⁰ LRP Review of the Environmental Management and Pollution Control Act 1994 – Fees, Schedule 2 and Assessment Timeframes. DPIWE's Preferred Options. DPIWE, August 2004

2. ENVIRONMENTAL MANAGEMENT

Part 3, Division 1 of EMPCA establishes an environmental management regime for activities that may cause environmental harm, based on the premise that the level of assessment and regulation should be appropriate for their level of environmental risk. Accordingly, three levels of activity are identified.

Councils are responsible for the assessment, approval and regulation of level 1 activities, which are generally small-scale, and of low or localised risk. However, the Director may require a council to refer any level 1 activity to the Board for formal environmental impact assessment (EIA) under the Act, and it is subsequently regulated by the Director as a level 2 activity. While the Act defines a level 1 activity¹¹, there is no list of such activities in either EMPCA or LUPAA.

The EMPCA Board and the Director of Environmental Management are responsible for the formal environmental impact assessment and regulation of level 2 activities, which are generally of larger scale, with the potential for greater environmental harm. Level 2 activities are listed in Schedule 2 of the Act.

While the Board must approve a level 2 activity before it can commence, the actual approval is generally¹² issued by a council in the form of a land use and development permit under LUPAA. The Board may impose operating conditions on the activity, and these are contained in the land use and development permit issued by the council.

Level 3 activities are activities assessed and approved as Projects of State Significance under the *State Policies and Projects Act 1993*, and are regulated in accordance with the approval issued by the Resource Planning and Development Commission. Environmental management conditions for level 3 activities are generally enforced by the Director.

The Review examined a range of issues that have arisen over the past ten years in respect of Division 1 provisions. These issues include –

- Referral and Assessment of level 1 activities;
- Called-in level 1 activities treated as level 2 activities for the purposes of regulation;
- Environmental authorisations, intended to overcome major difficulties with the residing of environmental operating conditions in land use and development permits issues under LUPAA; and
- Timeframes for level 2 referrals.

¹¹ s.3 – “level 1 activity” means an activity which may cause environmental harm and in respect of which a permit under the Land Use Planning and Approvals Act 1993 is required but does not include a level 2 activity or a level 3 activity.

¹² Some level 2 activities, such as waste transport businesses, do not require LUPAA permits. The Board approves these using an environment protection notice, and they are regulated by the Director.

2.1 REFERRAL AND ASSESSMENT OF LEVEL 1 ACTIVITIES

Under the Act, formal environmental impact assessment of level 2 activities is the responsibility of the EMPC Board.

EMPCA includes no requirement for formal EIA of level 1 activities by either the Board or the administering council, but the Director may require a council to refer a level 1 application to the Board for formal assessment.

There is no time limit on the Director's call-in power.

Issues:

- Should the Act include a explicit power providing for councils to refer level 1's for formal environment impact assessment by the Board;
- Should the Director's call-in power be subject to a time limit?

Findings

There is considerable support for providing an explicit mechanism allowing councils to refer level 1's. There is somewhat less support for this provision to include third parties.

However, there is also a general recognition that, under the current Act, there is no reason why a council - or any other third party - cannot alert the Director to a particular development, and request that he examines it to determine whether it warrants calling-in under the existing provisions of s.24.

There is also an acknowledgment from councils that, to date, none has needed to request the Director to exercise the call-in power.

While there may be benefits in inserting such a provision, in reality it would only be for the purposes of clarification. In examining the issue, the Review finds that the modifications required to s.24, and potential implications for 25, would make both unwieldy, and may even lead to further confusion.

It is therefore considered that the option to insert an explicit referral provision for councils or other persons does not significantly improve the Act for any party.

However, it is considered appropriate that the Director's call-in power should be subject to a time limit, in order that the level 1 assessment timeframe for councils, as imposed by LUPAA, is not significantly compromised.

Further, the Review finds that the provision of a list of activities that the Department considers to be level 1's for the purposes of environmental regulation, may help to reduce confusion among councils. In consultation with councils and industry, a set of "standard" operating conditions can then be drawn up, with individual activities being linked to specific standard conditions. Such a development may also assist councils in terms of cost recovery for regulation purposes.

Recommendations of the Review

Amendments to the Act are recommended.

1. Amend section 24 by the insertion of a time limit in section 24(1).
Time limits for s.57 applications should be aligned with expiry of the public submission period, and 14 days from lodgement for s.58 applications.

Administrative action is also recommended

2. In consultation with local government and individual councils, progress the development of an appropriate list of level 1 activities, and an associated set of standard environmental operating conditions. Representative industry groups should also be consulted.
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2.2 LEVEL 1 ACTIVITIES ASSESSED AS LEVEL 2's

Under the Act, level 1 activities are assessed and regulated by councils.

If the Director calls-in a level 1 application for formal environmental impact assessment by the Board, the activity must subsequently be regulated by the Director as if it were a level 2 activity, regardless of the assessed capacity for environmental harm.

Issue:

- Should Board-assessed level 1 activities automatically be regulated as level 2 activities?

Findings

There is considerable support, including from councils, for providing an explicit mechanism allowing the Board to determine the appropriate regulator for level 1's assessed under section 25. However, there is equally likely to be strong opposition to any attempt to allow the Board to require councils to regulate level 2 activities, no matter how benign they may be.

This issue of who should regulate an activity is clearly foreshadowed in the Act. The existing subsection (9)(d) of section 74 – “Environmental Impact Assessment Principles”, provides that an assessment should gather enough information to be able to make informed decisions about “*the management regime under which the proposed activity should proceed*”.

The Review finds that there is significant benefit in retaining the existing capacity in the Act for level 1 activities to be called-in for formal environmental impact assessment.

In particular, it finds that the use of this provision may be facilitated if the Act is amended to provide that the Board's assessment should determine the appropriate regulator for the activity.

Amendments will be required to s.25(2), (5)(a), (8A), (8B) and (8C). These subsections will need to be amended to explicitly apply only to level 2 activities – unless the Board has determined that the Director should regulate an assessed level 1 activity.

Recommendations of the Review

Amendments to the Act are recommended.

3. Amend the Act to provide that unless the Board determines otherwise, level 1 activities assessed by it under the Act would subsequently be treated as level 1's for the purposes of regulation under the Act – ie. they would revert to the responsibility of councils for regulation.
 4. The regulation of all level 2 activities, as defined in Schedule 2 of the Act, will remain under the jurisdiction of the Director.
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2.3 ENVIRONMENTAL AUTHORISATIONS

The Board may impose conditions on an activity that it assesses under section 25.

Those conditions are contained in a land use planning permit issued by a council.

The amendment of conditions does not involve the permit, but requires the use of another instrument – the environment protection notice (EPN) issued under section 44 of EMPCA.

Issues:

- The environmental conditions are operational, and require regular updating, whereas LUPAA permits are not amenable to subsequent frequent amendment.
- An EPN does not change conditions on the permit, the changes only apply to the person responsible for conducting the land use on the land to which the permit pertains, and they only apply for as long as that person remains responsible for the activity.
- There is a definite need to provide a mechanism to allow the conditions that were originally imposed by the Board to be changed, and for those changes to apply to the permit, not merely to the person responsible for the activity.

Findings

A significant reform achieved by the RMPS is an explicit linkage between the planning system under LUPAA and the environmental management and pollution control system under EMPCA.

The requirement under the previous *Environment Protection Act 1973* for an environmental licence to be obtained under a separate process was replaced with a single integrated process under EMPCA and LUPAA designed to satisfy both planning and environmental objectives.

Integrated planning and environmental decision making was a core reform of the RMPS and most practitioners and operators would regard it as a backward step to decouple the two processes.

The Review's Issues and Options Paper proposed an option to introduce an "environmental authorisation" to overcome the identified problems. This would not have been a "step back" towards a licensing system, it would have simply introduced a formal mechanism to allow the Board to append its conditions to the council permit in a standard format, and to amend those conditions without the use of the current EPN provisions.

Many submissions argued that while problems are acknowledged, and there may be merit in investigating authorisations, care needs to be taken to ensure the integrity of the RMPS system is not compromised. One major concern was that councils were reluctant to see any change that would prevent them from using EPNs to vary level 1 permit conditions – even though very few have ever done so.

It is recognised that s.25 includes provisions that make it clear that the Board and the Director have exclusive power to enforce level 2 environmental conditions, but these provisions do not provide any ability to control, manage or in particular, to amend the permit itself. While the permit houses the operating conditions imposed by the Board at the time of issue of the permit, the permit remains a static instrument, whereas the operating circumstances to which the permit pertains are inherently dynamic. This necessitates that the permit itself should be flexible enough to reflect those changes over time. Such a move will not detract from the integrity of the permit, but in fact enhance it by making it a "living" instrument.

As the above discussion indicates, the Department has previously been of the view that the issuing of an authorisation which is appended to the permit, and which can be replaced under specified circumstances, will best achieve this goal.

However, as a result of information gathered during the consultation process, the issue was re-examined. Close examination of new Queensland integrated planning and environmental management provisions suggests that the goals – at least for activities that require LUPAA permits (ie. non-s.27 activities) – can be achieved by amendments to both EMPCA and LUPAA, without the introduction of authorisations.

In particular, this model may prove useful in overcoming the "variation of permit conditions by EPN" problem experienced by the Department, and simultaneously allow councils an appropriate and alternative mechanism for variation of planning conditions [see also 4.1 below].

However, this model would require substantial changes to both EMPCA and LUPAA.

Anticipated changes to LUPAA include –

- Define “administering authority” for the purpose of regulation of the activity to which the permit pertains (they would include the council and the Board, and any other agency that may impose conditions on a permit issued by a council under LUPAA); and
- provide that the permit must specify who is the administering authority for various conditions;
- specify that the Board’s conditions (or those of any other administering authority) are appended to, or included in, the permit in the precise form issued by the authority;
- set up a comprehensive mechanism for changing, amending, cancelling or adding conditions for a variety of reasons, and in accordance with a specific set of criteria (including various notification requirements). The amendments would retain the existing provisions for making minor amendments and for permit holders to apply for changes;
- explicitly provide that the permit attaches to the land, and explicitly bind the owner and successors in title and any occupier of the land to compliance with it and any land use operating conditions therein;

In tandem, changes would be made to EMPCA to provide that

- a person responsible for a level 2 activity to be conducted on the land to which the permit pertains must hold a Registration Certificate issued by the Director;
- the certificate provides that the holder is bound to conduct the approved activity on that land in accordance with the conditions contained in the permit;
- registration may be suspended or cancelled for a range of specified contraventions; and to provide that
- it is an offence to dispose of the business to which the registration applies without giving written notice to the prospective buyer that he/she must apply for a new registration certificate.

A number of councils also saw merit in making authorisations available for their use in clearly applying ongoing environmental operating conditions to level 1 permits. It is possible that the “registration” concept described above could be adapted for inclusion in LUPAA as well as EMPCA, to address this need.

Another issue was identified during the course of the review, and that is the problem of multiple permits applying to one site. This particularly causes problems for the Department and operators of level 2 activities, in that environmental conditions may currently need to be repeated on a number of permits, and hence, any use of EPNs to vary conditions significantly increases the number of “pieces of paper” applying to a given activity.

The Review finds that it will be necessary to address this issue through additional amendments to LUPAA.

The existing provisions for the use of EPNs would be retained, and continue to be used by both the Department (via s.27 and s.44) and councils (via s.44), for activities that do not require LUPAA permits.

The Review finds it likely that this model could be adapted to address the problems associated with the current permit system.

Further, the Review finds that this model – if it can be successfully adapted - will in fact constitute a logical additional step in the further integration of the environmental management and planning systems established by the RMPS.

Recommendations of the Review

Amendments to both EMPCA and LUPAA are recommended.

5. Progress the adaptation of the Queensland model for amending both LUPAA and EMPCA to address this issue in a manner that preserves and enhances the integrity of the RMPS.

This will be done in close consultation with local government and other relevant parties, and should ensure that the final result is able to take account of the identified benefits of the originally proposed concept of environmental authorisations.

2.4 TIMEFRAMES FOR LEVEL 2 REFERRALS

Section 25(1D) provides that the Board has 14 days in which to determine whether it needs to formally assess an application for a level 2 activity referred by a council.

If the Board determines that a formal environmental impact assessment is not necessary, the assessment role reverts to council.

This may reduce the time available to the council for a permit decision under the time constraints set by LUPAA.

Issue:

- Should the Act or LUPAA be amended to “stop the clock” during this 14 day determination period?

Findings

Given the nature of level 2 activities (large-scale, complex industrial activities with significant potential for serious or material harm), it is unlikely that the Board will need to use this provision often.

Nevertheless, the time constraints governing a permit approval period, established in sections 57 and 58 of LUPAA, are quite tight, and leave little room for error in the event that the Board decides not to assess a Level 2 activity referred to it by a council under s.25(1) of EMPCA.

While only a minority of submissions directly addressed this issue, most of these supported an amendment to EMPCA. Respondents generally recognised the need for some form of rectification.

The view of several sectors has traditionally been that LUPAA time limits should not be extended, although an appropriate change could be accommodated easily in s.54 of LUPAA.

Nevertheless, this Review finds that the best option would be to insert appropriate "clock-stop" mechanisms into EMPCA.

Recommendations of the Review

Amendments to EMPCA are recommended.

6. Amend section 25(1). Insert an additional subsection providing that during the period specified in subsection (1D), the time periods specified in sections 57 (6) and 58(2) of LUPAA do not apply.
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3. ADMINISTRATION

Several administrative players are contemplated by EMPCA, including local councils, the Director and the Board.

Councils are given large roles as co-administrators of EMPCA with respect to assessment and regulation of level 1 activities. A vital enforcement function, also delivered by local government, is discussed later in this Review Report.

The Director is an important position under EMPCA, being vested with many routine and interventionist powers.

The peak body under the legislation is the EMPC Board, especially with respect to formal environmental impact assessments and the use of incentive-based tools¹³.

Many of the Board's functions are currently delegated to the Director, in practice effectively increasing the scope of that role.

Some of the powers and functions assigned to these players are exclusive whereas others are shared, reflecting the fact that environmental management is a joint responsibility under EMPCA.

Certain roles are unambiguous, such as the Board assessing level 2 activities, for example. However, the joint exercise of other powers and the performance of some functions appear to have created some confusion or uncertainty in the system.

Issues of a general nature concerning administration are reviewed here; enforcement-related issues are discussed in the next section.

¹³ These include Environmental Improvement Programs, Environmental Agreements, Audits and Financial Assurances.

3.1 ADMINISTRATION OF EMPCA

The Act is administered by the EMPC Board and the Director in respect of level 2 activities (and there is the option for regulation and enforcement in respect of any environmentally relevant activity).

The Act is administered by councils and council officers in respect of level 1 activities and those which are not level 2 or level 3 activities.

Issue:

- Are councils in particular able to fulfil the functions assigned to them by EMPCA?
- Should councils have access to all of the EMPCA tools that are available to the Board.

Findings

Whilst Councils have discharged environmental functions since the Environment Protection Act commenced in 1973, some feel that EMPCA has added considerably to the environmental management tasks carried out by local government.

Administrative efforts are limited by the resources available to both levels of government to fulfil the functions assigned by EMPCA.

It is recognised that municipalities differ in terms of population, industrial or commercial activity, geographical and other environmental features. Consequently, there are differences in the nature and scale of issues which different councils must address, and also their capacity to address them.

The Review concludes that the difficulties alluded to here are not due to any significant deficiency in the legislation, but to resourcing and the resultant capacity to act.

It is therefore suggested that these issues may best be addressed through existing forums such as the Better Planning Outcomes program, and should be debated through the Local Government Association.

It is agreed that there may be circumstances in which instruments administered by the Board (audits, EIPs etc.) could be useful in the management of level 1 activities regulated by councils. Under the current provisions of the Act, there is no reason why a council cannot request the Board to exercise its powers in relation to a level 1 activity that the council regulates. The Review finds that there is merit in making this capacity explicit by amendment of the Act.

However, the Review does not find that there needs to be an explicit provision enabling direct council use of such instruments. The EMPC Board was established by Parliament to make high level decisions on the prevention, control and remediation of environmental harm, and it is argued that the use of powerful tools such as Agreements, Audits and Improvement Programs should remain the responsibility of such a high level body.

Several residents' groups used this issue to call for greater effort by both tiers of government in administering and enforcing the Act to address environmental nuisance issues, and in particular, noise offences.

The concerns of these groups are acknowledged. It is imperative that any changes to the Act regarding noise nuisance are developed in close coordination with the development of the new draft Environment Protection Policy (Noise). The Review recommends that the Department consult directly with the representative groups throughout this process.

Recommendations of the Review

Amendments to EMPCA are recommended.

7. Insert a new clause into the Act confirming the currently unstated capacity for councils to request the Board to use its powers under Part 3, Divisions 2,3,4 and 6 in respect of an activity that is not a level 2 or 3 activity.

Administrative action is also recommended

8. It is recommended that the Department should approach LGAT with a view to stimulating debate between all parties on the resourcing and administration issue.
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3.2 COST RECOVERY BY COUNCILS

Sections 103 and 44 of EMPCA provide that councils may charge fees or recover costs in respect of functions performed under the Act. For a range of reasons, these capacities have remained under-utilised.

One outcome of this has been inequity between financial impacts on activities that are subject to Departmental regulation, as compared to similar-sized activities that are regulated by councils.

Issue:

- Cost recovery demonstrates a commitment to the polluter-pays principle, and to avoid inequities, should be implemented by both the Department and councils.

Findings:

The parallel LRP review is specifically addressing the issue of fee structures, so any inequities arising from differences in fees will be largely redressed through that process. For the purposes of this Review, the important consideration is whether EMPCA properly provides for councils to recover administration costs if they so choose.

It is evident that there is concern over the cost of environmental regulation by councils, and their perceived inability to recover costs. In response to this, it is pointed out that amendments were made to EMPCA in 2000 to remove reference to by-laws in section 103, to overcome the restriction on councils to charging fees by that mechanism alone. One possible solution may be found in the development of a list of level 1 activities worthy of ongoing regulation, and using the “registration” concept outlined in the findings section under Issue 2.3 above.

There is also a strong community perception that councils’ commitment to environmental regulation, particularly in relation to nuisance enforcement, is hindered by cost considerations. Submissions from some citizens and their representative groups discussed this issue in terms of “polluter pays” for generators of nuisance noise. They also considered that noise regulation (particularly for level 1 and residential nuisance) should be the domain of a separate body, rather than councils.

The Review finds that it is not feasible or appropriate to recommend the establishment of a separate body to deal with noise nuisance. It nevertheless acknowledges the need for provisions in EMPCA that facilitate the enforcement of the nuisance offence provisions. In particular, it is essential to ensure that any such provisions are effective “on-the-spot”, leading to a cessation of the offence.

Recommendations of the Review

No specific changes to the Act are recommended at this time.

9. However, the Department should seek to address the cost recovery issue in the context of the recommended action under section 2.1 above.
10. Nuisance noise issues should continue to be discussed in close consultation with residents’ groups in the context of the development of the Noise Policy and any associated amendments to the Act.

3.3 ROLES AND RESONSIBILITIES

The Act places responsibility on councils for its administration in respect of activities that are not level 2 or 3 activities.

However, much of the expertise and information base for environmental regulation lies with the Department in support of the Board and the Director, and there remains a level of confusion among councils of exactly what their roles are, and how they should fulfil those roles.

Issue:

- Is this confusion to the detriment of environmental management, and how best can it be overcome?

Findings:

A simple option to redress any lingering confusion in this area would be for the Department to produce new explanatory materials for distribution to stakeholders generally, or designed specifically for local government. If new instruments, such as registrations (adapted from the new Queensland model) and noise suppression notices are introduced, there will clearly be a need for the Department to produce new guidance and explanatory material.

The Review also examined a number of other possible changes, such as the development of a common level 1 fee structure, lists of level 1 activities, standard operating conditions for level 1 activities etc. There will need to be a concerted and integrated effort to develop and effectively communicate final changes to all stakeholders and the wider community.

Under this heading of "Roles and Responsibilities", 9 submissions from citizens and their representative groups repeatedly raised the issue of the perceived failure of local government and the police to effectively exercise their role as enforcers of EMPCA with respect to nuisance noise complaints. A number considered that the Department should assume a much greater role in the management of level 1 nuisances and level 1 pollution.

This Review finds that it is not feasible or appropriate for the Department to take on the principal responsibility for local environmental nuisance issues, or level 1 activities. As previously stated however, it is considered it appropriate that the Department should work closely with the relevant groups to ensure that any amendments to the Act are effective, and that they are coordinated with, and complimentary to, the new draft Noise Environment Protection Policy currently under development.

Recommendations of the Review

No changes to the Act are recommended.

Administrative action is recommended

11. The Department should factor in the development of effective guidance notes and explanatory materials in all stages of the finalisation of any changes decided upon as a result of this review.

3.4 THE EMPC BOARD

The Board comprises three non-government members, the Departmental Secretary and the Director of Environmental Management.

While its functions are listed in broad terms in section 14, its principal role is to assess level 2 activities, and impose operating conditions that are subsequently enforced by the Director.

Issue:

- Is the composition of the Board appropriate, and is its operation sufficiently transparent?

Findings:

There appears to be some support for the inclusion of an independent Chair. Although many submissions did not address this issue, those that did expressed strong views.

In addition, some citizens and their representative groups asked for the Board to include

- a qualified medical practitioner (experienced in noise-related health issues); &/or
- the Director of Public Health; &/or
- a community representative (experienced in noise-related nuisance issues).

However, the reasons for the composition of the Board in the current Act should be examined. The non-government members are to provide expertise on environmental management issues from an industry, local government, and conservation (&/or environmental health) perspective. The role of the Director on the Board is to support the objectives of pollution control and environmental regulation under the Act.

This composition is clearly designed to give a balanced perspective to Board decisions, with no one group, including the government, holding sway. Further, its size was seen as being conducive to an efficient and effective operation. The issue is whether the current Chair should be replaced by an independent person – ie. the Departmental Secretary would no longer be a Board member - or whether the Secretary remains on the Board, and a new member, appointed as the Chair, is added. The latter option would see the expansion of the Board, and perhaps open the way for additional membership representing other relevant interests. However, the question of unwieldiness then arises.

With respect to “openness”, the Review finds that administrative measures could be considered by the Board to make its decisions more transparent, such as using the Internet to publicise its decisions.

The Chairperson of the RPDC put the view that there should be a separation of policy formulation and process from the statutory regulatory and enforcement roles of the Act. [see also s.5.4].

The functions and powers of the Board, as set out in section 14 of the Act are very broad, and while they do not specifically define a policy role for the Board, it could be argued that they do include “functions” that might properly be considered as the role of government.

In practice, the Board has functioned as a high level decision-maker for key elements of the Act, and has provided policy advice to the Government associated with carrying out its functions.

Recommendations of the Review

The Review makes no recommendation on this issue.

12. The Review finds that there is general support for the Board to have an independent chair. The Review also concludes that there would be merit in re-defining the Board’s functions to more clearly align them with the current roles of high level decision-maker and provider of policy advice to government.

4. ENFORCEMENT

In broad terms, there are three methods of enforcement under EMPCA. The first is a directive to responsible environmental performance, which aims to secure compliance with the environmental conditions attached to permits and other approvals, and to avoid or mitigate environmental harm.

The second purpose of enforcement relates to punitive justice and deterrence. Gross or wilful environmental harm is unacceptable to the community, as is repeated non-compliance. Recourse to prosecution is necessary in these circumstances.

A third aspect to enforcement is the use of civil remedies. An attraction with avoiding recourse to the courts is that enforcement burdens are relaxed, and the wider stakeholder community is more able to become involved.

Several other instruments and approaches are available to enforce compliance, the most important being the environment protection notice system and the service of environmental infringement notices.

4.1 THE USE OF EPNS TO VARY PERMIT CONDITIONS

Environment protection notices (EPNs) are one of the most important tools available under EMPCA. EPNs are issued -

- to prevent or remediate environmental harm;
- to give effect to a State Policy or an environmental protection policy;
- to vary the conditions of a LUPAA permit; or
- to require compliance with the general environmental duty.

The Director is broadly empowered to issue EPNs while council officers can do so in respect of activities that are not level 2 or 3 activities (s44[2]).

Issues:

- LUPAA permits apply to a unit of land whereas EPNs are issued and apply to a particular person in respect of an activity;
 - since it may only impose requirements on a person who is or was responsible for an activity, an EPN can only be used to vary permit conditions to the extent that the incumbent is responsible for activities on the land to which the permit relates;
 - to the extent that original permit conditions are inconsistent with an EPN, the former have no effect ;
 - sequential EPNs may be issued to the same person to further vary environmental conditions, potentially creating administrative confusion;
 - since an EPN applies to a person, and does not run with the land other than following registration under s46, it is necessary to reissue an EPN when the land changes hands; or when a new person becomes responsible for the activity; and
 - third parties are not able to comment on variations to EPNs.
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Findings:

The simplest approach to all of these difficulties will be to find a solution that avoids using EPNs to vary permit conditions. EPNs are widely recognised as a valuable and integral mechanism in the range of enforcement tools provided by the Act. They are used regularly by both the Department and councils for the purposes of prevention and remediation of environmental harm. They are also used to vary permit conditions.

While many councils did not directly address the issue in submissions, those that did – including those in support of proposed options for change – expressed the insistence that changes should not impact on councils' ability to use EPNs, including for the purposes of varying permit conditions, although very few have ever done so.

The key to resolving this issue is in finding a more appropriate mechanism to vary permit conditions, as outlined previously in section 2.3 of this Review Report.

If this can be done in a way that preserves the capacity of both councils and the Department to effectively regulate the activities for which they are responsible, then there will be no need to use EPNs for permit condition variation.

The Review finds that adaptation of the Queensland model described in section 2.3 of this Review Report is most likely to address the concerns of both the Department and councils.

Only 7 submissions specifically addressed the third party appeal rights issue, with the majority supporting provision for limited appeals. Only one submission supported appeal rights for all third parties. Even those who opposed the granting of third-party appeals considered that it may be acceptable if those rights were restricted to parties who made submissions to the original permit.

The Review finds that, if the current capacity to use EPNs to vary permit conditions is retained, amendments should be made to section 44 to allow for limited third party appeals against such variation.

This will of course depend on whether the amendments recommended under section 2.3 of this Review Report are effective enough to render the current provisions of s.44(1)(d) and (2)(d) unnecessary.

Recommendations of the Review

Amendments to the Act are recommended

13. Progress options for adapting the Queensland model to rectify identified problems with EPNs as they relate to permits, while ensuring that the use and effectiveness of EPNs is not diminished.
 14. Provide for limited third party appeal rights for EPNs issued under s.44(1)(d) and(2)(d), if this capacity is retained in the Act.
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4.2 ISSUANCE OF EPNS

The Director may issue EPNs to any environmentally relevant activity, including level 1's, and activities that are not level 2 or 3's. Councils cannot issue EPNs in relation to level 2 or level 3 activities.

While councils must notify the Director of the issuance of an EPN after the event, there is no reciprocal requirement, and no formal requirement for consultation between the issuing authorities prior to the issuance by the Director of an EPN to a person responsible for an activity that is the regulatory responsibility of a council.

Issue:

- Potential exists for inconsistencies and conflict between EPNs issued by the two authorities.

Findings:

The integrity of the EPN system relies upon effective and efficient communication between the Director and councils; the timely notification of notices is central to this communication. The requirement for councils to notify the Director when they issue EPNs allows a complete record of EPNs to be maintained by the Department.

There was not a significant response to this issue from councils or the public. Provided the Director is also subject to time limits on notification, those that did respond would support such time limits also applying to councils.

While suggestions for a web-based register are worthwhile, this is not considered sufficient to overcome the potential problem of clashes in content between notices issued by councils and the Department in respect of activities that are not level 2 or 3.

In addition, a requirement for the Director to advise council of the issuance of an EPN on a level 2 activity is not only an appropriate courtesy, it will allow the council to be aware for the purposes of answering any public queries that may be directed to it.

Recommendations of the Review

Amendments to the Act are recommended.

15. Progress options for the improvement of the issuance and notification of EPNs – amendments are likely to s.44(4); with new subsections inserted to -
 - require that councils shall notify the Director of the issuance of an EPN on an activity that is not a level 2 or level 3 activity -
 - as soon as practicable, and in any event,
 - within a specified time; and to
 - require that the Director shall advise councils of the issuance of an EPN on an activity that is not a level 2 or level 3 activity
 - in advance where practicable; or
 - as soon as practicable, and in any event,
 - within a specified time.

4.3 ENFORCING ENVIRONMENTAL INFRINGEMENT NOTICES

EINS are “on the spot” enforcement tools that are used in cases where recourse to the courts is not considered necessary.

They are deemed to have been accepted by the person on whom they are served by the payment of the fine. If it is not “accepted”, the person may be prosecuted, but for various reasons, there have been few occasions where prosecution has ensued.

Issue:

- Should the Act be amended to make the acceptance of an EIN more effective, and so that fines are actually paid?

Findings:

Notwithstanding that, to date, EINs may have been under utilised as enforcement tools, these remain a very useful for both councils and the Department. Two considerations for addressing the issue were presented in the IOP.

- reverse the current administrative presumption that a person issued with an EIN may be prosecuted if the fine is not paid. This would require that the infringement notice is either accepted (by payment), or challenged in court by the recipient. and
- use the *Justices Act 1959 and the Justices Rules 2003*. This approach would allow a defendant who has not accepted the infringement notice to enter a plea in writing, and would allow the court to make a finding in the absence of a defendant who has been served a notice to attend that court.

There was limited comment on this issue, but views were expressed on both sides of the argument. Some submissions saw merit in both options.

It is pointed out that option 1 is not a change in a “presumption of innocence”. It is a change in the ‘deeming provisions’ of an administrative process. Further, the Review concludes that it is important to streamline administrative systems in relation to law enforcement, and it recognises that in doing so, it is important to seek complimentary amendments in other legislation, such as the schedules contained in the *Justices Rules 2003*.

Many other forms of infringement notice use this approach, such as parking fines and speeding tickets.

The Review concludes that both options can and should be utilised.

A residents group supported option 1, and saw merit in option 2, and also considered that noise nuisances should be listed in Schedule 2 of the Rules.

This Review considers that issue of noise nuisance offences will best be addressed through the development of the Noise EPP and/or nuisance suppression notices, and the continuation of close consultation with appropriate residents’ groups in this regard is recommended.

Recommendations of the Review

Amendments to the Act and to the Justice Rules 2003 are recommended.

16. Pursue the above options.

- Option one will result in a change to the “acceptance” regime. It will put the onus on the person to challenge the EIN if they choose not to accept it.
 - Option 2 will result in a range of simple EIN offences inserted into Schedule 2 of the Rules.
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4.4 SERVICE OF EINS

Section 70 provides that EINS must be served on a person by delivery directly to them in person.

This has led to problems where EINS are to be served on councils, or on company personnel in the field. Further, they cannot be served by mail under the current constraints.

Issue:

- Should the Act be amended to make the service of EINS less constrained ?

Findings:

To improve the potential value of EINS as an enforcement tool, it is desirable to correct the constraints relating to the mode of service delivery. The corrections could take the form of changes to both the means of delivery and recipients

This issue has not generated significant discussion, and little opposition.

The Review concludes that it is appropriate that the EMPCA provisions be brought into line with the *Acts Interpretation Act 1931* and Commonwealth legislation, to allow for the service of EINS by mail. It should also be made clear that EINS may be served on company personnel in the field (not only on company executives), and also on councils and other agencies.

Recommendations of the Review

Amendments to the Act are recommended.

17. Pursue amendments to section 67 to allow for service of notices by mail (including by courier) to company, council business and government agency addresses.
 18. The definition of “persons” can be broadened to include both natural persons in its ordinary sense as well as individuals in their capacity as executives of bodies in/corporate.
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4.5 PROSECUTIONS

EMPCA provides for prosecution for offences against the Act, and for civil action.

However for a variety of reasons, there have been relatively few prosecutions undertaken by either the Department or councils, particularly under the civil action provisions.

Access to the Appeal Tribunal may also be seen as restrictive.

Issues:

- Should the Act include explicit provision for cost recovery ?
- Should access to the Appeal Tribunal be broadened?

Findings:

In addition to comments on this issue, many submissions commended the Department's recent release of an Enforcement Policy, and the establishment of a Compliance Unit.

The Review finds that there is considerable support for moves to provide for the payment of costs under section 48 (civil action enforcement). This could be expanded to include recovery of the cost of remediation incurred by the government or council. (Under the current provisions of s.47, costs for remediation can be recovered from a person who fails to take action specified in an EPN).

Further, some submissions considered that where the Tribunal finds for the plaintiff in the case of third party action, costs could be awarded. However, it is likely that the current RMPAT Act¹⁴ provisions already allow the Tribunal to do so. Section.28 [1] provides that "each party to an appeal is to pay its own costs". However subsection [2] provides that "the Tribunal may require payment by one party of the costs of another"

However, the Review finds that the issue of expanding the role of, and access to, the Tribunal, and the associated issue of broadening the definition of "proper interest", to be more difficult to resolve. Submissions addressing this issue were either strongly supportive, or strongly opposed.

The Tribunal already has an express power to dismiss frivolous actions (s.22A, RMPAT Act 1993), and a case can be made that the costs and complexities of mounting a civil action are likely to deter frivolous action. However, this may not be sufficient reason to justify opening the provisions of s.48 to any person.

Some other States do allow any person to make application. However, there is inevitably a comprehensive set of criteria that must be met in order to ensure that the application is appropriate. In addition, applicants who lose their action may be required to pay the costs of the respondent. While no comparable State legislation appears to include a definition of "proper interest" the way that some legislation is structured could be read as having a similar intent.

¹⁴ *Resource Management and Planning Appeal Tribunal Act 1993*

The current provisions of LUPAA (s.64 “Civil enforcement proceedings”) also use a proper interest test in relation to appeals to the Tribunal.

Records of Tribunal decisions show that, since 1994, the “proper interest” test has not been invoked to successfully exclude any action under s.48 of EMPCA. The only time the proper interest issue has had an implication in a Tribunal decision was in a finding that a council was not a proper respondent to an application for an order.

There is a considerable body of case law that examines the use of the proper interest test in relation to civil action, and it is clear that Australian courts, including the High Court, have implied that it is not an improper provision.

The Review finds that there is no evidence that the current provisions of the legislation have prevented civil action being taken in respect of any environmental management matters that might be argued as in the public interest, and that there is therefore no imperative to change it at this time. Further, the issue is not limited to environmental matters, and any deliberation should involve a “whole of government” approach.

Recommendations of the Review

Amendments to the Act are recommended.

19. Pursue amendments to achieve the goal of cost recovery in relation to prosecutions; but
 20. do not amend the Act to remove the “proper interest” test from s.48.
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4.6 ENVIRONMENTAL NUISANCE OFFENCES

EMPCA provides that unlawful environmental nuisance is an offence (s.53). As demonstration of environmental harm is not necessary, prosecution should be relatively easy.

However, action to deal with nuisance “on the spot” is limited in the Act, and this makes the offence provisions more difficult to use, and also emphasises litigious nature of the provisions, rather than encouraging management action.

Issue:

- Should the Act include more explicit provision than currently, directly targeting nuisance abatement?

Findings:

Nuisance is best treated through management intervention rather than emphasising its offence characteristics. That is, because of the character, duration and severity of nuisance events, the practical option is to intervene at the time and take corrective action to manage these events when they occur.

The options canvassed here are directed to this end. This approach towards nuisance is already favoured by many councils.

One option is to expand the basis of EPNs so as to be more amenable to nuisance events, such as making them more applicable to immediate effect, removing appeal rights in nuisance cases, and making EPNs available for use by authorised officers (not just the Director) and police officers. However, these options have significant consequences for the overall EPN system in the Act.

An alternative option canvassed by the Review involves the creation of a new instrument to be used in nuisance events by authorised officers. An instrument—a nuisance suppression notice—might be designed specifically to redress the immediate public inconvenience caused by nuisances, such as noise or air pollution, without invoking offence provisions.

Resort to the courts would of course remain an option for persistent or deliberate breaches of nuisance provisions.

This issue is clearly one that generates concern across a broad spectrum of the community, including both regulators and the public. There was general support for the introduction of a new enforcement instrument – the “nuisance suppression notice”, and recognition that it should apply to more than just noise.

The view that nuisance noise should be treated as a public order matter, rather than as an environmental nuisance issue, is not supported. Noise impacts from level 1 & 2 activities, sport, concerts and infrastructure can be very similar to those from domestic sources - annoyance, sleep disturbance, etc. There are no scientific grounds for making a distinction between domestic noise and other noise nuisances. It is also noted that neighbourhood noise issues are dealt with under environmental legislation in other States and Territories.

The response to this issue of nuisance offences also highlighted perceived problems with the current offence provision of s.53. Clearly, there is a range of issues here. Feedback from the Issues and Options Paper has provided the Department with a wealth of information that can be used in the development of any new instrument, and also in the refining of the existing nuisance provisions.

One residents' group submission detailed proposals for a three-pronged approach comprising comprehensive amendment of EMPCA, new provisions for environmental infringement notices, and new regulations. It gave comprehensive details of a range of amendments including –

- Special provisions dealing with noise;
- Provision of a number of mechanisms appropriate for a range of noise issues;
- Facilitation of civil action and also mediation;
- Provision of a hierarchy of penalties;
- Providing for issuance of “warnings” prior to formal enforcement action; and
- Greater commitment to enforcement.

While the Review does not recommend that an entirely new section should be developed dealing exclusively with neighbourhood noise nuisance, the suggestions made by this group were comprehensive, and included useful suggestions.

The Review recommends that the Department should continue to work closely with the group and other relevant stakeholders in the context of the development of any new nuisance instrument. The suggestions will also be useful in the development of the new draft Noise Environment Protection Policy.

It is acknowledged that the new instrument will need to be compatible with, and complimentary to, existing enforcement provisions. In particular, it is likely that changes will be needed to the current section (53)(3) to ensure compatibility, appropriate integration and to avoid unnecessary duplication.

Whatever course is taken, the Review recommends strongly that it should be aimed at clearly empowering attending officers to adequately address the problem of nuisance on the spot.

Recommendations of the Review

Amendments to the Act are recommended.

21. In close consultation with all relevant stakeholders, progress the development of a new enforcement instrument dealing specifically with nuisance.

The new instrument should deal with all nuisance emissions, including noise, and it should ensure that action taken under the provision results in cessation of the nuisance.

22. Amendments are also recommended as necessary to section 53 to clarify "unlawful", to re-define "residential premises" and "habitable room", and to clarify that proof of nuisance is not solely dependent on technical measurements.

23. As already recommended in this Review Report, it is recommended that the Department should continue to work closely with Noise Tas Inc, and other relevant stakeholders in the development of any EMPCA amendments dealing with nuisance noise issues, and should closely coordinate this process with the development of the new draft Noise Environment Protection Policy.
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4.7 NOTIFICATION

EMPCA provides (s.32) that the person responsible for an activity must notify the relevant authority in the event of incidents that cause or may cause environmental harm.

Issue:

- Should the Act include explicit provision to extend the notification obligation to employees or contractors?

Findings:

In answer to questions raised in one submission, it has been confirmed that there is no relationship between the provisions of s.58, (Imputation in proceedings of conduct etc. of employees/agents), s.60 (Liability of officers of body corp.) and s.32. There is no implied responsibility on employees in these sections to report incidents to an officer or the "person responsible". However, in this context, the General Criminal Defence [s.55(3)] clearly implies that company management should have in place procedures whereby employees are required to report to management in the event of a likely breach of the Act.

The point is that the person responsible for the activity is the employer, and the employer should sensibly have proper reporting procedures in place to avail itself of the s 55(1)(c) defence, having regard to s 55(3), if it is charged with an offence under s 32(5).

The policy question is whether it is right to go further, and make the employee directly responsible for reporting. The Review concludes that it would be inappropriate to do so. The employee shouldn't be legally bound to report to the Director, as it places him/her in a quite invidious position - the company would (justifiably) expect an employee to report to their immediate supervisor in the first instance, not to the environmental regulator.

Recommendations of the Review

No amendments to the Act are recommended.

5. MISCELLANEOUS ISSUES

5.1 PUBLIC PARTICIPATION

Impact assessment processes in EMPCA (ss.25,27) provide for public participation in accordance with the s.74 principles of environmental impact assessment.

Level 2 assessments under s.25 are clearly linked to the LUPAA process, including notification and submission periods, whereas s.27 processes are only linked to the s.74 principles.

Further, unlike LUPAA processes, the Board is not specifically required to take account of public comment.

Issue:

- Should the assessment provisions of the Act be more explicitly reflective of the standard RMPS provisions, as contained in LUPAA?

Findings:

Section 27 applications – for proposed activities not requiring a permit under LUPAA – are subject to assessment in accordance with the s.74 Principles of Environmental Impact Assessment, which require provision of an opportunity for public consultation. However, there is no stipulation of any time requirement for public comment in s.74.

Traditionally, the Department has followed the requirements of the LUPAA notification period (up to 28 days), and formalising it will simply clarify it, and show that it mirrors the standard RMPS procedures. The Review finds that there is justification for the inclusion of such a timeframe in s.27.

Similarly, the Review finds that s.27 assessments should require accountability in terms of the consideration of public submissions. The Review finds that s.27 should be amended to include the current requirement of s.25 (level 2 assessment). s.25(5)&(8) require that, in formally notifying (via the planning authority) persons who made representations, the Board must provide reasons for its decision, and for any conditions it has required to be imposed on the permit.

With respect to amending s.25 (and s.27) to explicitly require the Board to “take account” of submissions, this is considered unnecessary, given the transparency of the s.25 formal assessment process and notification requirements. Given that the Board’s decisions are appealable, it would be foolish for its notification to give the impression that submissions were treated with anything less than diligent respect. Hence, amendments to section 25 of the Act are not recommended.

Recommendations of the Review

Amendments to section 27 of the Act are recommended for -.

24. the placing of public notification of s.27 applications, calling for submissions within a period of 28 days; and
 25. subsection (6) to require that the Board’s notification of both the applicant and persons who made representations, should include reasons for the decision and for any conditions imposed by it.
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5.2 DIFFUSE LAND USES

EMPCA is aimed at the assessment and regulation of polluting activities on discrete sites (industrial, mining etc.). There is an increasing awareness of the impact of diffuse land uses, such as farming and forestry.

Issue:

- Should the Act include explicit provision to take account of the environmental impact of diffuse land uses?

Findings:

While there was limited comment on this issue, some submissions repeated earlier council calls for EMPCA instruments such as Improvement Programs, Audits and Agreements to be made available for use by councils in respect of diffuse source activities. The use of the objectives-based instruments has been reviewed in light of this issue, investigating the benefits and implications of making them available through the Act to councils.

While the incentive-based provisions of the Act (audits, improvement programs, agreements) may have some application in the context of this issue, the Review concludes that their use may better be left to the high-level body established by government for that purpose – ie. the EMPCA Board.

It is pointed out again however, that there is no impediment to a council approaching the Board with a request for it to exercise these powers in respect of any activity.

One submission considered the aligning of serious and material environmental harm offences with acts of pollution to be a major impediment to combating diffuse source pollution.

It is acknowledged that the offence provisions of the Act (ss.50,51) directly align environmental harm with acts of pollution. These provisions reflect the policy of the government at the time the Act was made, and they are closely comparable with the offence provisions of other contemporary Australian legislation. In particular, EMPCA closely mirrors the SA legislation, in which the offence provisions specifically tie serious and material environmental harm, and also nuisance, to acts of pollution.

With respect to submissions questioning the environmental management of forestry activities, the Review finds that such activities are not generally exempt from the provisions of EMPCA. However, Tasmania has established a body – the Forest Practices Board – under the *Forest Practices Act 1985*, tasked with the environmental management of forestry activities in the State. The Chief Forest Practices Officer is an authorised officer under EMPCA.

Recommendations of the Review

An amendment was recommended under 3.1 of this Review Report

“ 7. Insert a new clause into the Act confirming the currently unstated capacity for councils to request the Board to use its powers under Part 3, Divisions 2,3,4 and 6 in respect of an activity that is not a level 2 or 3 activity.”

5.3 WASTE MANAGEMENT

While EMPCA is aimed at pollution control policy and the management/regulation of waste streams, there have been significant advances in waste management policy and practice over the past decade.

Issue:

- Should the Act be amended to reflect new approaches to waste management?

Findings:

Waste minimisation concepts such as Extended Producer Responsibility and Container Deposit Legislation are being discussed increasingly at both State level (Parliamentary inquiry into waste) and national level (National Packaging Covenant) and other proposed national product steward-ship schemes. Tasmania needs to be aware of, and prepared to contribute to, any moves on the national stage.

It is acknowledged that this issue should be coordinated with the current *Litter Act 1973* review.

It is also acknowledged that EMPCA is fundamentally based on the prevention of environmental harm, and this makes it difficult to gain support for many forms of waste minimisation. For example it is difficult to demonstrate that failing to recycle plastic bottles constitutes actual environmental harm.

However, the Act already clearly places a duty of care on all Tasmanians to exercise environmental responsibility (s.23A - General Environmental Duty), and clearly makes all Tasmanians responsible for any pollution that their activities cause (s.6).

Recommendations of the Review

No amendments to the Act are recommended at this time.

However, the Review does recommend that -

26. The Department should continue to monitor developments in waste minimisation concepts and legislation nationally and in other States, with a view to determining applicability to Tasmanian conditions.

5.4 ENVIRONMENT PROTECTION POLICIES

EMPCA provides for the development and making of Environment Protection Policies. These potentially powerful tools are subject to a transparent and consultative development and approval process.

In the case of the draft policies currently under development, the process has met with some criticism for being too lengthy.

Issue:

- Should the Act be amended to limit the period within which an EPP must be finalised?

Findings:

While fewer than one third of the submissions addressed this issue, those that did made strong comment. In general, submissions expressed concern over the delay in finalising the Air and Noise EPPs, and the perceived complexity of the process.

As stated in the Issues and Options Paper, it is not intended to make major changes to the EPP provisions at this time. The Review confirms that it would be counterproductive to tamper with the overall system while Policies are still in the course of development.

Nevertheless, the problems faced by all parties during the development of these Policies are acknowledged.

Public submissions particularly lamented the eventual withdrawal of the draft noise EPP. They recommended that, in the development and approval of any new Noise EPP-

- the Review Panel should include a suitably qualified medical practitioner and public representation; and
- public representation should be included on stakeholder committees; and that
- nuisance noise should be included in the Act itself, rather than in an EPP

The Review recommends that the Department should continue to work closely with Noise Tas Inc, and other relevant stakeholders in the development of any EMPCA amendments dealing with nuisance noise issues, and will closely coordinate this process with the development of the new draft Noise EPP.

The Executive Commissioner of the RPDC made a detailed submission in respect of EPPs and the Review Panel. Significant concerns expressed by the Commissioner included –

- that EPPS can contain a mix of policy and regulatory initiatives;
- the membership of the EPP Review Panel (which includes the non-Government members of the EMPCA Board);
- the lack of flexibility to appoint specialists to the Panel for the purpose of assisting in the assessment of draft EPPs; and
- the busy role of the Executive Commissioner clashes with his role as Chair of the EPP Review Panel.

With respect to the concerns regarding the Panel, the Review concludes that changes are appropriate at this time. Experience has confirmed that there may be circumstances in the development and subsequent assessment of a draft EPP, where a conflict of interest could be construed between the role of Board member and Panel member. One solution would be for the Panel to comprise the Commissioner of RPDC, and other members with skills, qualifications and experience appropriate to the issue being considered. This would neither exclude nor mandate Board members from participation.

The Review also finds that there are possible benefits in providing that the Panel may appoint experts to provide technical or other specialist assistance with draft policy assessment.

The Department has advised that it has also encountered significant problems regarding the drafting of regulatory tools within the EPP framework and agrees that the potential scope of EPPs should be amended to exclude such provisions.

Recommendations of the Review

While no amendments are recommended to impose a time limit on the process - Amendments to the Act are recommended with respect to the Panel.

27. the EPP Review Panel should comprise the RPDC Chairperson and two other members with appropriate skills, qualifications and experience, chosen by the Chairperson as required for the assessment of each draft EPP.
28. the Panel Chair may delegate his responsibilities to another member, or to another suitably qualified person;
29. the Panel may appoint specialists to assist it in the assessment of draft policies; and to provide that
30. the current provisions EMPCA regarding the inclusion of regulatory tools within EPPs are removed.

5.5 STRATEGIC ENVIRONMENTAL ASSESSMENT

EMPCA provides for formal environmental impact assessment of discrete developments.

New concepts have now emerged that assess a program of developments, and can be used where traditional EIA processes are inadequate.

Issue:

- Should the Act be amended to introduce such concepts as Strategic Environmental Assessment?

Findings:

Although only limited comment was received on this issue, all were supportive of the concept.

The Act could be amended to provide for SEA in specific circumstances, (eg. projects and infrastructure programs that may have state-wide significance).

However, there is no current impediment in the Act to administratively requiring SEA in a given situation.

With respect to the existing EIA process under EMPCA, the current review being conducted under the Legislation Review Program is investigating a range of changes and improvements.

The Review finds that it is not necessary to amend the Act at this time.

Recommendations of the Review

No amendments to the Act are recommended at this time.

5.6 ENVIRONMENTAL BONDS

EMPCA provides for the Board to require the lodgement of financial bonds, but only in limited circumstances relating to high environmental risk or to contraventions of the Act.

Issue:

- Should the Act be amended to broaden the application of bonds?

Findings:

Comment was limited on this issue, with opinion divided on any broadening of the provisions.

While some submissions considered there could be advantages in enabling councils to require bonds, another argued that the capacity already exists in the planning legislation to do so. One submission suggested the provisions be broadened to empower the Board to require an operator of a level 2 or 3 activity to maintain an insurance policy to cover remediation costs or damages claims.

Those opposed were very concerned about any extra impost on business.

The provisions of section 35 have seldom been used by the Board to date.

The current wording is quite specific, however. The Board cannot require an assurance in respect of any activity without good reason.

The Review finds that the clear purpose of this provision is to ensure that a person brings an activity into compliance with the Act.

The implication is that the Act intends that a Financial Assurance may only be required under section 35 if the activity is clearly out of compliance or if there is good reason to believe that it is likely to move into a state of non-compliance.

However, this intent can include requiring an assurance in view of the degree of risk of environmental harm associated with an activity.

While there may be reason to keep a watching brief on the evolution of the use and intent of such provisions in other jurisdictions, the Review finds that there is no immediate imperative to make substantial changes, given this very clear intent of the original Act.

Nevertheless, the intent of the provision has in the past been successfully used by the Board to require lodgement of a bond to cover future remediation costs. This has however, been done by imposing appropriate conditions on the permit rather than utilising the s.35 provision. This is currently not possible, because of the wording of subsections 35(1)(a) and (1)(b), which refer to compliance with "this Act", and "permits" are issued under LUPAA, not EMPCA.

The Review concludes that clarification of the currently accepted practice of imposing permit conditions that require the lodgement of assurances for future remediation, site-clean-up, site and infrastructure decommissioning etc. will not alter the intent of the current provisions.

Recommendations of the Review

An amendment to the Act is recommended.

31. Section 35(1) should be amended to clarify that financial assurances may be sought to ensure compliance with permit conditions imposed by the Board following environmental impact assessment under section 25.

CHAPTER 6. GENERAL AMENDMENTS

During the course of this Statutory Review, and also of the Review under the LRP, a number of other provisions were found to require minor amendment.

The Reviews do not consider these issues to be of a significant policy nature.

In general, they involve correction of errors, inconsistencies and anomalies.

Some of these issues involve re-wording of existing provisions to clarify and/or facilitate the enforcement of the intent of those provisions.

It is expected that an Amendment Bill will be developed as a result of the Reviews, and the opportunity should be taken to correct provisions where minor errors, anomalies, inconsistencies or uncertainty regarding intent exist.

Provisions identified for such amendment include –

Part 1 - PRELIMINARY

- S.3 – Interpretation:
 - Re-definition of “Internal Marine Waters” to clarify jurisdiction between the State and Commonwealth with respect to the dumping of wastes. [This amendment was identified in the LRP examination of Schedule 2 (Clause 7[e])].
 - Redefinition of “environmentally relevant activity” to clarify that it applies to existing and proposed activities – unless otherwise stated. [This will allow fulfilment of the intent of sections 35 and 44, but will not increase the effect of other provisions, such as the Board’s assessment powers under s.27(2)].
- S.9 – Interaction with other Acts Delete reference to *Environment Protection (Sea Dumping) Act 1987* which has now been repealed [the Commonwealth *Environment Protection (Sea Dumping) Act 1981* made the State legislation redundant].

PART 2A – ENVIRONMENTAL DUTIES

- S.23A – The General Environmental duty
 - Delete reference to “potential harm” in subsection(2)(a) and replace with “likely harm” to better reflect the wording and intent of subsection (1).
 - Subsection (4) – clarify that the provision only relates to meeting the GED in respect of the specific act or omission that is the subject of the proceedings, not for the whole “activity”.

PART 3 – ENVIRONMENTAL MANAGEMENT

- S.25 Assessment of permissible level 2 activities -
 - Reword subsection (1),(1A) and (1B) to clarify what councils must refer to the Board, and to clarify the “ancillary use” criteria.
- S.27 – Assessment of activities that do not require a permit
 - insert “serious or material” before “environmental harm” in subsection (4). Legal advice confirms that the current wording is too broad. It effectively makes the provision unworkable.
 - Provide for a penalty to enforce the intent of subsection (5) [a person must not commence an activity to which the section applies until the Board’s assessment is complete].

PART 4 – ENFORCEMENT PROVISIONS

- S.44 – Environment Protection Notices –
 - Clarify that council officers can issue EPNs to “an environmentally relevant activity other than a level 2 or 3 activity”, not to “an activity other than ...”.
 - Clarify that “environmental harm” in subsections (1)(a),(b) and 2(a)(b) mean “serious or material environmental harm and environmental nuisance”.
- S.46 – Registration of EPNs - Subsection 6 needs substantial rewording to deliver the original intent. The problem is one of punctuation and grammar, not content.
- S.51A – Offence to deposit pollutant ... - Clarify the meaning of “could reasonably be expected”.
- S.53 – Environmental nuisance offence – Clarify what constitutes “unlawful”.
- S.55A – The General Environmental Duty Defence
 - Subsection (1)(a) – clarify the meaning of “maximum levels”
 - Subsection (1)(b)&(c) – clarify that the provisions only relate to meeting the GED in respect of the specific act or omission that is the subject of the proceedings.
- S.63 – Orders by court against offenders – Clarify that costs may be awarded to the Director as well as to “any public authority”.
- S.64 – Recovery of technical costs – reword heading and clause to clarify that costs may be awarded for the investigation itself, as well as for technical examinations or analyses.

PART 7 – MISCELLANEOUS (Division 1A – Environment Protection Policies)

- S.96D – Subsection (4) refers to the “Panel”. It should refer to the “Board”.
- S.96(G)(H)(I) – provide for extension of public comment period.
- S.96O – clarify the implementation provision

SCHEDULE 2 – LEVEL 2 ACTIVITIES

- Clause 2[g] – wood processing works – clarify that it includes “kiln drying”.
- Clause 2[l] – woodchip mills – clarify that the existing exclusion applies only to chippers of less than 1000tonnes per annum capability.
- Clause 7[e] – Disposing of wastes in internal marine waters – clarify what “wastes” this applies to.

SCHEDULE 6 – TRANSITIONAL PROVISIONS

- Transfer cl. 4-6 of the Transitional Regulations to Schedule 6.

Recommendations of the Review

32. The Review recommends that amendments, to address minor errors and to provide clarification, are included in the development of the draft Amendment Bill.

7. OTHER ISSUES RAISED IN SUBMISSIONS

(The Review response to these issues follows each point)

Other issues raised in a number of **council submissions** included:

- Confusion between “environmental harm” and “environmental nuisance”
The s.3 definition of “environmental nuisance” is fairly specific. However, the definitions of “environmental harm” and “material environmental harm” in s.5(1) and 5(2)(b) refer to environmental nuisance. It was claimed that the definitions seem to conflict, this has led to confusion.
Response: *This issue can be examined in the context of section 4.6 “Environmental Nuisance Offences”. Further consultation will aim at determining whether clarification is necessary.*
- A council should be able to issue an EPN – not just an officer;
Response: *Noted – this issue can be taken up with local government as part of ongoing consultations recommended as a result of other issues in this Review. Clarification is also needed regarding whether any such power should be vested in the elected body, or in the council’s General Manager.*
- Contaminated site provisions should be included in EMPCA; and
- the communication of information between the Department and councils relating to contaminated sites needs improvement;
Response: *A range of amendments to EMPCA concerning contaminated sites is currently being formulated.*
- The Environmental Assessment Manual should be updated; and
- There should be no changes to Schedule 2 that will increase the level 1 regulatory burden on councils.
Response: *Possible options for amendment of EMPCA concerning the environmental impact assessment process and schedule 2 are currently being formulated under the Legislation Review Program.
The issues raised in these submissions can be examined in this context.*

The **Department of Economic Development** considered that there were some issues relating to the assessment of level 2 activities that were not addressed in the review. They do not require legislative change, but can be dealt with through revised administrative procedures. The issues include:

- The scale & nature of information required to support level 2 permit applications;
- The need for better scoping of issues to be addressed as part of the assessment documentation;
- The quality of DPEMP documentation prepared by consultants, and the resulting impact on approval outcomes and timeframes, and the need for a mechanism to allow rejection of sub-standard documentation;

- The need to use more up-to-date tools, such as Construction Environmental Management Plans, Standard Operating Procedures and Auditing processes.

Response: *Possible options for amendment of EMPCA concerning the environmental impact assessment process and schedule 2 are currently being formulated under the Legislation Review Program.*

The issues raised in these submissions can be examined in this context.

The **Environmental Defenders Office** raised two other issues:-

- Access to information appears to be inconsistent between agencies and councils, often necessitating recourse to expensive and time-consuming Freedom of Information procedures. The EDO recommended that Registers be kept by the Department (level 2's) and councils (level 1's) for development permits, including conditions.

Response: *Section 22 currently sets out what the Board must keep on the register.*

One requirement is to register all EPNs. The number of notices issued under s.44(1)(d) to vary permit conditions constitutes a substantial proportion of notices. Further, the recent practice – recommended by the Solicitor Generals Office – of such notices reproducing all of the previous conditions, minus or plus any variation, means that permit conditions are increasingly appearing on the register.

While it should be noted that they are publicly available already, the Department will consider the practicality of including permit conditions on the register.

- Supplying false or misleading information is already an offence under Schedule 5A of the Act (relating to the Environment Protection Policy Review Panel). The EDO suggested that such a provision should apply to any information supplied under the Act, or record kept pursuant to it, and cites s.119 of the SA ***Environment Protection Act 1993***.

Response: *Examination of both the SA and Qld Acts (those on which EMPCA was based) shows that the SA Act has a blanket provision as indicated by the EDO. The Qld Act goes much further, explicitly providing for offences in respect of false or misleading information in number of specific instances. The Department will examine this issue in consultation with the Solicitor General's office.*

One **public submission** made a number of points, including:

- The State of Environment provisions of the *State Policies and Projects Act 1993* should be moved to EMPCA to provide the basis for strategic policy development, priority setting, and to facilitate the Strategic Environmental Assessment initiatives;

Response: *It is considered appropriate that the provisions for State of the Environment reporting are under the administration of the independent Resource Planning and Development Commission, as distinct from the environmental regulator.*

- The Act should have a much clearer statement of objectives than the current Schedule 1. The submission cited the conclusions of the recent Australian Productivity Commission that one of the major problems with contemporary legislation is not being able to clearly establish what is trying to be achieved;

Response: *The Review has examined other contemporary State and Territory legislation, and considers that the current Schedule 1 RMPS objectives, and in particular those of Part 2 are appropriate and adequate. (Part 2 defines the objectives of the environmental management and pollution control system)*

- Insert litter and waste management provisions into EMPCA;

Response: *The Department is currently conducting a review of the Litter Act 1973, and these issues can be examined in that process.*

- Introduce requirements for Environment Management Plans, as distinct from assessment Plans;

Response: *Possible amendments to EMPCA concerning the environmental impact assessment process are currently being formulated under the Legislation Review Program. The issues raised in this submission can be examined in this context.*

- Insert a clarifying provision to the effect that councils must consider longer term environmental impacts of level 1 activities, not just construction phase ones.

Response: *The Department can examine this issue in consultation with Local government, and in the context of the possible introduction of environmental authorisations or other alternatives.*

Further, there may be some resolution to this issue of construction phase permits versus longer term impact regulation by encouraging councils to issue permits for “land use and development” where appropriate.

In addition to the above issues, and as previously indicated (3.1 Administration of EMPCA; 4.6 Environmental Nuisances Offences) -

- **one residents’ group** submission presented a very detailed set of options for amendments and regulations to address what it considers to be a very poor approach to nuisance noise issues.

Response: *These suggestions are appreciated, and the Department will continue to conduct ongoing discussion with the group in the development of the new Noise Policy and any associated amendments to the Act.*

8. THE LRP PREFERRED OPTIONS

The review of EMPCA under the Tasmanian Legislation Review Program resulted in recommendations for further critical evaluation of several specific provisions of the Act and some subordinate legislation.

These included –

- the content of Schedule 2 of the Act, which lists level 2 activities that must be assessed, approved and regulated by the Board and the Director;
- the statutory timeframes for the environmental impact assessment of activities under the Act; and
- the structure and level of fees charged under the *EMPCA (General Fees) Regulations 1995*;

Subsequently an Issues Paper was released for comment. Councils, industry, agencies, other stakeholders and the general public were consulted, and information forums were conducted around the State.

A Preferred Options Paper¹⁵ arising from this process was released in mid 2004, and comment was again sought from all stakeholders and the public.

Further consultation undertaken after receipt of submissions to the Preferred options Paper has resulted in the final recommendations presented in this Report.

8.1 SCHEDULE 2 – LEVEL 2 ACTIVITIES

8.1.1 Regulation of “Low Risk” Activities

The review of activities currently on Schedule 2 has highlighted some that, at certain scales or in certain environmental locations may not pose a serious risk of environmental harm, and therefore may not warrant regulation by the State government agency.

In the case of some of these, the activity class itself includes too many individual premises to devolve regulatory responsibility to local government by removing the class from Schedule 2. Further, some individual premises within the activity class may not be of sufficiently low risk.

It was therefore proposed that while the activity class should remain on Schedule 2, a mechanism should be introduced to allow individual premises that warrant it to be subject to a less intense level of regulation by the Director, and for this to be recognised in terms of the fees payable. The outcome for these premises will include –

- Less planned inspections;
- Less stringent reporting requirements (eg. Submission of monitoring data); and
- Lower annual fees

Such status would only be granted to small-scale, relatively benign activities. It clearly cannot apply to any industry of a major scale, or those with significant waste, process complexity or toxicity issues.

¹⁵ Review of EMPCA – Fees, Schedule 2 and Assessment Timeframes: DPIWE Preferred Options, August 2004

Approval of low risk status will be made by the Board/Director on a case-by-case basis, with individual permit holders making application to be assessed against a range of criteria. These criteria could include all or some of the following –

- production level/design capacity;
- nature of raw materials/products and wastes;
- permit requirements for emission limits, monitoring and reporting;
- history of environmental performance (frequency of, and need for inspection);
- potential for causing nuisance/history of complaints;
- demonstrated compliance with a recognised industry code of practice;
- proximity to sensitive environments or public health locations (eg. WHAs, town water off-takes, etc.)

Low risk status would be reviewed periodically, with the capacity to revoke the status at any time should circumstances change.

The mechanism can be set up by amendment of the EMPC (General Fees) Regulations. It does not require amendment of the Act itself.

The Preferred Options paper proposed the introduction a flat fee of \$300 per annum for level 2 activities classed as 'low risk'. This fee will cover the base administrative cost of maintaining these activities in the system and any infrequent or incidental regulatory activity associated with them. No variable fee will apply. The fee model assumes that 124 (about 25 per cent) of current level 2 activities may qualify for low-risk status. In most cases, this will halve the fee payable by these operators.

All 10 submissions addressing this issue were supportive of the concept, although some support was conditional on seeing the fine detail.

Recommendations

Amendments to the subordinate legislation are recommended.

33. The *EMPC (General Fees) Regulations 1995* should be amended to provide for low risk regulation.

Development of the amendments and procedures should be conducted in consultation with all relevant stakeholders.

8.1.2 Current Level 2 activities not considered in detail

The Issues Paper¹⁶ listed a number of activities currently on the Schedule that were considered to be significant enough to warrant remaining there without detailed examination.

These activities –

- are accepted as having significant potential for serious environmental harm; &/or
- generate significant public interest; &/or
- are generally regulated by other Australian State/Territory governments.

No submissions objected to this position in the Issues Paper.

¹⁶ Review of Level 2 activities, the Time-Limit for Assessment of Level 2 Activities, and the Fees Charged under EMPCA: Issues Paper, DPIWE, 2000

It is therefore proposed that the following activities should remain on Schedule 2 of EMPCA, at the same threshold levels currently applicable:

Table 1. Activities to remain unchanged on Schedule 2

• Chemical works (item 1{a})	• Woodchip mills (item 2{i})
• Coal processing works (item 1{b})	• Waste transport businesses (item 3{c})
• Oil refineries (item 1{c})	• Abattoirs and slaughterhouses (item 4{a})
• Wood preservation works (item 1{d})	• Breweries and distilleries (item 4{b})
• Cement works (item 2{a})	• Milk processing works (item 4{d})
• Ceramic works (item 2{b})	• Produce processing works (item 4{e})
• Ferrous and non-ferrous metal melting (item 2{c})	• Rendering or fat extraction works (item 4{f})
• Metallurgical works (item 2{d})	• Wool scourers, tanneries or fellmongeries (item 4{g})
• Mineral works (item 2{e})	• Mines (item 5{c})
• Pulp and paper works (item 2{f})	• Coal handling and washing (item 7{b})
• Textile bleaching and dyeing works (item 2{h})	• Pre-mix bitumen plants (item 7{d})

Recommendation

Amendments to the Schedule are not recommended in respect specified activities

34. The activities listed in Table 1 of this Report should remain on Schedule 2 of EMPCA, to be assessed, approved and regulated by the EMPC Board and/or the Director of Environmental Management, in accordance with the Act.
-

8.1.3 Racing and Testing Venues (Item 7[b])

The main environmental impact associated with racing and testing venues is noise nuisance. Those facilities that are within 500m of residential areas, and that conduct competition or speed trials, are on Schedule 2.

Complaints relating to such facilities are infrequent, and the vast majority are lodged with, and investigated by, local government.

While clearly having a nuisance potential, historically these activities have not given rise to significant levels of public complaint or environmental harm. There appears to be little need for ongoing environmental regulation of such facilities by the Director at a State level. The preferred option of the Department was to remove these activities from Schedule 2.

Submissions on this option from councils and the public were generally opposed to any change. They were concerned that the noise issue was not being taken seriously enough, or that the cost of noise measurement by council officers would be prohibitive.

The Department acknowledges that the nuisance noise issue is an important consideration, but points out that these are event-based activities which require planning permits and associated hours of operation and nuisance conditions, and these are issued and administered by local government.

The Department stresses a commitment to provide requesting councils with technical expertise in the assessment of noise issues for such events, on an “as-needs”, no charge basis.

Assistance could include –

- Assessment assistance, including the development of guidelines for councils, prepared under the Living Environment Program;
- Modelling for distribution of noise levels of all facilities of a specified scale, updated periodically;
- Event monitoring – comprising random testing of 1 or 2 events per year.

Any new large-scale facilities that require sophisticated assessment may be called-in by the EMPC Board.

Recommendation

Amendments to Item 7[b] of the Schedule are recommended.

35. Item 7[b] of Schedule 2 should be deleted from the Schedule 2 of EMPCA to remove the requirement for racing and testing venues to be regulated as a level 2 activity under the Act.
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8.1.4 Laundries (Item 7[c])

Laundries that use more than 100,000 litres of water per day are classified as Level 2 activities in Tasmania, but there are no such premises here. One laundry is regulated as a Level 2 activity however, because it uses fuel-burning equipment capable of burning more than 1 tonne of combustible fuel per hour (Schedule 2, Item 7[a]). No change is proposed to this latter item.

In accordance with Trade Waste Agreements, laundries discharge soap-rich waters to sewer for appropriate treatment at council treatment plans, and the potential for significant environmental harm is therefore minimal.

The Department’s preferred option was to remove this item (7[c]) from the Schedule.

The majority of responses to the Issues Paper did not oppose the option, and there were no strong objections. Only 2 responses to the Preferred Options Paper addressed the issue, and neither was opposed to the option.

Recommendation

Amendments to Item 7[c] of the Schedule are recommended.

36. Item 7[c] of Schedule 2 should be deleted from the Schedule 2 of EMPCA to remove the requirement for laundries to be regulated as level 2 activities under the Act.

8.1.5 Fish processing facilities (Item 4[c])

These facilities are defined in the Schedule as including premises that “process” fish by “scaling, gilling, gutting, filleting, freezing, chilling, packing or otherwise processing for sale”, and which produce 100 tonnes per year or more of product.

There are a number of facilities around the State that are involved in freezing, chilling or packing, that do no other forms of processing. Such premises produce little in the way of solid or liquid waste or odour, and have little potential or serious for material environmental harm or nuisance. Only one of these plants operates on a scale that triggers the Schedule 2 definition for regulation by the Board/Director.

It is therefore proposed to remove such facilities from the Schedule.

A minority of submissions to the Issues Paper did not support any change, but none objected during the Preferred Options consultation process.

Recommendation

Amendments to Item 4[c] of the Schedule are recommended.

37. Item 4[c] of Schedule 2 should be redefined to exclude premises that freeze, chill or pack fish for sale, provided that no other forms of fish processing occur at the premises.
-

8.1.6 Wood processing works (Item 2[g])

These are activities where timber is sawn, cut, milled, compressed or machined, and whose production capacity is 1000 cubic metres per annum or more.

Experience has demonstrated that where such facilities do not include woodchippers, boilers or fibreboard compressing equipment, the potential for serious or material environmental harm is limited. It is often the case that premises of a capacity up to 5000 cubic metres do not routinely have such facilities. It is recognised however, that chainsaw/machine saw noise can be a source of nuisance noise, even for such small facilities.

Hence, it was initially proposed that the threshold for classification as a level 2 activity should be raised from 1,000cubic metres per year to 5000m³/yr, significantly reducing the number of such plants that would require regulation at a State level .

This option, put forward in the Issues Paper, generated some strong opposition, particularly in terms of the noise issue that may be associated with the periodic use of contract mobile woodchippers by small sawmills. As a result, the option was re-considered.

The Preferred Options Paper suggested that, while the threshold may not be raised, the new mechanism proposed for “low risk’ regulation could be applied to the smaller facilities on a case-by-case basis (see 8.1.1 for details). Two submissions expressed either support or conditional support for the revised option. No submission opposed the new option.

Another issue that was flagged under this heading concerns firewood depots. As “cutting” and/or “sawing” is an integral part of such places, they may be captured by the Schedule 2 definition if the capacity is sufficient.

There are many firewood depots around the State, but all are small enough to not be classified as level 2 activities. Experience suggests that although they may have some potential to cause nuisance noise, there are few other significant environmental hazards associated with them.

The Issues Paper proposed that the definition of wood processing works should be amended to exclude wood depots. Although the majority of submissions indicated a level of support, two were opposed to any change. The Preferred Options Paper put the case again, evoking only one strong objection. A major council considered that problems from woodyards include noise and leachate. It also considered that the perceived need to regulate for moisture content justifies their presence on the Schedule for regulation by the Director.

With respect to noise, all such yards are currently level 1 activities by virtue of their limited size, and are regulated by councils in accordance with permits that include appropriate conditions covering hours of operation, and compliance with the EMPC(Miscellaneous Noise)Regulations 2004, (covering the use of chainsaws), which should limit the noise problem.

While leachate from sawmills and large wood processing works can contain pollutants, this has not come to the attention of the department as a significant issue at firewood depots.

The question of whether the moisture content of firewood should be regulated was examined as part of the development of the Environment Protection Policy on Air Quality. The conclusion that was reached was that the regulatory burden could not be justified by the expected benefits. Notwithstanding this, if such regulation were to occur then it would be best achieved by enacting regulations that would apply to all persons selling wood, and would not rely on woodyards being level 2 activities. This is not a justification for making some or all woodyards level 2 activities.

Given the rising price of firewood, and the trend away from the use of wood fires in urban areas, it is unlikely that there will be any new yards of a capacity that would trigger the 1000 cubic metre threshold for Level 2 status. The Department therefore does not agree that this category of wood processing should continue to be on the Schedule. Removing them from the Schedule will not increase the regulatory burden on councils, but will provide the business with a degree of certainty that currently is lacking.

Recommendations

38. Item 2[g] of Schedule 2 should be redefined to exclude firewood depots.
39. No change should be made to the current threshold of 1000 cubic metres per annum.

8.1.7 Sewage Treatment Works – Item 3[a])

Sewage treatment works (STWs) with a treatment capacity of 100,000 litres per day or more, (average dry weather flow) are classified in Schedule 2 as level 2 activities. Of the approximately 300 plants operating in Tasmania, 85 are level 2 activities.

It is recognised that a growing need for holistic, catchment-based seasonal management of water quality is likely to increase demand for STWs to adopt improved standards of pollution abatement technology in order to protect against degradation of receiving waters (and associated ecosystems) into which they discharge.

The current definition criterion is a simple design capacity threshold of 100,000 litres per day (average dry weather flow). However, it is also recognised that the above-mentioned sensitivity of the receiving environment may need to be taken into consideration when determining the appropriate level of regulation.

Accordingly, it was initially proposed that the definition should be changed so that assessment and regulation by the Board/Director would include plants of any size discharging into sensitive locations.

This proposal in the Issues Paper met with general support, although the issue of the need for groundwater protection was also raised as a concern

Subsequent attempts to draft an appropriate definition of “sensitive locations” proved difficult, and the potential for “loopholes” was evident. Also, it would not have been comprehensive enough to negate the need for, and usefulness of the call-in powers of s.24 or s.27.

The Preferred Options Paper therefore proposed that no change should be made to the definition, but that the Board / Director should be more pro-active in the use of the call-in powers where appropriate to protect sensitive environments.

There were no objections to this option.

Both Papers also raised the issue of the name of this category. The current name does not recognise the trade waste component of most urban treatment plants, and it was proposed that the name be changed to “Wastewater Treatment Works”. Submissions to both Papers were supportive of the re-naming.

It is therefore recommended that any change to this item be restricted to changing its title to reflect that it is often more than sewage that is treated.

Recommendation

Amendment of the definition of Item 3[a] is recommended

40. The current title of Item 3[a] should be deleted, and a new title, “Wastewater Treatment Works” be substituted.

8.1.8 Waste Depots – Item 3[b]

Waste Depots are defined as “the conduct of depots for the reception, storage, treatment or disposal of at least 100 tonnes per annum of waste (other than temporary storage awaiting transport to a depot, domestic waste management at a residence, and waste transfer stations)”.

In 2000 the definition of waste in EMPCA was amended to bring it into line with national initiatives. This has meant that activities, such as biosolid application, composting and mushroom substrate production fit the definition of waste depots in the context of Schedule 2. This is not an appropriate label, and the mushroom substrate and composting operations are not the final repositories for “waste”

There is ample evidence that such activities pose a significant risk of causing serious or material harm, particularly when conducted at large scale, and that such risk clearly warrants the activities remaining on Schedule 2.

The Issues Paper proposed that these activities be retained as level 2's, but recognised in a different category from waste depots.

There was general support for this, but several expressed the need for caution to avoid ambiguity in any redefinition/reclassification. Suggestions were also made for additional categories, such as waste receiving facilities, which would include waste transfer stations. Biosolid application was considered to need clarification to differentiate between organic sludge from waste water treatment plants and sludge from agricultural activities.

The Preferred Options Paper put forward the following range of changes:

- Expand the Schedule 2 category "Waste Treatment and Disposal" to include "Resource Recovery". This would include composting/mushroom substrate production and biosolid application.

However, Schedule 2 composting activities would not include any of the following:-

- backyard operations for own domestic use;
- composting (including silage production) for utilisation on agricultural land under the same ownership.

Class 2 and class 3 biosolids as defined in the Tasmanian Biosolids Reuse Guidelines 1999 (DPIWE) would be classed as level 2 activities, where the application rate is 50 wet tonnes per hectare per 3 year period, or more. In addition, the existing category of Waste Depot would be redefined to ensure the activities discussed above are only included in one category.

- Include a fourth sub-category to the exceptions from waste depots in Schedule 2, saying "the deposition of clean fill", and include in EMPCA a definition of clean fill consistent with that currently in the *Environmental Management and Pollution Control (Waste Management) Regulations 2000*. This approach would allow these sites to be exempt from classification as waste depots while retaining the recognition of clean fill as a waste.
- Redefine the existing Oil Refineries category to include waste oil re-processing where that activity utilises processes (such as separation by gravitation) that are not already included in the Schedule 2 category of Oil Refineries (item 1[c]). The Issues Paper canvassed the possibility of including a new category for waste separation and re-processing aimed at this activity, but the preferred option will better rectify this anomaly.

It was also proposed to modify the General Fees Regulations to provide fee categories for various types of waste depots dependent on the level of environmental risk associated with the different operations. (See Chapter 8.3 below)

Only two submissions to the Preferred Options Paper addressed the waste depots issue, with both expressing overall support.

However, one expressed opposition to any elevation of council-run waste transfer stations to level 2 status, and the other considered that silage production on agricultural land should not be a level 2 activity, even if the product is for sale to other landowners. With respect to transfer stations, it is not intended to include these in Schedule 2. With respect to silage production, subsequent investigation confirms that, provided the process is silaging and not composting, there is little chance of significant environmental harm occurring, and there is no need to schedule the activity.

Recommendations

Amendment of the definition of Item 3[b] is recommended

41. Class 3 of Schedule 2 should be expanded by the inclusion of a new category 3[c] – “Resource Recovery”.

The new category will specify the inclusion of composting and mushroom substrate production, but will specifically except –

- Composting in backyard operations for own use; and
- Composting on agricultural land for use on own land; and
- Silage production on agricultural land.

Biosolid application classification as a level 2 activity will be limited to biosolids that are

- defined as class 2 and class 3 biosolids in the Tasmanian Biosolids Reuse Guidelines 1999 (DPIWE); and that are
- applied to land at a rate of equal to or greater than 50 wet tonnes per hectare per 3 year period.

42. The current Item 3[b] should be redefined to exclude any activities specified in the new 3[c].
43. A fourth sub-category should be added to the exceptions from waste depots, to clarify that the deposition of clean fill does not constitute a level 2 activity. A definition of clean fill (consistent with the Regulations¹⁷) will also be needed.
44. Item 1[c] – “Oil Refineries” of Schedule 2 should be redefined to confirm that waste oil re-processing, using processes such as separation by gravity, is a level 2 activity.
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8.1.9 Quarries and Extractive Pits – Items 5[a], 5[b]

Experience suggests that extractive operations producing less than 10,000 cubic metres of rock, gravel, sand or clay per annum generally pose a low risk of significant environmental harm. The potential for environmental nuisance (eg. Noise from blasting) from these operations is a function of the proximity of neighbouring residences to the operation, or to its access route.

DPIWE’s experience has been that these smaller extractive activities generally operate sporadically rather than continuously, require infrequent blasting, if at all, and are less likely to be adjacent to urban areas. The environmental impacts from small to medium sized quarries can however, be more significant when crushing occurs on-site (such operations are covered by item 6[a] of the schedule).

It was therefore proposed in the Issues Paper that the threshold for classification as a level 2 activity should be raised from 5,000m³/yr to 10,000 m³/yr. Ten submissions addressed this issue. Most considered that no change should occur, while three submissions supported raising the threshold. Two submissions considered that all extractive and processing operations should be on Schedule 2, principally on the basis of ensuring regulatory consistency.

¹⁷ *Environmental Management and Pollution Control (Waste Management) Regulations 2000*

In view of the opposition to raising the threshold, particularly from local government, the Preferred Options Paper proposed that there should be no change to the threshold level of 5,000m³/yr.

Of the six responses to the revised option, 4 gave conditional support, with two being strongly of the view that all extractive operations should be classified as level 2 activities, regardless of production capacity. Again, the principal concern was perceived inconsistency in regulation between different municipalities.

In response to the latter submissions, quarries producing less than 5,000 cubic metres per year are generally considered to be of low risk to the environment. With the use of publications such as the Quarry Code of Practice¹⁸ and Extractive Industries Assessment Report Template, these activities can be regulated in a consistent manner by local government.

It is therefore confirmed that quarries with a capacity of less than 5,000 cubic metres per year should not be added to Schedule 2 and regulation will remain with local government. The additional burden of being regulated as a level 2 activity is likely to be disproportionate for small-scale activities.

It is concluded that no threshold changes should be made to these Schedule Items (5[a]/[b]), and that the current threshold of 5,000m³/yr be retained.

However, activities producing less than 10,000 cubic metres per annum may be approved for low risk regulation, determined on a case-by-case basis. This will be dependent on location, history, blasting and crushing activities.

Recommendations:

Amendment of these Schedule Items is not recommended at this time

45. The threshold levels of Items 5[a] and 5[b] should remain at 5,000m³/yr.

8.1.10 Materials Handling: - Crushing, grinding or milling works – Item 6[a]

Processing of rock by crushing, screening and washing occurs in conjunction with quarrying operations. Rock crushing operations producing 1,000m³/yr or more are currently classified as level 2 activities. This includes mobile units of such capacity.

Because of this predominance of co-location of quarrying/crushing, regulatory decisions regarding each should not be made in isolation. Further, virtually all material destined for rock crushing derives from operations that employ blasting – which most often necessitates State government-level regulation. There are also mobile crushing/screening units operating for hire, and these are contracted when stockpiled raw material is of sufficient quantity to make the crushing operation viable. This is generally accepted to be in the region of 5,000m³.

The principal environmental impact from this class of activity is one of noise and dust nuisance, and wastewater from washing operations. Experience has demonstrated that the risk of significant harm from operations of less than 5,000m³ is relatively low, particularly if the activity is operated in compliance with the Quarry Code of Practice. However, where crushing activities occur in the proximity of residences or other sensitive uses, complaints can be generated.

¹⁸ DPIWE (1999), *Quarry Code of Practice*, June 1999.

The Issues Paper proposed a range of options including “do nothing”, raising the threshold to 5,000m³, or alternatively, the regulation of all crushing activities (ie. delete the 1,000m³ threshold). Of seven submissions, the majority supported the do nothing option. Councils generally did not support the second option. The extractive industries association also strongly rejected the second option

The Preferred Options Paper acknowledged the concerns regarding the option to raise the threshold from 1,000 to 5,000m³. It recognised that, in combination with the proposal to raise the threshold for small quarries from 5,000 to 10,000m³ (see previous section 8.1.9), this would result in a significant increase in the regulatory burden for councils (a total of 62 additional premises). It was therefore proposed that the status quo should remain. Crushers of 1,000m³ capacity would continue to be regulated by the Department. Only two submissions responded to this preferred position, with both in support of the “do nothing” option. Nevertheless, where the Director considers it appropriate, having regard to the sensitivity of the location, the option of “low risk regulation” can be considered for individual crushing activities between 1,000 and 5,000 m³ capacity.

Recommendations:

Amendment of this Schedule Item is not recommended at this time

46. The threshold level of Item 6[a] should remain at 1,000m³/yr.

8.1.11 Wind energy facilities

Wind energy facilities are not currently included in Schedule 2, and the subject was not raised in the Issues Paper. Since then, a number of large wind farms have been proposed, and they have all been called-in for formal environmental impact assessment under s.24.

A major reason for this is the potential for mortality on rare and endangered migratory birds. Also for this reason, 4 of the 5 proposals have triggered Commonwealth involvement under the *Environment Protection and Biodiversity Conservation Act 1999*. These facilities also involve a number of other environmental, noise nuisance and planning issues. It is recognised in Victoria and New South Wales that facilities of 30 megawatt (MW) generating capacity or more warrant State government assessment.

Including such facilities in Schedule 2 of EMPCA could serve to increase certainty for proponents, the community and councils, and is consistent with the environmental impact that can be expected from such large facilities. This was proposed in the Preferred Options Paper. The capacity to call in smaller proposals on a case-by-case basis would remain.

4 submissions addressed the subject, with 3 approving the preferred option. One also considered that, for smaller facilities, guidelines would be needed to assist local government assessment. One submission opposed the preferred option. The submission objected to the negative connotations that may be perceived to be associated with the level 2 activity classification, and considered that the current call-in powers provide sufficient ability to deal with the industry. It also considered that, if the use of the call-in powers was to be continued, there should be clearly specified criteria governing the exercise of their use.

Under s.27 (for the assessment of activities that do not require a permit under LUPAA), the Directorial call-in power must be exercised “in the public interest ... having regard to the environmental impact” of any activity.

Although there is no test required for the exercise of the call-in power under s.24 (for non-level 2 activities that do require a permit), Experience has confirmed that a similar test is routinely applied to the use of the Section 24 power. In addition, the current provision of s.24(3), (any called-in level 1 activity is to be regulated by the Director as a level 2 activity), means that the power is unlikely to be used without serious consideration of both the assessment and ongoing regulatory requirements.

The powers under both sections were intended to provide the Board with the discretion to subject any activity to a formal impact assessment process, where the Board considers it necessary. It is not considered appropriate to potentially hamper this ability by specifying any further criteria.

Further, if this is considered to be an issue of uncertainty, adoption of the preferred option to schedule all large-scale facilities will provide that certainty.

Recommendation

Amendment of the Schedule is recommended

47. The Schedule should be amended by the insertion of a new category Item - 7[f] – “Wind energy facilities” with a threshold generating capacity of 30 megawatts or more.
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8.2 TIMEFRAMES FOR EIA UNDER THE ACT

The LRP Review Panel made the following recommendations with respect to assessment timeframes –

- The time limit on the assessment of level 2 activities, currently set down in the *Approvals (Deadlines) Act 1993* (ADA), should be reviewed and replaced with time limits established within EMPCA. These time limits should be intermediary between the current limit and those specified for level 1 activities in the *Land Use Planning and Approvals Act 1993* (LUPAA).
- The Review Panel recognised that this issue is a complex and difficult one which needs to be worked through carefully with proper consultation with all relevant parties before any decision is made on what model should be adopted.

The Issues Paper canvassed a range of options -

- No changes to the current 180 day timeframe for assessments, and leave the timeframe within the ADA (ie do nothing).
- Remove the timeframe from the ADA and replace it with the same timeframe under EMPCA.
- Apply a number of staged time limits to the process with ‘stop clock’ mechanisms and an ability to extend the time limits under extenuating circumstances. Statutory time limits for proponents to lodge requested information and for referral agency input could be included.

- Introduce a mechanism that allows an appropriate level of assessment to be determined, with differing overall time frames or staged time limits. This would allow for the complexity of proposals to be taken into consideration.
- Introduce a mechanism that provides greater flexibility in managing the assessment workload, provided that additional resources can be made available (for example, recruitment or secondment of extra staff, use of consultants, etc.).

Feedback to these options was taken into account in the development of subsequent options presented in the 2004 Paper¹⁹ -

- introduce three levels of assessment based on a range of criteria.
- introduce statutory timeframes for the three critical stages of the assessment process: the development of assessment guidelines, the assessment of the DPEMP and the Board of Environmental Management and Pollution Control's determination.
- introduce a requirement for a Notice of Intent (NOI) to initiate the assessment process, a sunset clause to limit the permissible lifetime for the submission of a DPEMP, and a requirement for councils to make a determination on a development within a statutory timeframe following the Board's decision.

The Preferred Option was that the three levels of assessment should have the following statutory timeframes (in business days). There would be the capacity to extend the timeframes on a case by case basis if required.

Table 2 (Initial): Preferred statutory timeframes for EMPCA environmental assessments.

	DPEMP Guidelines Development	Preparation of Assessment Report	Board determination
Level 2A	15	20	5
Level 2B	20	35	5
Level 2C	45 * *includes advertising	55	10

Following the Board's decision, councils would have a maximum of 20 business days to make a permit decision.

The three levels of assessment would be categorised as Level 2A, 2B and 2C. The statutory timeframes for assessments reflect the level of complexity associated with each level.

The Preferred Options Paper generated considerable response, which has been taken into account in the formulation of the final recommendations:

- There was general support for the introduction of a three-level assessment process, although some support was conditional on decisions regarding the definition of, and criteria for the different categories.

While the Department will develop detailed guidelines for the 2A/2B/2C categories in consultation with relevant stakeholders, the following summarises the expected approach -

¹⁹ Review of EMPCA – Fees, Schedule 2 and Assessment Timeframes: DPIWE Preferred Options, August 2004

Level 2A activities – Small-scale projects with potential local environmental impacts that are:

- minor in scale or consequence; and
- can be readily avoided or mitigated through management measures; and
- which are unlikely to generate any significant public interest.

Level 2C activities (Major Projects) – Generally projects which are likely to:

- involve a complex or multi-jurisdictional assessment process; and/or
- involve significant multi-disciplinary or complex environmental issues.
- require approval from other State or Commonwealth Governments; and/or
- generate a high level of public or political interest; and/or

Level 2B activities – All other level 2 activities. Most projects will be level 2B activities.

- The proposed timeframes generated little opposition, but some submissions were sceptical that they would be met.

Some submissions opposed the inclusion of clock-stopping provisions in the assessment processes (for the purposes of seeking further information).

Stopping the clock while adequate information is sought is a standard feature of all comparable systems where time limits are set on administrative processes. This is because it is reasonable to require an applicant to provide an adequate information base for decision-making without reducing the statutory administrative process time. In particular, immediately following completion of the public comment period, it is accepted practice, and often necessary, to provide applicants with an opportunity to respond to issues raised in submissions.

As the preparation of this supplementary documentation may take some time, it is appropriate to “stop the clock” on the limited statutory assessment period, which commences immediately following the comment period.

Some submissions considered that there should be provisions to require that where timeframes are not met, the application is deemed to be approved, with conditions etc being set by RMPAT.

The review finds that there is justification for provision of an ability to extend the time limits. In such an event, it is also appropriate to specify a consequence for not meeting the extended timeframe. It is proposed that this issue be resolved using a similar approach to that currently provided in the *Water Management Act 1999*–

This will allow for time limits for decision-making to be extended by –

- agreement with the applicant prior to the expiration of the statutory period; or
- the Minister on application by the Board.

However, where the Board subsequently fails to meet the extended timeframe, the approval decision and any associated conditions becomes the responsibility of the Resource Management and Planning Appeal Tribunal.

- There was limited comment on the introduction of a Notice of Intent, with some concern expressed over possible confusion with the current Development Application (DA) process under LUPAA.

Traditionally, proponents of level 2 activities consult the Department (regarding likely requirements/guidelines for the assessment process and documentation) in advance of lodging a DA with council. The introduction of the Notice will simply formalise that process. It does not derogate from the need to lodge a formal application for a permit. Where the DA lodgement occurs before the Department is approached, council must refer it to the Board under s.25(1). This will not change, and such an event can be taken to be lodgement of the Notice.

- The proposal to express the time-frame periods in business days met with general opposition. The concern was over confusion and conflict with the “calendar day” format of LUPAA.

The Review therefore finds that the timeframes in EMPCA will continue to be expressed in the same terms as in LUPAA. This will necessitate a corresponding adjustment of the times shown in Table 2, as follows

Table 2 (Final): Preferred statutory timeframes for EMPCA environmental assessments.

	DPEMP Guidelines Development	Preparation of Assessment Report	Board determination
Level 2A	21	28	7
Level 2B	28	49	7
Level 2C	63* *includes advertising	77	14

Only one submission addressed the issue of a sunset clause for submission of the DPEMP by the proponent, considering the proposed 12 months to be too generous.

However, the Review concludes that this is a pragmatic and reasonable limit, and will be retained as the recommended option.

- There was considerable concern regarding the proposal to require a council decision within 20 business days of the Board decision. Submissions considered that time should be allowed for scheduling discussion at regular council meetings, which may not be possible under the proposed time limit. One (non-council) submission considered the proposed period to be excessive.

This provision was included because s.25(2)(e) of EMPCA effectively removes the statutory time limit set by s.57(6) of LUPAA for a council determination of a development application. It was considered appropriate that a closure provision should be introduced. Four weeks was considered sufficient for the Board’s decision to be received by the council General Manager, and for a council meeting to be subsequently organised and to appropriately inform the councillors in accordance with established procedures.

It is acknowledged that this may necessitate an extraordinary council meeting. However, over the past decade, the number of level 2 decisions made by the Board has averaged 12-14 per year. This would mean that an individual council may be required to make level 2 decisions approximately once every two years.

It is therefore unlikely that the proposed time limit (which now becomes 28 days on the calendar-day proposal) will impose significant demands on council schedules.

Recommendations

Amendment of the Act and development of new subordinate legislation is recommended

48. Part 3, Division 1 of the Act (Assessment of environmental impacts) should be amended by the insertion of provisions to –
- introduce three levels of assessment based on a range of criteria to be set by the EMPCA Board; and
 - introduce statutory timeframes for the critical stages of the assessment process (the time periods would have the meaning as provided by s.29 of the *Acts Interpretation Act 1931*, and hence, the same meaning as in LUPAA); and
 - include “clock-stop” mechanism in these timeframes as appropriate; and
 - introduce similar provisions to that contained in the *Water Management Act 1999* to allow for extension of the statutory approval timeframe by –
 - agreement with the applicant; or
 - the Minister on application by the Board; and to provide that
 - Where the Board subsequently fails to meet the extended timeframe, an approval decision and any associated conditions becomes the responsibility of the Resource Management and Planning Appeal Tribunal.
 - introduce a requirement for a Notice of Intent to initiate the assessment process and associated timeframes; and
 - provide that receipt of a Development Application, forwarded by a council in accordance with s.25(1)(a), is taken to be a Notice of Intent, where the latter has not previously been lodged; and
 - introduce a sunset clause for lodgement of documentation required by the Board for the assessment of the proposed activity (the DPEMP); and in addition; and
 - provide that councils must determine an application for a level 2 permit within 28 days of the notification date of the EMPCA Board's decision.
49. Associated amendments should be made to EMPCA to ensure that the above processes link with the current requirements for the overall conduct of the EIA assessment process specified in s.25 of the Act.
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8.3 GENERAL FEES UNDER THE ACT

The LRP review recommended a more detailed investigation be carried out focussing on finding ways to make the fees more equitable and to improve cost recovery levels.

An Issues Paper was subsequently released for public comment. The purpose of the Issues Paper was to raise issues and discuss options with respect to the LRP recommendations.

Comments received on the Issues Paper and information from other jurisdictions were used to assist with the development of Preferred Options²⁰ that was released in August 2004. The Paper outlined the Department's preferred options for change to the fees structure. Overall, most respondents supported the proposed changes for fees with some conditional qualifications.

8.3.1 Assessment Fees

The preferred options with respect to assessment fees were to:

- Extend the capacity for DPIWE to recover direct costs associated with the assessment of a development proposal not covered by the hourly rate.
- Charge the hourly rate fees from the time DPIWE receives a Notice of Intent.
- Charge an hourly rate fee for further assessments of large development proposals (level 2C) during their construction and commissioning phases.

Several respondents objected to the proposal to charge hourly rate assessment fees for construction and commission plans – plans that are submitted post the development approval process. These tend to be large developments that seek approval for 'investment ready' purposes such as the Southwood development. It was decided not to pursue this option given that developers will also be paying an annual permit fee once approval has been granted.

Another issue for respondents concerned the level of transparency with charging hourly rate assessment fees. Several wanted to see more detailed invoicing outlining the time spent on tasks by assessment officers and desired to see up-front estimates provided for hourly rate assessments. These are more procedural matters that the Department is currently addressing in order to provide a break-down of the fees to improve transparency.

The Department of Economic Development raised a concern at the potential size of assessment fees calculated on an hourly rate basis, particularly in concert with the proposal to start charging for time from the submission of the Notice of Intent (NOI) (see previous sub-chapter 8.2, pages 66,68). Currently assessment fees are charged from the time that a development application is referred to the Board, and changing this to the date of lodgement of an NOI will generally increase assessment fees, and perhaps significantly so for large projects. The DED argued that other jurisdictions generally do not charge substantial assessment fees and that there is a strong public good component of development assessment. As a result of these discussions it was agreed that

- assessment fees will not include charges for the time required to prepare guidelines for the preparation of Development Proposal and Environmental Management Plans, as the EIA principles in s.74 of the Act identify this as the responsibility of the assessing authority; and
- a cap will be introduced for assessment fees charged on an hourly rate basis. The quantum and details of how the cap will work will be examined in the RIS that will be required for the new Fee Regulations. However, current thinking is that the cap for the largest projects will be set at around \$50,000 and that this will be scaled back for smaller developments.

²⁰ DPIWE (2004), *Review of EMPCA, Fees, Schedule 2 and Assessment Timeframes*, DPIWE Preferred Options, August 2004.

The other two options will be implemented. Direct costs associated with use of external expertise and not covered by the hourly rate for large development proposals will be passed onto the proponent.

The second option concerns charging the hourly rate for large development assessments from when a Notice of Intent (NOI) has been submitted. A NOI will mark the formal start of the assessment process.

8.3.2 Annual Permit Fees

The preferred option for annual permit fees was to introduce a two-part fee consisting of a fixed fee component and a variable fee component. The fixed fee component is equivalent to the current fee. The variable fee component is the amount required to recover the full cost of regulating level 2 activities on a day to day basis.

If the permit holder is able to satisfy a number of steps to improve their environmental management practices, satisfying criteria set out by the Director of Environmental Management, then they are not required to pay part or any of the variable fee component. It is estimated that up to one third of premises may avoid all or part of the variable fee in this manner.

There is considerable support for the proposed change to a two-part fee structure with a reward for improved environmental management practices built into the fee structure. Most comments, while supportive, were conditional upon more detail of the proposed structure and system being provided. Some submissions made detailed suggestions for ways to modify the proposed model while retaining the overall concept of the two-part model. Some preferred the fixed fee to reflect administrative costs and not be based on production capacity. Others objected to increasing the fixed fee component by 10 percent stating that there was little justification for such a move, as it will not address the issue of cross subsidisation and inequity. The Department has further investigated the fees required to achieve the target level of cost recovery and does not propose to pursue the 10 per cent increase.

Some also expressed concern about the ability for small to medium sized enterprises to be able to satisfy the three steps for reduction and removal of the variable fee component. The Department has undertaken further consultation on this matter and proposes to modify the tests put forward in the Preferred Option paper to better reflect the ability of different sized businesses to achieve them. More detail about the proposed changes to annual permit fees will be presented in the Regulatory Impact Statement that is required under the *Subordinate Legislation Act 1992*.

The Preferred Options paper also proposed the introduction a flat fee of approximately \$300 per annum for level 2 activities classed as 'low risk'. There were no objections to the proposal to have a lower fee for low risk activities. On current estimates approximately 25% of existing level 2 premises may qualify for low risk status.

8.3.3 Environmental Improvement Program Fees

It is proposed to incorporate the EIP fees into new General Fees Regulations and allow the current EIP regulations to lapse. The current fee contains a "penalty" component that can be counterproductive in achieving the purpose of an EIP. It is also proposed to drop the penalty component with these regulations. There were no objections to this proposed change and therefore, this change will take place and will be outlined in more detail in the Regulatory Impact Statement.

Recommendations:

Recommended Legislative action:

- 50 Make new General Fees Regulations maintaining the current structure based on production capacity; and
- 51 Introduce a two-part annual permit fee, based upon production capacity and a variable component that is payable only if permit holders have not taken extra steps to reduce the impact of their environmental risk; and
- 52 Introduce a flat fee for Level 2 activities classed as 'low risk'; and
53. Maintain the current fixed assessment fee structure with an hourly rate component for large-scale developments, but -
 - with commencement of the hourly rate fee period corresponding to the lodgement of a Notice of Intent, but not including the period of guideline development; and
 - with the hourly rate capped at a maximum to be calculated on a sliding basis dependent on the scale /complexity of the development.
- 54 Allow the Environmental Management and Pollution Control (Environmental Improvement Program) Fees Regulations to lapse and be included in the new General Fees regulations.
- 55 A Regulatory Impact Statement will be required outlining the proposed new regulations as required under the *Subordinate Legislation Act* 1992. While Local government and major stakeholders have been consulted throughout the LRP process, further consultation will be essential during the RIS development process.

..... END