Tasmania

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

10-year Statutory Review of the *Environmental Management and Pollution Control Act 1994*

Issues and Options Paper

Environment Division
Department of Primary Industries, Water and Environment
GPO Box 44, Hobart TAS 7001

December 2004

SUBMISSIONS

Comments are invited on any issue or option canvassed in this paper. Views on the following topics are especially invited –

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

Written submissions in relation to this document should be forwarded to:

Director of Environmental Management
Department of Primary Industries, Water and Environment
Environment Division
GPO Box 44
Hobart TAS 7001

Submissions may also be hand delivered at the Lands Building, 6th floor, 134 Macquarie Street, Hobart.

Submissions should be received by **11th February 2005**

If you have any queries about these documents, please contact:

Administrative Assistant
Environmental Policy Section
Environment Division
Department of Primary Industries, Water and Environment
Telephone: (03) 6233 4028
Facsimile: (03) 6233 6800
Email: Environmentenquiries@dpiwe.tas.gov.au

Please note

- Respondents are advised that the contents of submissions will not be treated as confidential unless they are marked 'confidential' and they are capable of being classified as such in accordance with the *Freedom of Information Act 1991*.

- Disclaimer: Any representation, statement, opinion or advice expressed or implied in this publication is made in good faith but on the basis that the Department of Primary Industries, Water and Environment, its agents and employees are not liable (whether by reason of negligence, lack of care or otherwise) to any person for any damage or loss whatsoever which has occurred or may occur in relation to that person taking or not taking (as the case may be) action in respect of any representation, statement, opinion or advice referred to herein.

- This document may be freely copied and distributed.

Table of Contents

ABBREVIATIONS & ACRONYMS

Board	Board of Environmental Management and Pollution Control
Director	Director of Environmental Management
DPEMP	Development Proposal and Environmental Management Plan
DPIWE	Department of Primary Industries, Water and Environment
EIA	Environmental Impact Assessment
EIN	Environmental Infringement Notice
EIP	Environmental Improvement Program
EMPCA	*Environmental Management and Pollution Control Act 1994*
EPBCA	*Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth)
EPN	Environment Protection Notice
EPP	Environment Protection Policy
LGAT	Local Government Association of Tasmania
LRP	Legislation Review Program
LUPAA	*Land Use Planning and Approvals Act 1993*
NOI	Notice of Intent
POSS	Project of State Significance
RMPS	Resource Management and Planning System
RPDC	Resource Planning and Development Commission
SEA	Strategic Environmental Assessment
SPPA	*State Policies and Projects Act 1993*
Tribunal	Resource Management and Planning Appeals Tribunal

1. INTRODUCTION

1.1 TASMANIA'S RESOURCE MANAGEMENT AND PLANNING SYSTEM

The *Environmental Management and Pollution Control Act 1994* (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 all decisions about the use of land and natural resources in the State are made in pursuit of common objectives. These five objectives frame all the legislation that comprises the RMPS, being 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 applicable to particular issues with which both levels of government must comply; a single appeal system involving the RMP Appeal Tribunal; and a suite of five key statutes. The RMPS objectives are given legislative effect in each of these statutes, of which EMPCA is one.

A significant reform achieved by the RMPS is an explicit linkage between the planning system and the environmental management and pollution control system under EMPCA. The requirement under the previous *Environmental Protection Act* for an environmental licence to be obtained under a separate process was replaced with a single integrated process under EMPCA designed to satisfy both planning and environmental objectives.

1.2 BACKGROUND TO THE REVIEW

As with much contemporary legislation, an automatic review trigger is contained within EMPCA. In this particular case, the Minister must ensure that the statute is reviewed ten years after its commencement (s108). Although EMPCA did not commence in entirety until 1996, some provisions did commence in January 1995, hence the need to have the review substantially completed by early in 2005. To meet this timing requirement, in April this year Terms of Reference for conducting the statutory review were issued by the Minister, viz –

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.

A number of themes are being examined under these terms. 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.

The Department is undertaking a number of parallel initiatives to better plan for the use of the environment and to protect it against pollution. Because these other efforts partly define the scope of this ten-year review of EMPCA, it is necessary to briefly introduce them here.

Firstly, a paper was released in September outlining the Department's preferred options for revising three particular aspects of EMPCA: the fee structure and level of fees; activities listed in schedule 2; and statutory timeframes for assessment.[1] These three matters are therefore outside the scope of the current ten-year review. However, because some issues overlap or are related, several aspects of assessment—particularly timing and referrals—are also addressed in this Issues and Options Paper.

Another Departmental project underway is a review of the Litter Act.[2] 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.

A third environmental management initiative is designed to improve the management of controlled waste.[3] This initiative will better understand 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.

For similar reasons, the subject of sites contaminated with hazardous pollutants is being considered outside of this ten-year review. 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 waste contamination is being undertaken within the Department.

The Department has also just released a discussion paper reviewing the planning system in Tasmania. That 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 review of EMPCA.[4]

---

[1] LRP Review of the Environmental Management and Pollution Control Act 1994 – Fees, Schedule 2 and Assessment Timeframes. DPIWE's Preferred Options. Department of Primary Industries, Water and Environment. August 2004

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

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

[4] Better Planning Outcomes. Department of Primary Industries, Water and Environment. November 2004

Finally, 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 topic, will be repealed, and is not considered in the review.

1.3 THE REVIEW PROCESS

This Issues and Options Paper is a major output of the EMPCA statutory review process. The Terms of Reference introduced above guide the Paper's structure. A number of issues have been elaborated under each of the four broad terms, along with some possible options for addressing each particular issue. The issues identified in this Paper have been distilled from two principal sources of input: Departmental and other agency experience, and a formal local government survey. As well, where available input from other stakeholders has been reflected in this paper.

On a broad level, the experience and feedback that the Department has had indicates that EMPCA has been regarded as a significant step forward by most stakeholders. It contains a range of tools and approaches to environmental management that are featured in most contemporary legislation around Australia. As with all legislation it has evolved with time, and several series of amendments have been made to address issues that have emerged in the practical operation of the system it creates. This review offers the opportunity to examine any further changes that might improve the EMPCA's operability as well as the system itself. It is also worth noting advances in environmental law and policy interstate and overseas in terms of how some issues are conceived. It is timely therefore to consider the suitability to the Tasmanian system of trends and reforms pursued elsewhere.

To inform the development of this paper a written questionnaire 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 this year 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 have been reflected in this paper.

This Paper is designed to stimulate debate on the substantive issues needing review, by canvassing achievable approaches or solutions. Comments on both the issues and possible options are invited. In this regard, it is worth noting that the Terms of Reference frame the scope of the review; some issues may fall outside of these terms and therefore the review process. Some other matters are minor or administratively technical and are therefore not discussed in this paper, which concentrates on substantial issues of importance to the review.

It is worth noting that in scoping this paper several local government and other stakeholders put the view that forestry activities should be subject to assessment under EMPCA. No aspect of the forestry industry is explicitly excluded from EMPCA, although harvesting is not an assessable activity, which is consistent with the manner in which other non-industrial activities that may produce diffuse (but not point source) pollution are regulated, such as agriculture and fisheries.

While a number of the tools under EMPCA could be used in relation to any environmental impacts caused by forestry activities, the Parliament has passed industry-specific legislation, the *Forest Practices Act* and established and funded the forest practices system to deal with this matter. The forest practices system will remain as the primary means of regulating forestry activities.

Stakeholders and interested participants are invited to comment on this Paper. Comments on the proposed options, as well as suggestions about options that may not have been identified here, are especially welcome. For some issues, the proposals may reflect a preferred option for change, without prejudice to a final position following further consultation. Comment on these options is also invited. Information on how to lodge comments is provided at the beginning of the Paper.

The review is being overseen by a Steering Committee comprising representatives from the Local Government Association of Tasmania (LGAT), and the Strategic Policy and Environment Divisions of the Department. This Committee is providing broad oversight and guidance to the review process. A Reference Group comprising EMPCA practitioners has been established to complement the Steering Committee. Membership of the Group includes government agencies, the Department, industry sectors, councils, and non-government peak bodies knowledgable of the operations of the legislation. This Paper has been drafted with the direct input of the Group, and endorsed by the Committee.

The final output from the project will be a Review Report, with recommendations for amendments to EMPCA, if appropriate. The final report will document and discuss all proposed modifications to EMPCA, as well as other issues and suggested options for change that have arisen through the consultation process.

Any legislative changes to EMPCA that are proposed after debate on the Review Report will be undertaken as a separate project and subjected to thorough consultation. It is intended that the Minister will table the Report of the Statutory Review of EMPCA in Parliament in the first quarter of 2005.

2. ENVIRONMENTAL MANAGEMENT

EMPCA establishes an environmental management regime based around the principle that the level of assessment and regulation of activities should be appropriate for their environmental risk. Three classes of activities are identified under EMPCA (levels 1 to 3), reflecting these considerations. As introduced earlier, the EMPCA regime integrates planning and environment approvals, so there is an explicit linkage between the two systems. In particular, where an environmental assessment is undertaken under EMPCA the results of this assessment, in terms of whether it can proceed and, if so, under what conditions, are implemented through the permit process under the *Land Use Planning and Approvals Act 1993* (LUPAA).

Since enactment, EMPCA's policy goal of achieving an integrated application and assessment process has been achieved and continues to be supported by the State Government as part of the RMPS. However, the benefit that the integrated assessment and permitting system has delivered have also created some practical difficulties, and the current review is an ideal opportunity to address these.

Councils are generally responsible for the assessment and regulation of level 1 activities. Such activities require a permit under LUPAA to operate but generally pose a lower risk to the environment than level 2 activities. Controls of an environmental nature can be effected as conditions imposed by the relevant council on the permit issued under LUPAA to use or develop land. Level 1 activities may, however, be called in for assessment by the Board. In this case, level 1 activities are treated as level 2s.

Level 2 activities are those classes of land uses or developments specifically identified by EMPCA (Schedule 2) because they are likely to pose the greatest risk to the environment if not adequately located and managed. Most industrial and extractive development activities of a certain size are listed in Schedule 2. Developments that are level 2 activities must be referred by councils for assessment by the Board of Environmental Management and Pollution Control, a specialised body established under EMPCA with environmental expertise. Following this assessment, the Department undertakes the subsequent regulation of activities.

The philosophy of assigning the environmental management of larger activities to the State is based upon the greater technical and financial capacity of this sphere of government. As well, scale benefits from standardising the assessment and approvals approach flow to both government and developers.

One exception to this approach occurs in respect of level 2 activities outside the LUPAA system. Certain land uses and developments may not be identified in a council planning scheme as requiring LUPAA permits to commence or operate, despite being an identified level 2 activities. These activities are regulated directly by the State following Board assessment.

A third category of activities is outside the LUPAA and EMPCA assessment system. These level 3 activities—or Projects of State Significance—are designated and assessed in accordance with the *State Policies and Projects Act 1993* (SPPA) by the Resource Planning and Development Commission (RPDC). The RPDC undertakes an integrated assessment of level 3 activities for the purpose of informing a recommendation to Government on whether or not the project should proceed, and if so on what conditions. Approval under

the Act is by an order of the Governor, in which the conditions upon which the project is permitted to proceed are specified.

Overall, the environmental management system established under EMPCA has created a range of policy tools and instruments that simply were not available in the legislation that it replaced. Ten years of experience with EMPCA has highlighted a number of areas where there may be the opportunity for improving the efficiency and effectiveness of the system for managing both level 1 and level 2 activities. These issues and possible options are outlined below.

2.1 REFERRAL AND ASSESSMENT OF LEVEL 1 ACTIVITIES

The issues

As described, councils are the authority for assessing level 1 activities under EMPCA. The trigger is an application to the council pursuant to LUPAA for permission to use or develop land, which the council may condition for environmental purposes. Before the council finishes processing the application, the Director of Environmental Management (the Director) may require the council to refer level 1 activities for assessment by the Board, an exercise known as "calling in" a proposal (s24(1)).

The Director's call in power enables the Board to consider the environmental issues associated with a permit application if these warrant a more thorough assessment, or if they are more appropriately addressed by the State due to technical complexities or the scale of impacts. It may be appropriate for the Board to assess a level 1 activity if the level of environmental risk is deemed equivalent to that normally associated with a level 2 activity. Another reason for Board assessment might be that a more strategic approach to the issue is warranted than is available to a council. However, there are no explicit criteria that the Director must take into account in making a decision to call a level 1 in for assessment. Once a council has made a decision under LUPAA the Director is unable to call in a level 1 application for subsequent assessment (s24(1)).

The basis of the level 1 system is that the impacts of level 1 activities are generally smaller, localised and better managed by the relevant council, according to its local circumstances. A number of councils are concerned that conditions of development approval differ between municipalities, and that the burden of assessing and managing activities falls unevenly on certain councils. The latter is largely a function of to the level of development activity within local government areas.

Because each of the 29 councils assesses level 1 activities, the approach taken to assessing environmental issues will almost certainly vary. Given local geographical and other physical characteristics, a degree of difference in terms of how issues are evaluated by councils is inevitable. Another important consideration is that the technical and financial capacity of local government to address environmental issues differs between councils.

More Board input to level 1 activities is perceived by some councils as a means for ensuring greater consistency at this level. In this regard, some councils believe that they cannot refer level 1 activities these to the Board for assessment. While there is no explicit enabling provision within EMPCA, third parties, including councils, are able to draw a level 1 activity to the Director's attention and request that it is called in before receiving council permission to proceed. Several councils would like to be able to refer proposals to the Board for assessment of their own volition.

An important factor in considering this issue is the effect that calling in a level 1 activity for assessment and subsequent regulation as a level 2 activity will have on the proponent of the development. The level 2 assessment process is significantly longer, more complex and costly for a developer. Therefore there is an argument, embodied in Tasmania's regulatory impact system, that this power should only be exercised where the level of environmental risk is comparable to a level 2 activity and that the benefits of the action offset the increased impact on business. Business may also be unfairly disadvantaged by the capacity for the call in to occur at any time during the approval process right up to the point of a council's decision. In addition, it is not apparent that calling in a limited number of activities in a class would lead to greater consistency because the majority would not be called in. A better means of providing consistency could be through the development and use of guidelines.

The options

The mechanism by which Councils can request the Director to call in a proposal seems to provide adequate surety that high risk proposals will be brought to the Board's attention, although this may not be evident to some. Options for change that could be considered are:

- Providing an explicit provision that Councils or third parties may refer a level 1 activity for the Director for consideration as to whether it should be considered for assessment by the Board;
- Providing an explicit power for a Council or third party to directly refer a level 1 activity to the Board for assessment;
- Specifying matters that the Director (or Board) should take into account in making a decision as to whether a level 1 activity should be called in.
- Limiting the time after which a development application is lodged with a Council during which an activity could be called in – for example 28 days.

All of these options would require amendments to EMPCA.

2.2 LEVEL 1 ACTIVITIES TREATED AS LEVEL 2S

The issues

Once the Director compulsorily refers (calls-in) a level 1 activity, it is then treated as a level 2 activity for the purposes of the Act (s24(4)). As constructed, EMPCA prevents a level 1 that has been assessed as a level 2 from being referred back to the council for regulation.

The issue with this situation is that although it may be appropriate for the Board to assess certain level 1 activities, subsequent or on-going regulation at a higher level may not be warranted. An activity with a significant construction phase but minor operational risks would fall into this category. It would be more consistent with the risk-based approach to regulation that underpins EMPCA to have the option of assessing an activity at one level, but regulating it at another.

The options

The above issue could be addressed by enabling level 1 activities to be called in and treated as level 2s only for the purposes of assessment, with regulation reverting to the relevant council. Specific options for regulation might include: the Board deciding where ongoing regulation of the activity should reside; the Director in consultation with the relevant council agreeing upon regulation; the responsible council electing to regulate the activity. The level of operational environmental risk posed by the ongoing activity, and the level of expertise required during regulation, would be the basis upon which regulatory responsibility would be decided.

2.3 ENVIRONMENTAL AUTHORISATIONS

The issues

The assessment regime under EMPCA is built upon integrating the planning and environment protection systems. The integration of approvals is designed to minimise duplication in processes while ensuring that all environmentally relevant activities are subject to regulation and control.

As described above, environment and planning issues in respect of level 1 activities are addressed in the one assessment process undertaken by councils. By contrast, the level 2 regime revolves around proposed activities being referred to the Board either for assessment or for a decision not to assess. Responsibility for referring a proposal to the Board differs depending upon whether the activity requires a LUPAA permit or not. The referrer in the case of permissible activities is the relevant council whereas it is the proponent who refers activities not requiring a LUPAA permit (ss25(1), 27(1)). In both cases, the intention of the legislation is that development may not proceed prior to and without the Board's approval.

Similarly, following assessment by the Board, the mechanism for applying environmental conditions depends upon whether the activity is a permissible or a non-LUPAA level 2. In the case of the former, Board conditions are contained in the development permit issued by the relevant council. A single instrument is therefore issued following conclusion of the two processes to satisfy both sets of approval considerations.

However, when the environmental conditions in a permit need to be updated, this must be done by the Director issuing an environment protection notice (EPN) because LUPAA permits are not designed as "living" instruments and there are very limited powers for amending these. In essence, amending environmental conditions through the issuance of an EPN removes these from the land use permit.

For non-LUPAA activities, following an assessment by the Board the Director issues to the proponent an EPN with the Board's conditions contained therein. The proponent still needs to obtain separate approval from the responsible controlling authority for the proposal to proceed having received approval under EMPCA.

The integrated assessment and approval system has generally functioned as it was intended. Over time, though, a number of operational problems with the integrated system have become evident. Amongst these issues are:

- that environmental conditions set by the Board and enforced by the Director are contained in an instrument that is neither controlled nor managed by either of these authorities;
- the manner in which the Board's conditions are contained in LUPAA permits varies enormously, sometimes rendering the conditions invalid or unenforceable;
- the absence of penalties for commencing a non-LUPAA activity prior to assessment;
- difficulties in managing "bracket creep" whereby a level 1 activity increases production to become a level 2;

Perhaps the fundamental problem is that environmental conditions are operational and require regular updating whereas LUPAA permits are not amenable to subsequent frequent amendment. An alternative instrument (EPNs) must therefore be relied upon to amend Board conditions, bringing its own set of issues, such as:

- a permit runs with the land whereas EPNs apply to the person;
- there are inconsistencies and differences in the penalties and rules contained in permits and EPNs; and
- because an EPN is an enforcement instrument some operators object to routine environmental conditions being contained therein

The options

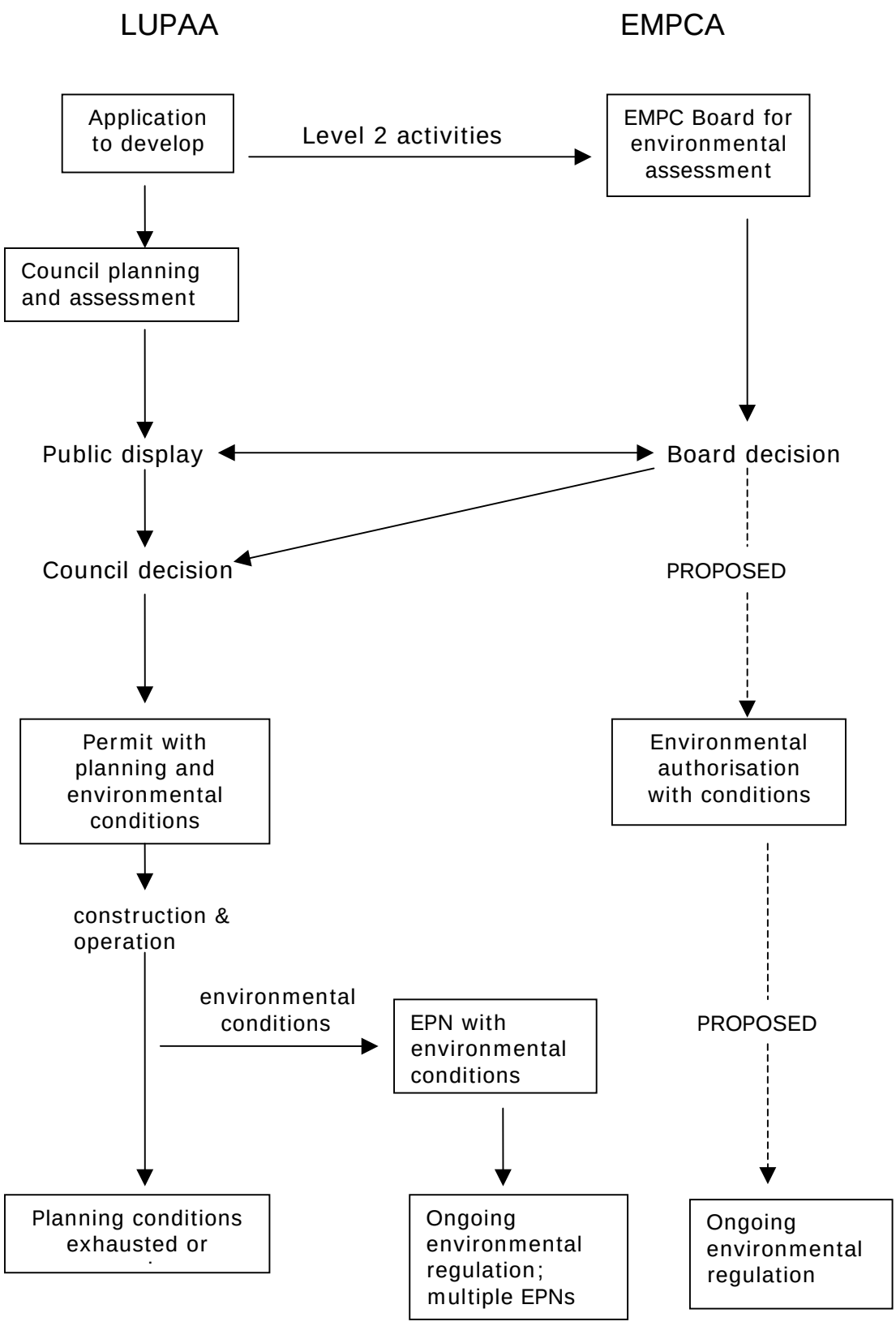
Experience has shown that the approach of individual "fixes" has complicated the administration and interpretation of EMPCA. All of these issues—and indeed many others discussed in this Paper— can be addressed by considering a broader change to the current system.

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. However, it is possible to retain the benefits of the integrated assessment system while also addressing the current problems by introducing a new instrument to house environmental conditions—an environmental authorisation—under EMPCA. This approach is used in other jurisdictions with an integrated planning and environmental approval system, such as Queensland.

Under this model, the current structure and processes for assessing level 2 activities would remain unchanged. The one difference would occur with Board approval following assessment. Rather than the relevant council being required to include the Board's conditions in the permits it issues under LUPAA, these conditions would be contained in the environmental authorisation issued by the Board. The Board's assessment and authorisation would be provided to the council just as its advice and conditions are at present, and would not take effect until the council had made its decision under LUPAA. Current provisions for appealing to the Resource Management and Planning Appeal Tribunal would also remain unchanged. The diagram shows clearly how the integrated process will not change, the only difference being the instrument in which environmental conditions are contained.

The permit and authorisation would essentially be issued together and a single integrated appeal process would remain. In essence, the system would work as it does at present, but with the environmental conditions being maintained in an instrument designed for this purpose, rather than being extracted from the LUPAA permit and contained in an EPN following first amendment. Approval of non-LUPAA activities would similarly be achieved through an environmental authorisation rather than by the issuance of an EPN.

Integrated assessment and approval process for level 2 activities and proposed environmental authorisations



The creation of discrete instruments in which environmental conditions are maintained would greatly simplify the administration of level 2 activities for operators, councils and the Department. Currently, there are provisions to ensure that conditions imposed by councils do not conflict with the environmental conditions required by the Board. These provisions would clearly need to be retained under this proposed reform to ensure that inconsistencies do not arise between the LUPAA permit and the environmental authorisation. Some issues, such as operating hours, have both planning and environmental dimensions, but this is equally an issue with the existing system, and current consultative processes employed during the preparation of assessments should address such issues.

Whilst level 1 activities that are assessed and regulated by councils generally pose a lesser environmental risk than level 2s, some are likely to require ongoing regulatory conditions; EMPCA should enable councils to impose such conditions where appropriate. Under the model proposed above, this might be most easily achieved by providing councils with the option of issuing environmental authorisations. An environmental authorisation system would also provide a ready mechanism for ensuring that level 2 activities cannot commence construction or operation before the Board has completed its assessment (or decided not to assess), especially in respect of non-LUPAA activities.

Creating environmental authorisations would require amendments to EMPCA.

2.4 TIMEFRAMES FOR LEVEL 2 REFERRALS

The issues

Amendments to EMPCA passed in 2002 sought to clarify certain aspects of the assessment process, including the addition of timeframes. The Board must now determine within 14 days whether to assess a referred level 2 activity (s25(1D)). A positive determination to assess is not needed; the default position is that an assessment is required unless the Board determines otherwise within two weeks (s25(1E)). LUPAA timeframes then do not apply in respect of activities that the Board assesses (s25(2)(e)).

However, timeframes continue to apply in the case where the Board determines not to undertake an assessment. That is, the timing requirements of LUPAA are not put into abeyance during the two-week period while the Board determines whether or not to assess an activity. It is only once an activity is subjected to Board assessment that LUPAA timings do not apply (s25(2)(e)). For activities that the Board determines not to assess, the 42-day period for a council decision under LUPAA has consequently been reduced by two weeks. The council therefore has to make a permitting decision under LUPAA within a considerably compressed timeframe.

The options

The issue of timeframes for assessments under EMPCA has been considered in detail under the LRP review introduced earlier. This current discussion relates to the narrower issue of referral timeframes; that is, the period of time that the Board needs for determining whether or not to assess a proposal. The two-week period adopted in 2002 has worked well insofar as the Board's determination to undertake an assessment is concerned.

Nevertheless, an unanticipated problem has arisen with respect to a determination not to assess a proposal. A number of councils find that the time available to approve an application for a permit that is not subjected to Board assessment has been truncated. Although this occurs only infrequently, it is nonetheless an issue, which presents occasional difficulties for some councils.

A solution to this situation might be to ensure that the two weeks the Board uses to determine to not assess a proposal does not deduct from the time available to councils to process a permit under LUPAA. Amending the controlling EMPCA provision would achieve such a change; the period that the Board takes to determine not to assess a proposal could become additional to the statutory timeframes under LUPAA. An alternative might be to instead amend LUPAA to extend the time available for making decisions from 42 to 56 days in respect of referrals to the Board where its determines not to assess the proposal. Of course, any extension to decision making timeframes will have implications for development in terms of delaying permission or approval to proceed.

Both these options would require legislative amendments.

3. ADMINISTRATION

Several administrative players are contemplated by EMPCA, especially local government, the Director and the Board. As described already, councils are given large roles as co-administrators of EMPCA with respect to assessments. A vital enforcement function is also delivered by local government, as is discussed below. The Director is an important position under EMPCA, being vested with many routine and interventionist powers. The peak body under the legislation is the Board, especially with respect to assessments. Many of the Board's functions are currently delegated to the Director, in practice effectively increasing the scope of that role. Finally, although not given a particular role under EMPCA, the Department is also a major player, servicing as it does both the Director and the Board.

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 discussed here; enforcement-related issues are discussed in the next section.

3.1 ADMINISTRATION OF EMPCA

The issues

The enactment of legislation to manage the environment and control pollution has broadened governmental functions at all levels. Whilst Councils have discharged environmental functions since the Environment Protection Act was enacted in 1973, some feel that EMPCA has added considerably to the collection of tasks carried out by local government.

Environmental management is perceived by some parts of local government as an additional burden. Some councils have questioned whether the community benefits flowing from the exercise of environmental controls are worth the financial costs. These doubts are especially evident with respect to nuisance issues, which many consider to be less amenable to management than serious or material environmental harm issues. Beneficial environmental outcomes may be going unrealised if competing priorities depreciate the value of environmental services.

The options

Administrative efforts are limited by the resources available to both levels of government to fulfil the functions assigned by EMPCA. As recognised previously, municipalities differ in terms of geographical and other environmental features. Consequently, there are differences in the nature of issues which councils must address. Some councils may have significant industrial or agricultural activities within their boundaries whereas elsewhere the main land use types may be residential. Clearly, little can be done to address profound differences that are the result of natural circumstance. It is also difficult to address differences that result from economic activity, which itself is related to the natural occurrence of resources.

Within these constraints, there are some possible options for redressing perceived cost-benefit issues. Consolidating environmental management efforts across and between councils may realise improved economies relating to scale, for example. Consolidation efforts may also lead to more consistent environmental management. The Department, LGAT, and individual councils could examine options for exploring how the contributions of all three can be maximised. One option might be for local government itself to pursue greater harmony in approaches through its own mechanisms.

These options can be managed administratively and do not require changes to EMPCA.

3.2 COST RECOVERY BY COUNCILS

The issues

EMPCA provides for councils to offset or recover costs associated with performing environmental functions, generally and in relation to environment protection notices (EPNs) (ss103,44(3A)). Councils have been reluctant to charge for many environmental services, however. First, to administer a cost recovery system requires additional administrative effort, with costs possibly in excess of the revenue earned. There is also little precedent available to councils for guidance in terms setting charges for activities under EMPCA. Local government is also unwilling to impose further cost imposts on constituents. As a result, the provisions relating to cost recovery or offsetting have gone unutilised by councils since EMPCA was enacted.

The Department collects fees from those activities it regulates as a matter of principle; it considers that those who impact the environment so that it needs management must contribute towards offsetting that cost. In other words, recovering costs demonstrates a commitment to the polluter pays principle, an approach adopted by most western industrialised economies. One particular inequity issue arises with respect to the larger level 1 activities. These are regulated by local government under that regime whereas some smaller level 2s with similar operating characteristics to level 1s are subject to a heavy regulatory and cost structure set by the Department.

The options

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. Notwithstanding any apparent inequities, however, it remains the prerogative of governments to determine how to charge for and fund their activities. For the purposes of this review, the important consideration is whether EMPCA properly provides for councils to recover administration costs if they so choose. Any possible legislative amendments that might better facilitate the recovery of costs could be considered in the context of this review.

It is accepted that initiating a cost recovery structure would involve some effort for councils, and may even represent an additional burden initially. As the system adjusts over time, though, some of the cost of administering EMPCA would be shifted away from councils to those activities needing regulation. Revenues could in turn be directed to improving environmental services. State and local government could assist councils in developing appropriate cost recovery mechanisms to defray environmental regulation costs, if such an approach was favoured by both spheres of government. One perceived barrier to recovering costs might be the challenge of determining an appropriate scale of fees for regulating level 1 activities. In this regard, State and local government could explore developing a common fee schedule for level 1 activities.

These options are mainly administrative, although it is possible that amendments to EMPCA may also be needed if problems with the current provisions are identified.

3.3 ROLES AND RESPONSIBILITIES

The issues

A substantial Departmental role is to service and support the Director and Board in assessing and managing level 2 activities. At the same time, the Department also provides advice to councils regarding both level 1 assessments and the continuing regulation of level 1 activities. Another key Departmental function is to advise councils with respect to the general administration of EMPCA. The Department is also a principal repository of information and expert knowledge in respect of environmental issues, and as such is an important resource for councils (and indeed the wider community). Because of this mix of functions, it is perhaps not surprising that even after ten years of practice some confusion continues to prevail over the relative roles of councils, the Director and the Board.

The options

The proposed introduction of environmental authorisations would go a large way towards clarifying roles and responsibilities as the Department would administer these new instruments directly. As well, amendments to original environmental conditions—a source of particular confusion as discussed in Part Four—will become greatly simplified.

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. Providing such materials will be essential as part of adopting the new environmental authorisations, so it would seem timely to clarify roles and responsibilities in new explanatory materials produced for that purpose.

Preparing guidance notes and similar materials would be an administrative matter, not requiring amendments to EMPCA.

3.4 THE EMPC BOARD

The issues

The Board of Environmental Management and Pollution Control is established as the peak decision making body under EMPCA. Its key role is to assess level 2 activities, although it performs a number of other important functions. However, the role of the Board appears not to be fully understood, especially amongst some councils and other important stakeholders.

The composition of the Board is stipulated in EMPCA, and is designed to reflect the range of expertise and perspectives that should inform important environmental management decisions. Government members are the Departmental Secretary (as Chair) and the Director, with three non-government members being persons with environmental management experience in industry, local government and the community (s13). Decision making is shared between the Board and Director, with the latter exercising powers that need to be used quickly or routinely. Ministerial involvement in the operation of the Board is limited to a reserve power to refer matters for Board recommendation, which must then be disclosed (s15).

During the life of EMPCA, the composition and role played by the Board has rarely been commented upon. Similarly, there is little to suggest that the division of powers between the Board and Director has been a problem with respect to the making of decisions. It has been suggested, however, that the Board may be perceived to be more independent if it had an independent Chair.

The options

The main legislative change in relation to the Board that could be considered is whether the Chair should be independent, rather than a senior representative of Government. Such a reform may assist in raising the profile of the Board or making it more accessible to stakeholders. A number of administrative measures could be considered by the Board to make its decisions more transparent, such as using the Internet to publicise its decisions, for example.

Changing the composition of the Board would require an amendment to EMPCA.

4. ENFORCEMENT

In broad terms, there are three methods of enforcement under EMPCA. The first is a directive to responsible environmental performance. This aim is 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. Many modern statutes, and especially those relating to the environment, embrace the prospect of civil enforcement as a supplement to prosecution. 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 instruments and approaches are available to enforce compliance, the most important being the environment protection notice system and the service of environmental infringement notices. Much of councils' and the Department's enforcement activities hinge upon issuing such notices, to serve as a warning and to correct non-compliant behaviour. Issues arising from the environment protection and environmental infringement notice systems are discussed here, as are several problems relating to prosecuting offences.

4.1 THE USE OF EPNS TO VARY CONDITIONS

The issues

Environment protection notices (EPNs) are one of the most important tools available under EMPCA. EPNs are issued to prevent or remediate environmental harm; give effect to a State Policy under the SPPA 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 corresponding powers vest in council officers in respect of non-level 2 and 3 activities (s44).

EPNS may be issued for a number of reasons and have proved to be a very effective tool for most of these purposes. Over ten years of operation, though, it has become apparent that EPNs are not well suited to being used as a vehicle to modify permit conditions. Specific difficulties that have arisen are –

- 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 environmentally relevant activity, an EPN can only be used to vary a permit 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 frequently necessary to reissue an EPN when the land changes hands; similarly, an EPN must be reissued when the person who carrying on the environmentally relevant activity changes.

It is also worth noting that third parties are not able to comment on variations to EPNs. Where the EPN is varying a permit condition, persons who made a representation in respect of the latter must be notified of this fact (s44(8)). However, these third parties are not able to comment on the EPN nor have a right of appeal to the Tribunal, although the permit holder on whom the notice is served can appeal against the variations (s44(6A)). This issue becomes relevant in those situations where original permit conditions have been reached through agreement with third parties, or through an appeal.

The options

The simplest approach to all of these difficulties will be to find a solution that avoids using EPNs to vary permit conditions. This suggestion is discussed in section 2.3. Any solution of this nature would need to address the needs of local government which, in the absence of powers to significantly modify permit conditions in LUPAA, has found the power to use EPNs to modify conditions an advantage. If such a solution is not adopted there are options for partly addressing some of the difficulties outlined above. However, some are not easily addressed without fundamental change to the system.

One way of addressing the problems caused by having multiple EPNs to amend the conditions of the same permit may be to issue an EPN to replace in entirety any other notices as may exist. All environmental conditions could be contained in the single EPN: existing conditions to be maintained, conditions as changed by the EPN, and completely new conditions. Such an EPN could exclude any original permit conditions no longer required, and change the wording of any existing condition.

It may be possible to find a mechanism to ensure that an EPN that varies the conditions of a permit survive changes is ownership. There is already a mechanism in EMPCA that allows EPNs to be registered on the title to the land, although there are some problems with the efficacy of these provisions.

The issue of making permit variations subject to objection and appeal could be addressed fairly simply by legislative change. However, this would introduce further administrative complexity to the system that may not be warranted for many variations that simply update conditions and do not involve substantive change to the terms under which the activity is operated. If this option is pursued, it may be prudent to limit any such third party action to those parties who originally made representations in respect of the permit.

4.2 ISSUANCE OF EPNS

The issues

Potential exists in EMPCA for clashes between the content of EPNs issued by the two issuing authorities, the Director and council officers. As mentioned earlier, the power to issue EPNs vests in the Director broadly (s44(1)) and in council officers with respect to level 1 activities (s44(2)). A council must notify the Director as soon as practicable whenever a council officer issues an EPN (s44(4)). Some councils issue many EPNs each year, with a corresponding requirement to notify following the issuance of each notice.

The Director is able to revoke any EPN and amend any conditions, but cannot include new conditions (s44(5)). As well, the Director retains the broad power to issue a separate EPN regardless of the existence of a council-issued notice. Potential therefore exists for conflict or inconsistency between two EPNs issued by different authorities in respect of level 1 activities, although practical difficulties of this nature have not been encountered. The Director's capacity to issue EPNs for level 1 activities has been exercised on a number of occasions where it appears to be more appropriate for the State rather than local government to take action. While there is no formal requirement for consultation with the relevant council, this has been undertaken as routine.

The options

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

Options to improve the current system could include:

- precise time frames for notifying the Director may be preferable to the current requirement of "as soon as practicable", which may not necessarily require notification upon each issuance
- There may be some value in applying the same approach in the reverse situation, so that the Director becomes required to notify relevant councils of EPNs that s/he issues in respect of activities that are not level 2 or level 3 activities.
- it could made a formal requirement for the Director to consult with the relevant council before issuing an EPN to an activity that is not a level 2 or level 3 activity, although it would be wise to qualify this to allow for emergencies

All of these possible options would require legislative amendments.

4.3 ENFORCING ENVIRONMENTAL INFRINGEMENT NOTICES

The issues

Environmental infringement notices (EINs) are tools designed to complement prosecution by avoiding recourse to the courts in enforcement situations. EMPCA empowers authorised (ie, Departmental and police) or council officers to serve an EIN on a person in respect of any offence against the legislation (s67(1)). If the person so served accepts the notice and pays the relevant penalty, the prosecution is completed and an offence is recorded (ss67(6,8)). The scheme thus offers an expeditious means for encouraging compliance while avoiding the costs and efforts associated with judicial action.

In practice, however, the EIN scheme has not always worked as conceived. Some offenders have observed that there exists little likelihood of being prosecuted for not accepting an EIN. In other words, authorities such as councils, the police and the Department are reluctant to prosecute the types of offences that are addressed under EINs (general issues involved with prosecution are discussed further below). The prospect that they may have to prosecute if an EIN is not paid may have deterred some councils from broader use of EINs.

The options

Notwithstanding that EINs may have been under utilised as enforcement tools over time, these remain a very useful enforcement tool available to councils and the Department. To rectify the problem that has become apparent, one option might be to reverse the current presumption within the EIN regime.

Currently, offenders have the choice of electing to accept and pay an EIN. Section 67 could be amended to require the payment of any EIN that is issued, unless the person on whom it is served elects to challenge it in court within a specified period. If the EIN were left unchallenged and unpaid, then the Fines Enforcement Unit of the Department of Justice would be able to extract payment. In this situation, it would then become appropriate to impose an additional fine to both recover those enforcement costs and deter future infractions. This approach would require EMPCA to be amended.

An alternative approach may be to use the *Justices Rules 2003*. The inclusion of a range of simple offences in Schedule 2 to those Rules would provide an expeditious means of dealing with offences relating to notification, nuisance, contravention of EPN and permit conditions, for example. This approach would allow a defendant to enter a plea in writing, and would allow a defendant to be found guilty on the first non-appearance to the court when served proof of service is available. This approach would maintain the current obligation on the State to prove the offence rather than 'unproved' criminal convictions being recorded.

4.4 SERVICE OF EINS

The issues

Separate to problems related to accepting EINs, the actual method of serving notices on businesses, councils and individuals is problematic. EMPCA makes clear that EINs can be served in person only (ie, not by other means) (s70(1)). The Acts Interpretation Act does permit the service of notices by post to incorporated bodies, but because EMPCA stipulates personal service then this other mechanism has no effect. The result is that the sole option for serving an EIN on individuals, councils or companies is limited to personal delivery, except as discussed below.

Commonwealth law (Corporations Act) operates to allow companies to be served notices through other means, such as delivery to registered business offices and personally to a company director. This mechanism does not extend to the service of EINs on councils, however, as these are not companies under the Corporations Act. This is true also with respect to serving notice on individuals. So whilst it is possible to serve notice to companies through means other than by personal delivery because of the paramountcy of Commonwealth law over EMPCA, other bodies including councils, agencies, and individuals can only be served a notice in person. Moreover, EINs issued to companies need to be served to executive officers as representatives of the organisation, and not to personnel in the field.

The options

To continually improve the potential 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.

In terms of the former, EMPCA could be amended to allow for service of notices by mail (including by courier) to company, council business and government agency addresses. A complementary change may be to broaden persons to include both natural persons in its ordinary sense as well as individuals in their capacity as executives of bodies in/corporate. It would thus become possible to serve an EIN personally on a director of a company at their place of abode, for example, or through the mail to the general manager of a council.

Amendments to EMPCA to achieve this option would be fairly minor.

4.5 PROSECUTIONS

The issues

Mounting a successful prosecution is not an easy task. Offences are often not subjected to legal action due to the evidentiary demands and resource costs required to sustain a prosecution, especially in the case of local government. To date, the penalties imposed by courts following convictions have been at the lower end of those available and are therefore modest relative to the time and efforts involved with prosecuting the case. There is also a prevalent view within local government that resources and efforts are best applied to correcting a problem rather than becoming embroiled in litigation. In this context, most councils tend to rely upon negotiation and conciliation as the approach for ensuring compliance with environmental conditions.

The options

Most stakeholders would generally prefer to avoid the extreme litigious character of enforcement in some other jurisdictions. Nonetheless, a degree of litigation is appropriate as it evidences commitment on the part of authorities to the policy enshrined in the legislation, and serves to define and refine the scope of the law. It is important that enforcement authorities (police, councils and the Department) see prosecution as a viable option in deserving circumstances. A key issue in this regard, particularly for councils, is the prospect of incurring expenses in the course of a prosecution that may not eventually be recouped, even in the event of a successful case. An amendment to EMPCA to redress this matter may be worth consideration, to ensure that full costs are awarded in any ruling.

It is possible that the penalties imposed would rise if more offences were prosecuted, courts became more familiar with EMPCA, and a body of precedent was established. The Department is already moving to better enforce EMPCA. For example, a dedicated unit within the Department has been established to actively pursue prosecutions and an enforcement policy has been issued and is publicly available. These changes have been administrative and organisational, and have not required legislative action.

Another option is to reform the civil enforcement regime so as to expand the role of the Resource Management and Planning Appeal Tribunal. Already, the Tribunal does have a limited role in hearing applications for orders relating to contraventions (s48). However, a person must have a "proper interest in the subject matter" to initiate civil proceedings (s48(1)).

Although case law has broadened the interpretation of proper interest, this concept still generally entails a proprietary, financial or some other special interest. It may be timely and appropriate to consider expanding access to the Tribunal, and at least three options have emerged –

- to allow any person to apply to the Tribunal for an order providing that the claim is not frivolous;
- to allow a third party without a proper interest to pursue proceedings if councils or the Department have been remiss;
- to insert a broad definition of "proper interest".

Any of these proposed legislative amendments would expand the potential for civil enforcement without departing from the current system under EMPCA.

4.6 ENVIRONMENTAL NUISANCE OFFENCES

The issues

Environmental nuisance is a concept fundamental to EMPCA, especially in an enforcement context. It is unambiguously an offence to unlawfully cause an environmental nuisance (ss53(1,2)). Indeed, proving a nuisance offence in court does not rely upon demonstrable harm being caused, and therefore should be easier to prosecute. In practice, though, there are operational barriers to enforcing the nuisance provisions of EMPCA

Nuisance is best addressed through interventionist action to negate the offence at the time rather than through subsequent prosecution. However the provisions of EMPCA simply do not empower officers to intervene in nuisance events when these occur, which are most commonly noise offences.

In terms of prosecution, because nuisance is a less serious offence than serious or material harm there may be less inclination to invest the time and resources necessary to mount a prosecution. For example, the time and cost involved in obtaining noise measurements to establish environmental nuisance deters enforcement action. Councils therefore accord low priority to prosecuting environmental nuisance priority relative to other issues. Without clearer guidance as to what constitutes nuisance and the capability to address such events, including investigations, there may be reluctance on the part of some authorities to test such offences in court.

The options

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. Presently, some councils address the problem of nuisance through issuing abatement notices under the Local Government Act. These instruments are more familiar to local government than are EMPCA instruments. Abatement notices are not appealable to the Tribunal. Police and departmental officers do not issue abatement notices, so this mechanism is limited by its availability.

To improve the capacity of EMPCA to manage environmental nuisance, one option is to expand the basis of EPNs so as to be more amenable to nuisance events. One option could be to streamline the issuance of EPNs to facilitate their immediate use in addressing nuisance situations. This option would require consequential refinement of other provisions relating to EPNs. For example, removing appeals against an EPN in nuisance situations—such as noise pollution—would need to be distinguished from the issuance of EPNs more generally. Also, police officers and Departmental staff could be empowered to issue EPNs. This could be achieved through a delegation from the Director under section 16 of EMPCA or an amendment to the relevant enabling provisions governing EPNs (ie, s44). Both of these proposals potentially have wide consequential effects on the EPN system.

An alternative option might be to consider creating 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. Nuisance suppression notices could have immediate effect upon service, to require an offensive nuisance to be discontinued immediately. The notice would automatically expire after a limited period (eg, 24 hours). It would be an offence to ignore the nuisance suppression notice, and a breach of the notice could thereafter allow officers to take more insistent action to abate the nuisance, such as forcibly removing people or confiscating equipment.

Both of these possible options would require amendments to EMPCA.

Resort to the courts would of course remain an option for persistent or deliberate breaches of nuisance provisions. This option would require resolve on the part of all authorities to prosecute nuisance events in preference to other offences. It is worth considering whether the community interest is best served by addressing nuisance through this approach.

4.7 NOTIFICATION

The issues

Section 32 of EMPCA requires the notification of incidents where pollutants are released and which may cause environmental harm or nuisance. All pollutant releases causing serious or material environmental harm must be notified to the Director. Nuisance incidents are notifiable to the Director in the case of levels 2 and 3 activities, and to the council in respect of level 1s.

In all of these situations, the requirement to notify falls to the person responsible for the activity. No similar requirement extends to others within an organisation—ie, employees—creating a possible gap in the notification system. It is therefore conceivable that some notifiable pollution events are going unreported within a workplace, given that obligations to notify do not apply to employees. Although councils and the Department regularly receive pollutant notifications, it has been suggested that these almost certainly under-report the level of pollution releases. The incomplete notification chain may in part account for pollution events going unreported.

The options

One possibility for reforming the notification requirements of EMPCA is to broaden the obligation to notify of pollution incidents. Employees engaged by or as part of the operations of an activity could be required to notify an incident to the person with responsibility; that person in turn must notify the council or Director. A consequent consideration is whether allied employees such as contractors, consultants or maintenance personnel would be required to notify of any incident. Such a change would be intended to close any gaps in the notification system by sharing responsibility amongst the workforce. Ultimately, a higher level of environmental diligence would hopefully become inculcated in the workforce.

5. MISCELLANEOUS ISSUES

Many of the issues associated with EMPCA are concerned with the assessment and permitting regime, including the enforcement thereof. Although this is the clear preoccupation of the legislation, it deals with a range of other issues which have become evident as difficulties since 1994. This statutory review is the appropriate vehicle for highlighting some of these non-management issues, and proposing options for addressing them.

5.1 PUBLIC PARTICIPATION

The issues

A basic tool in the environmental assessment of activities is the preparation by proponents of management plans and related documents. These materials provide the essential basis for the assessment and regulation of proposed activities. The rationale underpinning this approach to environmental assessment is that proponents are best placed to describe their activities and identify management responses to particular issues. Moreover, forcing proponents need confront the environmental aspects of proposed developments.

One of the strengths of EIA is its very public nature. The EIA principles in EMPCA state that an opportunity for public consultation is to be provided (s74(6)), but do not specify how this is to be achieved. Currently, the Department interprets this requirement by announcing the availability of Development Proposal and Environmental Management Plans (DPEMPs) as part of the parallel requirement to advertise permit applications under the LUPAA process. Board assessment reports are provided to those who commented on the DPEMP following advertisement. This is no compulsion that the Board considers public comment when assessing a proposal, although it is clear from assessment reports that this is standard practice.

LUPAA does require some public consultation in respect of discretionary permits (all level 2 permits must be treated as discretionary). Such permits must be advertised and are available for comment for between 14 and 28 days. The council (not the proponent) is compelled to consider comments received.

Where an activity is that is not subject to LUPAA is assessed under EMPCA (about ten percent of all assessments, mainly being waste transport businesses) the latter does not define a set comment period or advertising requirement, although compliance with the section 74 principles mandates an opportunity for public comment. Typically the LUPAA process is followed.

The options

The role of the public in assessing proposals could be made more explicit in EMPCA. A statutory requirement for advertisement and comment for non-LUPAA assessments could be included in EMPCA, such as 14- or 28 days, depending upon the nature of the proposal. Another possibility is to legislate to require the Board to consider in its assessments any comments received during the consultation periods, thereby formalising current practice.

This option would require legislative amendments.

5.2 DIFFUSE LAND USES

The issues

The EMPCA assessment and permitting regime is designed to regulate activities located on discrete sites. Such land uses tend to be industrial or extractive developments, such as factories, mine sites, and wastewater treatment plants. The impacts of these activities often relate to the generation of waste or pollution, which are manageable as point sources. EMPCA has proved to be a robust framework for addressing these types of environmental management issues.

Most of the tools and powers under EMPCA are more easily applied to point sources of pollution rather than broad scale land uses that generate pollution more diffusely. Such land uses and developments are usually those that do not require a LUPAA permit, or are not level 2 activities. Agriculture is a particularly acute example of such an activity that is not easily dealt with by pollution control legislation. The associated environmental impacts might include vegetation loss, habitat disturbance, soil erosion, eutrophication, land degradation, and disruption to hydrological cycles.

As experience with administering EMPCA has grown, there is now an increased awareness of diffuse environmental issues and non-point source pollution events. To address diffuse activities, EMPCA provides a number of objectives-based instruments to be utilised by the Director and Board. Agreements, audits and improvement programmes are objectives-based instruments provided for in EMPCA (ss28-31, 37-42). These instruments are the province of the Board rather than councils, although the mechanisms for delivering objectives contained therein may be LUPAA permits and EPNs. Despite the availability of these tools and their potential to address environmental issues, they have rarely been employed.

The options

Several councils have expressed frustration over their inability to deal effectively with diffuse environmental management issues, especially farming. EMPCA is not designed to manage such issues, however, which are controlled under other legislation and instruments, including planning schemes. However, the statutory polices developed to support EMPCA (such as in relation to water and air pollution) can and do overtly address diffuse sources of pollution. That much said, the objectives-based instruments available under EMPCA may have application to managing diffuse environmental issues. A number of councils have expressed a desire to have at their disposal agreements and audits to better manage diffuse environmental issues. To improve their utility and attractiveness, the Department could explore with local government and other agencies the potential use of EMPCA tools in addressing diffuse land uses and developments. Such an approach would not require amendments to EMPCA.

5.3 WASTE MANAGEMENT

The issues

EMPCA is concerned largely with pollution policy and the regulation of wastes. As has been discussed, the various systems and instruments have generally succeeded in controlling wastes and other polluting substances. Much of the foregoing discussion has been directed at improving the efficacy of available tools and approaches.

In addition to these identified issues and options for improvement, it is useful to consider how the policy approaches to the management of waste have advanced since EMPCA was enacted. Two particular concepts gaining currency are waste minimisation and extended producer responsibility. Essentially, these concepts are designed to embed and internalise

into production planning consideration of the subsequent waste stream. The rationale is to compel the waste generator—and perhaps also consumers—to assume the full cost of and responsibility for wastes.

The options

Adopting concepts to minimise or internalise waste production would represent a major new approach to how waste is managed in Tasmania. Because these concepts have only recently emerged, there is little practice upon which to inform this ten-year review of EMPCA. However, the review is directed to consider whether EMCPA provides a mix of incentives, sanctions and powers, and if it is flexible enough to accommodate changing circumstances. In this context, there may be some value in considering whether these new waste management concepts are suitable to the Tasmanian situation.

5.4 ENVIRONMENT PROTECTION POLICIES

The issues

Environment protection policies (EPPs) are an instrument designed to further the objectives of EMPCA in relation to a particular aspect of the environment or the environment generally in a relation to a particular activity. Provisions relating to EPPs were added to EMPCA in 2000 based upon and similar to other jurisdictions (ss96A-O). EPPs may be prepared in relation to eight subject areas, viz: a pollutant, an industry or activity, a technology or process, waste management, pollution control practice, land, air or water quality; noise and litter. EPPs may include a wide variety of provisions such as objectives, environmental values, ambient environmental standards, allowable emission levels, delivery programs and performance indicators.

The process for developing and subsequently amending EPPs is transparent and consultative, and therefore necessarily lengthy. An EPP Review Panel (which is independent of the Department) assesses draft EPPs and reports on them to the Minister. There are two mandatory stages of public consultation, and the Review Panel may also hold public hearings. The potential reach of EPPs is expansive, and demonstrated compliance with the standards of an EPP confers (s55A) a general environmental duty defence against proceedings under ss50-53. For these reasons, both public input and final parliamentary approval are vital.

EPPs on air quality and noise are currently under development. Some councils and community groups have expressed concern about delays in finalising these two EPPs, some four years since their development was commenced. The inference from such delays is that the process for developing EPPs is intrinsically laborious or protracted.

The options

Because EPPs are such potentially powerful tools, their preparation is necessarily detailed and thorough. There have also been teething problems with a new process. Although some anxiety over delays is understandable, it would be detrimental to prepare and finalise an EPP without proper consultation. It is not therefore proposed to make substantive changes to the EPP provisions. However, it is expected that with experience the process may be less protracted. No options for amending EMPCA are therefore proposed.

5.5 STRATEGIC ENVIRONMENTAL ASSESSMENT

The issues

EIA of project activities has existed since 1969 with enactment of the National Environmental Policy Act by the U.S. Congress. Most countries now have enacted laws governing the environmental assessment of projects, and update these in response to new thinking or other improvements to EIA systems. As this experience of project EIA has grown over time, some jurisdictions—both Australian States and Territories and other countries—are looking at new approaches, such as the assessment of policies or plans. This approach to EIA is designed to shift the assessment and management of impacts to earlier in the decision making process, thereby negating the need for project-level assessments.

Strategic environmental assessment (SEA) is another emerging approach gaining some currency. SEA is a tool for assessing a program of activities where individual projects defy traditional EIA, such as forestry operations or commercial fishing. The Commonwealth's Environment Protection and Biodiversity Conservation Act provides for the SEA of activities with respect to matters of national environmental significance.

The options

Neither the assessment of policies and plans, nor SEA of programs, are available under EMPCA. This option would allow these activities to be subject to assessment using a tool more suitable to the particularities of their operations. Similarly, there may be some attraction in considering policy or plan assessment as an optional approach to assessing individual projects. Any of these options would require amendment of EMPCA.

5.6 ENVIRONMENTAL BONDS

The issues

Many jurisdictions routinely impose financial bonds upon activities that cause significant environmental disturbance. Extractive mining activities are a common candidate for bonding, primarily for decommissioning and rehabilitation purposes. Bonds are also applied to industries with a high environmental risk—such as contamination—to ensure that any remediation costs do not fall upon the public.

Under EMPCA, financial assurances can only be required by the Board in very narrow situations relating to high environmental risk or to contraventions (s35(2)). Environmental bonds therefore assume a punitive role rather than being a guarantee of environmental protection and remediation. As well, several councils have expressed concern that the capacity to impose financial assurances is exclusive to the Board, and that these are not imposed routinely.

The options

An option is to amend section 35 of EMPCA to remove the some of current constraints to requiring financial assurances from proponents. This option would see a broadening of the provisions to allow for environmental bonds to be required in respect of activities that may cause widespread disturbance or time delayed impacts, explicitly ensuring that restoration costs can be met by developers. As well, proponents could be required to maintain insurance coverage to meet remediation costs and compensation damages. A problem with the latter is that in the event of insurance lapsing or insolvency, the concept of compulsory coverage would become meaningless. Councils could be empowered to require financial assurances, although they may currently approach the Board to seek imposition of an assurance. It would be expected that assurances would be more commonly applied to Level 2 activities than level 1 activities given the relative levels of environmental risk. If this option were preferred, amendments to EMPCA would be required.