

# **EMPCA Statutory Review**

## **Summary of Submissions**

May 2005

## SUMMARY OF SUBMISSIONS REPORT

This report -

- lists each of the Headings presented in the December 2004 Issues and Options Paper (IOP), numbered and in the order in which they appear in the Paper, and
- very briefly states the issue(s) being investigated under each heading, and then dot points the options presented in the IOP
- It then summarises the responses to each of them, including statistics on numbers “for”, against” etc.”

**NOTE** as individual submissions often commented on several options within one heading, the totals may exceed the actual number of submissions;

- And finally, any other matters (relevant to the Review) raised by the submissions are listed.

There were a total of 34 formal submissions, being from –

- 12 Councils (plus a consolidated response from the LGAT);
- 10 private citizens;
- 4 residents’ groups;
- 3 departments;
- 2 industry associations;
- 2 legal/planning bodies; -

plus 2 informal submissions, submitted by telephone after the close of the consultation period.

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## ABBREVIATIONS & ACRONYMS

Board	Board of Environmental Management and Pollution Control
Director	Director of Environmental Management
DPEMP	Development Proposal and Environmental Management Plan
Department	Department of Primary Industries, Water and Environment
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
LGAT	Local Government Association of Tasmania
LRP	Legislation Review Program
LUPAA	<i>Land Use Planning and Approvals 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

## **2. ENVIRONMENTAL MANAGEMENT**

### **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.

**Issues:**

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

**The options:**

There is currently no reason why a Council cannot currently request the Director to call-in a level 1 proposal for formal assessment. To date, this has provided adequate surety that high risk proposals can be brought to the Board's attention.. However, this provision is not explicit in the Act. 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.

**Summary of 34 submissions** (*note: some submissions put several views*)

**8** agreed that councils should have an explicit power to refer the activity to the Director for consideration.

(5 Councils; 1 citizen; 1 residents' groups; 1 industry association )

One council considered that, while it had not needed to refer any level 1s, it may be beneficial to provide explicitly for councils to "request" that Director call-in, but not a "referral" provision.

An industry association considered that all extractive activities should classified as Level 2s, or in the absence of such a change, that they should all be referred to the Director for assessment at least, regardless of size or location.

**12 agreed that there should be clear criteria specified whereby the Director can refuse to call-in (and/or guidelines for councils on what could be referred).**

*(7 Councils; 1 citizens; 2 departments; 1 industry association; 1 legal/planning)*

A number of councils wanted guidelines on what constitutes a level 1 activity – for the purposes of EMPCA (i.e. for environmental regulation)

**1 preferred an explicit power to refer directly to the Board for assessment.**

*( 1 citizen)*

This submission considered direct referral to the Board (rather than to the director) should require the council to pay all reasonable costs incurred by the Board in undertaking the assessment.

**6 agreed that the time limit on the Director's call-in power should be specified.**

*(3 Councils; 1 citizens; 1 departments; 1 legal/planning)*

**4 specifically agreed that third parties should be included in any change.**

*(1 Councils; 1 citizen; 1 departments; 1 legal/planning)*

Some submissions considered that third parties should be limited to proponents.

One considered it appropriate to allow third party referrals to the Director for consideration of an assessment, but did not support the same rights for direct referral by third parties to the Board for assessment.

**2 specifically disagreed that third parties should be included in any change.**

*( 1 department; 1 industry association )*

The submission considered this would add unacceptable administrative burdens/delays. It acknowledged the existing informal ability of both councils and third parties to bring activities to the attention of the Director/Board.

**5 considered that there should be no significant change.**

*(3 Councils; 1 department; 1 industry association )*

No council submission referred to any situation whereby they had needed in the past to request the Director to call-in a level 1 activity for assessment.

While not approving any change, many submissions agreed that guidelines – perhaps one set defining the Director's criteria for call-in, and one to assist councils in level 1 assessment - could be helpful.

The Department of Economic Development offered to contribute funding for workshops for the purposes of training local government in the assessment and regulation of level 1 activities.

**11 did not comment specifically on these options.**

*( 7 citizens; 3 residents' groups; 1 planning/legal )*

This group were particularly concerned with community noise issues.

**2 made distinctly different suggestions in the context of this heading.**

*(1 Councils; 1 citizen)*

One council considered that the time frame for assessment of level 2s significantly infringed on council's ability to access Commonwealth funding for infrastructure projects (eg WWTPs). It recommended some form of interim or draft Board approval based on conceptual design.

One citizen suggested that "noise" be upgraded from level 1 to level 2.

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**2.2 LEVEL 1 ACTIVITIES ASSESSED AS LEVEL 2S**

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 their assessed capacity for environmental harm.

**Issue:**

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

**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.

**Summary of 34 submissions**

**14 agreed that there are merits in determining the appropriate regulator for level 1s assessed by the Board.**

*(8 Councils; 1 citizen; 3 departments; 1 industry association; 1 legal/planning)*

While recognising the merits in respect of the regulation of referred level 1s, many submissions were concerned that the mechanism for such a determination needed careful discussion with planning authorities, and questioned how disputes would be resolved.

There was also a call for involvement of any key relevant government agency where appropriate.

One submission suggested that reversion to Level 1 for the purposes of regulation may not necessarily occur immediately after assessment.

One Departmental submission went further, recommending that the option be extended to include bona fide level 2 activities (both new and existing), but was concerned about whether that would include annual fees being payable to council, and whether councils could issue EPNs, and just how councils would be explicitly made responsible for enforcing conditions imposed by the Board.

Another made the point that if such a “hand-back” of called-in level 1s is to occur, then council officers should be involved in the assessment phase. (In fact, the Act already requires that, as far as is practicable, council officers and the Department should collaborate in all section 25 assessments).

With respect to the extractive industry, the association supported this option only if all extractive proposals are referred to the Board for formal Level 2 assessment.

**20 did not comment specifically on this issue.**

*( 5 Councils; 9 citizens; 4 residents' groups; 1.industry association; 1 legal/planning)*

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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.

### **The options**

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.

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 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 under section 27 would similarly be achieved through an environmental authorisation rather than by the issuance of an EPN.

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.

### **Summary of 34 submissions**

#### **14 agreed that there is merit in considering the introduction of environmental authorisations .**

*( 9 Councils; 1 citizen; 2 departments; 2 industry associations;)*

Submissions expressed a wide range of issues that need to be addressed in considering this option:-

- Caution and close consultation between the Department and local government is needed to ensure that duplication is avoided, and that the RMPS is not compromised.

- Should it include authorisations for level 1 activities, and if so, will it apply retrospectively, and will it undermine/duplicate the DA process?
- Environmental conditions included in the planning permit should be restricted to those associated with the construction / set-up phase, and they must be consistent with those in the authorisation.
- How would it address the issue of bracket-creep?
- One submission considered that only the Director should be able to issue authorisations, regardless of whether to level 1's or 2s.
- One submission stressed the importance of the planning permit "remaining with the land", and although being supportive of the concept of authorisations, suggested that if the problem is with EPNs being issued to a person, the Department should look at ways of fixing that problem.

## **2** **opposed the introduction of authorisations.**

*( 1 department; 1 legal/planning )*

The HEC opposed this option – on the grounds that it would disintegrate the environment and planning system. It also expressed considerable doubt as to the arguments presented in the Issues and Options Paper in support of authorisations. In particular, it disputed the claim that neither the Board nor the Director "control or manage" the instrument in which the Board conditions reside. It cited s.25(8)(e), (8A) &(8B). It also considered that the use of EPNs to vary permit conditions is an effective tool. The HEC also considered that further explanation is necessary regarding a range of legal, property and appeal issues.

The Environmental Defender's Office, while acknowledging the difficulties with the current system, opposed any dismantling of the integrated system. It pointed to the Integrated Planning Act 1997(Qld) as an example of how the current system could be changed without introducing authorisations.

## **18** **did not comment specifically on this issue.**

*( 4 Councils; 9 citizens; 4 residents' groups; 1 legal/planning )*

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### **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 an 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 L:UPAA.

Issue:

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

## The options

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 it determines not to assess the proposal.

## Summary of 34 submissions

### **7 supported the option that EMPCA should be amended to stop the LUPAA clock.**

*( 5 Councils; 1 citizen; 1 department; )*

In particular, the clock-stopping should include the period for requesting additional information (s.54 LUPAA).

### **5 supported the option that the LUPAA timeframe should be extended.**

*( 3 Councils; 1 department; 1 legal/planning )*

One council considered this option preferable, provided that the “stop the clock” provisions of LUPAA (s.54) are not compromised.

The DED suggested an alternative amendment could be made to s.54 of LUPAA to “stop the clock” while the Board makes its determination. The EDO preferred this option, suggesting LUPAA be amended so the periods referred to in s.57(6)(b) and 58(2) don’t run during the Board’s determination period.

### **0 expressed support for both options.**

### **1 opposed either or both options.**

*( 1 citizen; )*

While expressing support for option 1, one submission explicitly opposed extending the 42 day period in LUPAA.

### **21 did not comment specifically on this issue.**

*( 5 Councils; 8 citizens; 4 residents’ groups; 1 department; 2 industry associations; 1 legal/planning )*

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### **3. ADMINISTRATION**

#### **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 environmental 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?**

#### **The options**

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

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.

#### **Summary of 34 submissions** (*note: some submissions put several views*)

**11** stated or clearly implied that administrative changes, and/or greater effort is needed by both tiers of government to address environmental management issues (particularly nuisance issues such as (but not limited to) noise.

( 4 Councils; 3 citizens; 2 residents' groups; 1 department; 1 industry association; )

Any changes would need thorough negotiation with all councils.

One council considered that this issue (inter-council consolidation of environmental management effort) was beyond the scope of this review, and should be referred to LGAT as a stand-alone issue for discussion by all councils.

One pointed out that Tamar Valley councils have already successfully conducted a consolidated effort to address wood-smoke and other air quality issues.

The extractive industry reiterated its position that regulation of all extractive operations should be the responsibility of the State government.

**1** did not agree with consolidation of effort between councils.

( 1 Council; )

One council considered that, while the principle may have merit (and is demonstrably effective within the framework of initiatives such as the Derwent Estuary Program and the NRM Strategy), previous discussions on the issue (eg during the last council amalgamation debate), had clearly indicated that setting up such a consolidated approach may be more cumbersome than maintaining the status quo.

The submission stated that a more effective method of getting local government to deal with environmental management issues pro-actively may be to make other EMPCA instruments available to councils – such as EIPs and Environmental Agreements.

**20 did not comment specifically on this issue.**

*( 8 Councils; 7 citizens;; 2 departments; 1 industry association; 2 legal/planning )*

The majority of council submissions did not address the question of consolidation of environmental management effort between councils.

**3 made other comments on the issue of administration.**

*( 3 residents' groups )*

Several residents' groups wants a special section within EMPCA dealing with noise, [see also s.4.6 "Environmental Nuisance Offences"]

One submission in particular submitted detailed amendment proposals for tackling noise problems across both State and local government jurisdiction. It recommended a three-pronged approach to tackling noise issues, comprising EMPCA amendment, environmental infringement notices and regulations.

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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.

#### **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.

For the purposes of this review, the important consideration is whether EMPCA properly provides for councils to recover administration costs if they so choose.

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.

**Summary of 34 submissions** (*note: some submissions put several views*)

**12 agreed that councils should have appropriate cost recovery mechanisms, and that administrative changes may be beneficial.**

( 8 Councils; 1 citizen; 2 departments; 1 industry association )

While expressing agreement with the need for adequate mechanisms to facilitate cost recovery, a number of council submissions cautioned that a thorough consultative process must precede any formal changes, and some expressed opposition to a common fee schedule.

DED considered that it should play an integral role in any process to establish a new fee structure for level 1 activities.

**17 did not comment specifically on this issue.**

( 5 Councils; 7 citizens; 1 residents' group; 1 department; 1 industry association; 2 legal/planning )

**6 made other comments on the issue of cost recovery.**

( 1 council; 2 citizens; 3 residents' groups; )

In discussing the issue of cost recovery and council regulation of Level 1 activities, the claim was made that

- while EMPCA provides appropriate mechanisms for council regulation of new level 1s, it does not do so for existing activities. It allows only reactive management through the use of EPNs or EINs after a pollution event.
- while the submission acknowledges that this could be overcome by the enactment of a by-law to require some form of registration or licensing, there is no ability for council to recoup its costs in regulating under such a by-law.
- further, it was suggested that leaving such an action to individual councils would lead to inconsistencies across the state.

Some citizens' submissions 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.

### 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?

#### The options

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.

#### Summary of 34 submissions

**13 agreed with the proposed option.**

( 7 Councils; 2 citizens; 2 departments; 2 industry associations; )

The DED suggested the development of a dedicated web site for this purpose.

Other submissions considered that the introduction of Environmental authorisations may help to resolve any confusion.

**12 did not comment specifically on the issue.**

( 6 Councils; 2 citizens; 1 residents' group; 1 department; 2 legal/planning )

**9 expressed different views.**

( 6 citizens; 3 residents' groups; )

Citizens and their representative groups repeatedly raised the issue of the 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 pollution.

### 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?

#### 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.

#### **Summary of 34 submissions** (note: some submissions put several views)

**6** agreed that the composition of the Board should be broadened by the inclusion of an independent Chair, and that its workings should be made more transparent.

( 4 Councils; 2 citizens )

**7** agreed that the composition of the Board should be broadened in some other way.

( 4 citizens; 3 residents' groups )

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.

**3** considered that the composition of the Board should remain as it is, albeit with mechanisms put in place to make its workings/decisions more transparent.

( 1 Council; 1 department; 1 industry association )

**18** did not comment specifically on this issue.

( 8 Councils; 7 citizens; 1 department; 1 industry association; 1 legal/planning )

**2** made other suggestions.

( 1 department; 1 legal/planning )

The DED supported the proposal to make the Board decisions more transparent, but expressed the view that, regardless of its composition, the Board should be seen to take a higher profile role in the setting of strategic longer-term environmental management policy.

The RPDC expressed disappointment that this was the only change proposed for the Board. The Commission strongly believes 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]

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## **4. ENFORCEMENT**

### **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;
- 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 corresponding powers vest in council officers in respect of non-level 2 and 3 activities (s44). Nevertheless, difficulties have arisen with their use over the years –

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 environmentally relevant 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 frequently necessary to reissue an EPN when the land changes hands; similarly, an EPN must be reissued when a new person becomes responsible for carrying out the environmentally relevant activity; and
- third parties are not able to comment on variations to EPNs.

#### **The options**

The simplest approach to all of these difficulties will be to -

- Find a solution that avoids using EPNs to vary permit conditions – such as the introduction of environmental authorisations.

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 currently used to overcome the problem of multiple EPNs amending the conditions of the same permit is 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. However, this does not overcome the fundamental problems – it does not replace the permit itself, or that the permit still contains the original conditions, and that the EPN applies only to the person to whom it is issued, not to the land. It does not survive ownership/operator change.
- It may be possible to find a mechanism to ensure that an EPN that varies the conditions of a permit survive changes in 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.

**Summary of 33 submissions** (*note: some submissions put several views*)

**11 Broadly agreed that another instrument than EPNs may be worthwhile.**

( 5 Councils; 1 citizen; 2 departments; 2 industry association; 1 legal/planning )

One submission was supportive, provided the use of authorisations does not erode the existing use rights inherent in permits.

Council submissions supportive of this option were insistent that any change should not impact on councils' current powers under s.44. One was concerned that the links and differences between the authorisation process, permit process and EPN process should be clearly spelled out.

One submission clearly stated that EPNs should not be a mechanism for varying permit conditions.

The EDO supported moves to develop another instrument, but did not favour the use of authorisations, preferring to retain the full integrity of the integrated permit system.

**6 broadly favoured the continued use of EPNs in this context, thereby supporting options 2 and 3**

( 5 Councils; 1 department; )

Again, most Council submissions were reluctant to see any change that may lessen their ability to use EPNs to vary permit conditions.

The HEC supported any mechanisms that would improve the efficiency of the use of EPNs to vary conditions (other than the introduction of environmental authorisations).

Two councils saw merit in both the introduction of authorisations and the continued use of EPNs for permit condition variation. One submission also specifically recognised the benefits associated with options 2 and 3.

**5 supported third party appeal rights (option 4)**

*(4 Councils; 1 legal/planning )*

The EDO considered that broadly unrestricted third party appeal rights should apply.

One council specifically supported third party appeal rights, provided they are restricted to persons who made representations to the original development. Another gave in-principle support, but cautioned careful consideration to clarify the extent.

**2 did not support third party appeal rights (option 4)**

*(1 department; 1 industry association )*

A number of submissions opposed any moves to allow third party appeals, unless those parties were objectors to the original development or party to relevant decisions made by the RMPAT.

**19 did not comment specifically on these issues**

*( 5 Councils; 9 citizens; 3 residents' groups; 1 department; 1 legal/planning )*

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## **4.2 ISSUANCE OF EPNs**

The Director may issue EPNs to any environmentally relevant activity, including activities that are not level 2 or 3s (including level 1s), whereas councils are limited to the latter.

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.

### **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.

### **Summary of 34 submissions**

#### **7 broadly agreed with the options.**

*( 4 Councils; 1 department; 1 industry association; 1 legal/planning )*

The HEC supported the options, and suggested that the Department set up a web-based register, accessible by approved council officers.

#### **1 broadly disagreed with the options.**

*( 1 department )*

The DED did not support the options, but suggested that the Department set up a web-based register, accessible by approved council officers.

#### **26 did not comment specifically on this issue.**

*( 9 Councils; 10 citizens; 4 residents' groups; 1 department; 1 industry association; 1 legal/planning )*

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### **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, so that fines are actually paid?

#### **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.

### **Summary of 34 submissions** (note: some submissions put several views)

#### **5 agreed with option 1.**

( 2 Councils; 1 citizen; 1 department; 1 legal/planning )

The EDO supported the option, and suggested that, within 28 days, the fine must be paid, or written notice given that the EIN will be challenged in court.

#### **3 agreed with option 2.**

( 1 Council;; 1 department; 1 industry association; )

#### **5 saw merit in both options.**

( 3 Councils; 1 citizen; 1 residents’ group )

The important thing is to ensure that the principle behind the use of EINs is not compromised by other concerns – eg. cost of prosecution.

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*.

#### **3 opposed one or both options**

(1 department; 2 industry associations; )

TMC did not believe reversing the onus of proof is justified, and there would need to be a stringent set of prosecution guidelines.

DED supported option 1, but expressed opposition to the use of the *Justice Rules 2003*. The submission considered such use would shift the focus from “hands-on” environmental management to inciting the use of legal proceedings, and considered this would cause problems in terms of perception in the community, particularly for local government.

The Extractive Industry Association opposed option 1 on the grounds that it considers the principle of presumption of innocence to be too important.

**22 did not comment specifically on this issue.**

( 8 Councils; 8 citizens; 3 residents' groups; 1 department; 1 legal/planning )

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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 ?**

#### The options

To 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.

#### **Summary of 34 submissions** (note: some submissions put several views)

**2 agreed with option 1.**

( 1 Council; 1 department; )

**9 saw / implied merit in both options.**

( 6 Councils; 1 citizen; 2 residents' groups )

**1 opposed one or both options.**

(1 department )

The HEC questioned the necessity of option 2 in view of the proposed change in the first option.

**22 did not comment specifically on this issue.**

( 6 Councils; 8 citizens; 2 residents' groups; 2 departments; 2 industry associations; 2 legal/planning )

## 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. Access to the Appeal Tribunal is also seen as restrictive.

Issue:

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

### 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.

**Summary of 34 submissions** (*note: some submissions put several views*)

*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.*

**4 agreed with one or more options.**

( 3 Councils; 1 citizen; )

2 Councils recommended amendment of EMPCA to ensure full cost recovery in successful prosecutions.

**6 saw / implied merit in all options.**

( 3 Councils; 2 citizens; 1 legal/planning )

In addition to approving the options, public submissions often considered that where the Tribunal finds for the plaintiff, costs should be awarded.

Councils supported any change which would allow successful prosecution with full cost recovery.

The EDO suggested an additional amendment to s.64 to "allow the court to order a convicted person to pay any other reasonable costs and expenses incurred by the council in prosecuting the offence or taking action to mitigate the environmental harm caused by the contravention".

The EDO also considers it appropriate that ANY person should be permitted to take action under s.48, citing s.22A of the RMPAT Act and the costs and technical complexity of mounting an action as adequate barriers against this amendment "opening the floodgates".

In addition to supporting the options in the Issues and Options Paper, one submission supported the concept of a person seeking redress through the Tribunal in the event that a council or the Director has been remiss in pursuing prosecutions.

**4 opposed one or more options.**

( 1 Council; 2 departments; 1 industry association )

While supporting the concept that breaches of the Act should be prosecuted as often as practicable in order to demonstrate a clear commitment to environment protection, the HEC considered that changes to the Tribunal's role, and any expansion of civil action, would be inappropriate.

The DED agreed with the concept of full cost recovery in the event of a conviction, but opposed any change to s.48. The submission considered that opening up civil action proceedings alleging the Director or a council has failed to take appropriate action would lead to challenges on routine Departmental and local government decisions.

**20 did not comment specifically on this issue.**

( 6 Councils; 7 citizens; 4 residents' groups; 1 department; 1 industry association; 1 legal/planning )

#### 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?

##### 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.

**Summary of 34 submissions** (*note: some submissions put several views*)

**14 specifically agreed that the nuisance provisions should be changed – including by the introduction of “Nuisance Suppression Notices”.**

( 7 Councils; 2 citizens; 2 residents’ groups; 2 departments; 1 legal/planning )

Councils raised the following points in support of the options:-

- Regulations would be easier to enforce than “nuisance”, and should include hours of operation for many domestic sources of noise;
- Strong support for provisions to allow confiscation of equipment, or to empower enforcement officers to take other interventionist actions;
- One council supported the first option, and considered it made the second option unnecessary. With respect to noise specifically, the submission considered it should best be dealt with in the Noise Policy, rather than in the Act;
- While supporting the merits of the Suppression Notice concept, one council considered that Councils’ Abatement notices are more commonly used because they are more effective than EPNs, not simply because officers are more familiar with them.

The HEC supported the notion of a nuisance suppression notice, but would oppose any move to remove appeal rights. As a remedy for this, the DED suggested that removal of appeal rights should only be on the basis that non-compliance with any such notice is subject to a fine which is then challengeable.

The DED supported the notion that the instrument should apply to “Nuisance” rather than restrict it to noise. It could then be used for other problem nuisances, particularly in domestic situations, such as offensive backyard burning.

The DED also cautioned the use of the term “suppression”, as it may imply lowering the noise for example, rather than stopping it, leading to further dispute.

The comment was also made that whatever instrument is decided upon, it must overcome the current problem of EPNs, in that they do not result in the cessation of nuisance at the time of issuance, and are subject to appeal.

The EDO cited the Qld *Environment Protection Regulations 1998* as a good example of how notices could work.

**19 made other comments on the Nuisance provisions of the Act.**

( 5 Councils; 10 citizens; 3 residents' groups; 1 legal/planning )

The majority of private citizens and residents' groups commented on this issue, and always in the context of nuisance noise issues. Their comments covered a wide range of specific circumstances, which are summarised hereunder.

- Consistent failure of authorities (police, council and department) to :
  - a. take noise complaints or the issue of nuisance noise, seriously; or
  - b. respond to complaints, or
  - c. enforce the law, or
  - d. report back to complainants, and
- no explicit requirement in legislation that authorities must act on complaints,
- Inadequate training for officers in dealing with noise nuisances;
- Perception by authorities (Council officers and police) that s.53 is not strong enough to allow confident enforcement;
- Nuisance complaint and response records should be kept and made available;
- More comprehensive regulations addressing a whole range of specific nuisance noise issues;
- Legislative provision for action to be taken against authorities for non-enforcement of nuisance provision;
- Establishment of a Noise Council including public representation;
- Perceived indifference of authorities regarding the seriousness of the effects of nuisance noise – the term “nuisance” isn’t indicative of this seriousness;
- EMPCA should have special section dealing with noise nuisance, not in an EPP, and it should clearly focus on human health effects. [see also s.3.1 “Administration of EMPCA]
- Education of the public re vehicle noise is necessary;
- Strong agreement that confirmation of noise nuisance offences should not rely on technical noise (dB) measurements, and that complainants’ evidence should be admissible;
- Strong agreement that the Departmental Enforcement Policy must be rigorously applied to nuisance noise events;
- Concern over threats and reprisals from nuisance offenders [see paragraph below re NSW Act] ;

One citizen suggested that a broader range of nuisance offences, coupled with a broader range of instruments, would be preferable, citing Part 6 of the NSW *Protection of the Environment Operations Act 1997* as an example. Instruments should include restraining order provisions.

One residents’ group submission detailed proposals for a three-pronged approach, and suggested a range of amendments including –

1. Special provisions dealing with noise;
2. Provision of a range of mechanisms appropriate for a range of noise issues;
3. Facilitation of civil action and also mediation;
4. Provision of a hierarchy of penalties;

5. Providing for issuance of “warnings” prior to formal enforcement action; and
6. Greater commitment to enforcement.

Several council, public, residents’ groups and legal submissions claimed difficulties in using s.53 for several reasons –

- a. The inclusion of the word “unlawful” in the offence provision makes it extremely difficult for councils to deal with domestic nuisance;
- b. A re-definition of “residential premises” is needed so that it includes sheds, garages, carports, outdoor entertaining areas, etc. They contend that:

“any structure on the land, or area of the land, used by persons occupying that land for the purposes of residential dwelling within the boundaries of that land, should be included in the definition of “residential premises”.
- c. “Habitable room” should include any room in the house, and in fact any area within the boundaries of the residential property.
- d. Noise nuisances often occur after hours (when council officers cannot respond), and they are usually transitory. Further, reliance upon noise measurements makes it virtually impossible to corroborate complaints [see also dot point 11. above under this heading]. There is a need to take complainants’ evidence into account.

The EDO also recommended that dog noise controls should be considered the same as any other domestic nuisance, and to this end, the provisions of Part 3, division 6 of the *Dog Control Act 2000* should be repealed and brought within the ambit of EMPCA.

**1 did not agree that changes are necessary.**  
( 1 Council )

Follow-up discussion revealed the following:

The Council spokesman believed that EMPCA should not be dealing with what he called “amenity nuisance”, but should concentrate on real pollution issues. He explained his view that nuisance noise issues in particular are not environmental nuisance issues, because there are no residual environmental effects – turn off the noise, and the problem ceases, with nothing more than alleged emotional or psychological effects on the part of the complainant. This kind of nuisance is essentially an issue of disturbance of the peace, and as such should be dealt with by the police, not by council EHO’s as an environmental issue. While other forms of nuisance such as backyard burning or smokey wood-heaters may be considered s environmental nuisance, this should be dealt with in the Air Policy, not under the nuisance provisions of the Act.

**6 did not comment specifically on this issue.**  
( 2 Councils; 1 department; 2 industry associations; 1 legal/planning )

## 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?

### 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.

### **Summary of 34 submissions** (note: some submissions put several views)

#### **9 Agreed with one or both options**

( 6 Councils; 1 citizen; 1 department; 1 legal/planning )

The HEC pointed to S.58 (Imputation in proceedings of conduct etc of employees/agents), and s.60 (Liability of officers of body corp.) and asked if this did not negate the need for the proposed options – if not, they support any clarification of notification provisions.

The EDO also suggests a broadening of s.32(7) to clarify that evidence gathered as a result of a notice can be admitted in proceedings.

#### **5 disagreed with one or both options**

( 2 Councils; 1 department; 2 industry associations )

#### **20 id not comment specifically on this issue**

( 5 Councils; 9 citizens; 4 residents' groups; 1 department; 1 legal/planning )

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## **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?

#### **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.

These options would require legislative amendments.

#### **Summary of 34 submissions**

##### **10 agreed with one or both options**

*( 7 Councils; 1 citizen; 1 industry associations; 1 legal/planning )*

In particular, submissions were supportive of an explicit requirement for the Board to take account of submissions.

Council submissions were supportive of formalising public participation in respect of s.27 applications, but did not wish to see any separation of the process in respect of permissible level 2 applications. Some council submissions asked how this will work with Environmental Authorisations.

Two council submissions contended that any review of public participation provisions should only take place in conjunction with a simultaneous review of the LUPAA provisions.

The EDO also suggested clarification of the process for preparation and notification of a DPEMP.

The Extractive Industries submission supported amendments, provided that this does not result in the drawing-out of approval times.

##### **1 disagreed with one or both options**

*( 1 department )*

The DED did not support the “take into account” option, citing s.25(7) – the Board must formally advise any person who made submissions, giving details of its decision – and reasons for it, and of any conditions, and reasons for them. The submission contends this is sufficient.

**22 did not comment specifically on this issue**

( 6 Councils; 8 citizens; 4 residents’ groups; 2 departments; 1 industry associations; 1 legal/planning)

**1 made other suggestions under the heading of “Public Participation”**

( 1 citizen )

One submission called for public representation in the formulation of EPPs.

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## 5.2 DIFFUSE LAND USES

EMPCA is aimed at the assessment and regulation of polluting activities on discrete site (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?

### 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.

### **Summary of 34 submissions** (note: some submissions put several views)

**8 agreed with the option.**

( 6 Councils; 1 citizen; 1 legal/planning )

One council suggested that the structure of the Act should be changed to clearly apply to diffuse source activities – not leave it to other Acts.....

Another considered that these issues should be further explored in a wider review of the RMPS, and could possibly be dealt with through NRM / State Policies / EPPs.

One council, while supporting this option in respect of diffuse source issues, specifically contended that these objective-based instruments (Agreements, Audits, Improvement Programs) should be explicitly made available for use by councils in respect of point source activities. NOTE: similar comment made under 3.1 "Administration of EMPCA"

**27 did not comment specifically on this issue**

( 8 Councils; 9 citizens; 4 residents' groups; 3 departments; 2 industry associations; 1 legal/planning )

**1 made other suggestions under the heading of "Diffuse Land Uses"**

( 1 legal/planning )

The EDO contended that another major impediment to addressing environmental harm from diffuse sources is the wording of ss.50/51, which restrict offences to environmental harm caused "by polluting the environment". The submission suggests removal of this restriction in line with other jurisdictions (such as Queensland) and also with s.53 offences.

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### 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?

#### 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 for the Tasmanian situation.

#### Summary of 34 submissions

**4 agreed that consideration should be given to these new concepts.**

( 3 Councils; 1 citizen )

- Should compliment the review of the *Litter Act 1973*.

**29 did not comment specifically on this issue**

( 9 Councils; 9 citizens; 4 residents' groups; 3 departments; 2 industry associations; 2 legal/planning )

**1 made other suggestions under the heading of "Waste Management"**

( 1 council )

Submission questioned why EMPCA is only concerned with pollution and waste management – why not other issues of "Environmental Management"?

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#### **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?

#### **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.

#### **Summary of 34 submissions**

**10 commented on EPP issues.**

( 3 Councils; 3 citizens; 1 residents group; 1 industry association; 2 legal/planning )

The public submissions complained about the delay in, and eventual discarding by the Minister of, the draft Noise EPP. In particular, they asked for;

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

NOTE: The above issues were also raised by members of the public and their representative groups under the heading of "Environmental Nuisance".

One public submission wanted a simplification of the process, and considered that the current process is out of proportion with the issues (eg air and noise pollution).

This view was also taken up in a council submission that considered a more strategic approach should be taken to such issues. This could use a standard format and be done in the context of NRM and/or planning reviews or programs.

One residents' group considered that noise should not be addressed in an EPP, but should be the subject of a State Policy, partly in order to ensure that it has a direct outcome in planning schemes.

The Extractive Industry Association pointed to the delays in finalising the Air and Noise EPPs as proof that the checks and balances inherent in the statutory process are effective.

The EDO expressed disappointment about the delays in finalising the Air and Noise EPPs, and questioned government commitment to these "potentially powerful tools".

The RPDC made a detailed submission in respect of EPPs and the Review Panel. The Commission lamented the current mix of policy and regulatory initiatives that the Act permits EPPs to contain. This concern extends to the Act itself, as cited previously (see s.3.4).

The Commission expressed concern about the constitution of the EPP Review Panel. The Commission considered that the inclusion of the non-Government members of the EMPC Board leads to a public perception that the Panel is neither independent of the Board, nor of the Department (because of the Board's links with the latter). The submission cited at least one occasion where a member of the Panel had to stand aside after being challenged about a perceived bias arising from the member's connection with industry.

The Commission also expressed concern over the lack of flexibility to appoint specialists to the Panel for the purpose of assisting in the assessment of draft EPPs.

Finally, the RPDC commented that the busy role of the Executive Commissioner clashes with his role as Chair of the EPP Review Panel. The submission suggested that the EPPRP Chair should have the capacity to delegate his role to another Panel member, or a suitably qualified other person, in order that (for example) both PoSS assessments and draft EPP reviews may proceed expeditiously.

**24 did not comment specifically on this issue.**

( 10 Councils; 7 citizens; 3 residents' groups; 3 departments; 1 industry associations;  
legal/planning )

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## 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?

### 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.

### Summary of 34 submissions

**7** commented on the SEA issue.

( 3 Councils; 1 citizen; 2 departments; 1 legal/planning )

SEA is supported provided it reflects best practice, and increases compliance.

DIER cited the benefit (for subsequent construction projects) of subjecting the Soil and Water Management Code of Practice (currently under development) to an SEA process.

The EDO considered that if SEA cannot be introduced immediately, a staged EIA process should be developed, whereby level 2 proponents should be required to initially compile and lodge an "Assessment of Alternatives", prior to compiling a DPEMP.

**27** did not comment specifically on this issue.

( 10 Councils; 9 citizens; 4 residents' groups; 1 department; 2 industry associations; 1 legal/planning )

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## 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?

## 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.

## Summary of 34 submissions

### **7 agreed that the EMPCA provisions should be broadened.**

( 4 Councils; 1 citizen; 1 department; 1 legal/planning )

One council submitted that such provisions would benefit councils in respect of some level 1 activities, such as broad-scale subdivision development.

Another pointed out that it is currently routine for councils to include bonds for capital works associated with planning permit conditions.

The EDO also suggested that the Board be empowered to require an operator of a level 2 or 3 activity to maintain an insurance policy to cover remediation costs and damage claims. It pointed to similar provisions in the *NSW Protection of Environmental operations Act 1997*.

### **4 disagreed.**

( 1 Council; 2 departments; 1 industry association )

The HEC considered it wise to do an analysis of provisions in other jurisdictions before any changes are made to EMPCA.

The DED opposed any changes that would increase financial burdens on business.

The Extractive Industry Association opposed any imposition of additional bonds on an industry already subject to financial assurance provisions under other legislation (eg MRDA).

### **23 did not comment specifically on this issue.**

( 8 Councils; 9 citizens; 4 residents' groups; 1 industry association; 1 legal/planning )

## OTHER ISSUES RAISED IN SUBMISSIONS

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.
- A council should be able to issue an EPN – not just an officer;
- Contaminated site provisions should be included in EMPCA; and
- the communication of information between the department and councils relating to contaminated sites needs improvement;
- 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.

The Department of Economic Development considered that there were some issues relating to the assessment of level2 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 DPMP 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.

The EDO raised two other issues:-

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

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;
- 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;
- Insert litter and waste management provisions into EMPCA;
- Introduce requirements for Environment Management Plans, as distinct from assessment Plans;
- Insert a clarifying provision to the effect that councils must consider longer term environmental impacts of level 1 activities, not just construction phase ones.

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. These suggestions will continue to be the subject of ongoing discussion with the Department in the development of the new Noise Policy and any associated amendments to the Act.

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## **INFORMAL SUBMISSIONS**

Two submissions were made by telephone after the close of the formal consultation period. One was from a government agency, and the other was from an industry association. As their comments were informal, and not specifically directed at any particular issue or heading as contained in the Issues and Options Paper, they are briefly summarised here:

The former submission was supportive of those recommendations that would bring better integration between EMPCA and LUPAA.

The latter was concerned that the initial intent of EMPCA for simple devolution of environmental responsibility for level 1 activities to councils has not been fulfilled. The submission considered this was perhaps because more difficult local political pressures make it harder to retain professional officers.

The submission went on to suggest that the State government should pay more attention to ensuring that councils have both the ability to assess environmental impacts, and the will to enforce environmental conditions. It was suggested that a vehicle for this could be through the Better Planning Outcomes program.

**END**