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Director of Environmental Management
Department of Primary Industries, Water and Environment
Environment Division
GPO Box 44
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Dear Sir

10 Year Statutory Review of EMPCA

Thank you for the opportunity to participate in the 10 year review of the *Environmental Management and Pollution Control Act 1994* (***EMPCA***).

The Environmental Defenders Office (***EDO***) is a non-profit, community based legal service specialising in environmental and planning law. Our comments are therefore primarily concerned with the regulatory and enforcement aspects of the legislation.

Our submission responds to the issues raised in the Issues and Options paper and also raises a number of matters we believe should be addressed in any review of EMPCA.

Environmental Management

Referral and assessment of Level 1 activities

Pursuant to s.24(1), the Director may "call in" a permissible level 1 activity for assessment by the Board at any stage before a decision has been made by the Council in respect of the activity. This call-in power raises two major issues:

- Should third parties be able to refer Level 1 activities directly?
- When should the power be exercised?

Referral by third parties

We acknowledge that there is currently nothing to prevent third parties asking the Director to exercise his call-in powers. However, we consider that it would be preferable to have a formal process by which Councils and interested third parties could refer the matter to the Board to determine whether assessment as a Level 2 activity is warranted.

We recommend the introduction of a process similar to the following:

1. Third parties (including Councils) can refer an activity to the Board for consideration (within a particular time frame – see comments below). Referrals should address the criteria specified in the legislation for exercising the "call-in" power (see comments below).

2. The Board notifies the applicant that the activity has been referred and invites the applicant to comment.
3. The Board decides whether the activity should be treated as a Level 2 activity and notifies the applicant, the Council and any third party who referred the activity.
4. If the Board decides that the activity is **not** to be treated as a Level 2 activity, the activity will be assessed and regulated as a Level 1 activity.

When should the power be exercised?

Section 27(2) allows the Director to direct a person to refer an activity that does not require a permit to the Board for assessment when "*it is expedient in the public interest to do so, having regard to the environmental impact of [the] proposed environmentally relevant activity.*" In contrast, s.24 does not include any qualification on when the Director may "call-in" an activity.

Level 1 activities should only be called-in for Level 2 assessment and regulation if the activity has significant potential to cause environmental harm. To ensure that the power to "call-in" a level 1 activity is exercised consistently, we recommend that the matters to be taken into account in making the decision to call-in be specified in EMPCA (or associated regulations).

The matters to be considered should include:

- Complexity of the process / design of the activity
- Nature of materials to be handled in activity
- Nature and volume of emissions
- Scale of operation
- Public interest
- Character, resilience and values of the receiving environment. This could include the sensitivity of the receiving environment (e.g. conservation area), proximity to schools, hospitals and other public areas or proximity to habitat for threatened species
- Environmental record of the applicant (e.g. has the applicant been issued with an EIN, formal warning, or been prosecuted in relation to a similar activity in the past 5 years).

We acknowledge that applicants may be unfairly disadvantaged if a development can be called-in at any time before Council makes a decision in respect of the application. We would support a time limit being introduced to address this concern.

However, any time limit imposed must be sufficient to include the notification period for activities requiring a permit under s.57 of the *Land Use Planning and Approvals Act 1993* (***LUPAA***). This is because:

- Third parties are often unaware of a proposed development activity until the application is advertised.
- Issues are often raised in representations that Council was not aware of (e.g. that the development site includes habitat for a population of threatened birds). These issues may influence whether the Council seeks to refer the matter to the Board for consideration.

Level 1 activities treated as Level 2 activities

We agree that while some activities may be assessed as level 2 activities, ongoing higher level regulation may not be appropriate in some situations. In our view, it would be appropriate for the Board to determine at the time of assessment where the ongoing responsibility for regulation should reside. Any development condition imposed by the Board should specify who is responsible for monitoring compliance with the condition.

Environmental Authorisations

We acknowledge the difficulties presented by the use of EPNs to amend environmental conditions of development permits and fully support amendments to address this issue. However, we believe that it is preferable to retain an integrated permit system rather than create a new instrument to contain environmental conditions. Legislative change should address the ability for relevant agencies to amend these conditions, rather than creating a new instrument.

We note that the introduction of the *Integrated Planning Act 1997* in Queensland began a move towards integration of the development assessment process to reduce red tape and have only one document governing the whole use of a site. Recent amendments have finalised this integration, abandoning the former system of separate environmental authorities. Development permits now include all conditions imposed by referral agencies and Councils, including environmental conditions.

We recommend amendments to allow development permits to be varied by the Director or council (see, for example, section 73C of the *Environmental Protection Act 1994* (Qld) and s.3.5.33A of the *Integrated Planning Act 1997* (Qld)). This process would involve:

- Retaining environmental conditions in development permits. Permits should specify the agency responsible for regulating each condition.
- Amending LUPAA and EMPCA to allow the agency responsible for a condition to add, change or cancel a development condition if the amendment is necessary or desirable because:
    - the operator has committed an environmental offence; or
    - the development permit was issued because of a materially false or misleading representation or declaration; or
    - the development approval was issued on the basis of a miscalculation of—
        - the quantity or quality of pollutant authorised to be released into the environment; or
        - the effects of the release of a quantity or quality of pollutant authorised to be released into the environment; or
    - the way in which, or the place where, pollutants are, or are likely to be, released into the environment changes; or
    - the approval or amendment of an Environment Protection Policy changes the levels of environmental harm that are authorised; or
    - an environmental report reveals that the development causes greater environmental harm than anticipated.
- If the council or the Director considers it necessary to add, change or cancel a condition, they must give written notice to the owner / operator, all adjoining owners and any person who made a representation in respect of the original development permit.

- Each person who receives a notice must be given at least 14 days to make a submission in respect of the proposed changes.
- The council or Director must consider all submissions received, then decide whether to proceed with the amendment. Any person who made a representation must be notified of the decision and should have a right of appeal to the Tribunal.
- The amendments take effect the day that notice of the amendment is given to the owner / operator.

Minor amendments to a development permit could continue to be made without notice to third parties (see comments below).

Codes of environmental compliance could be developed for particular industries, setting out specific environmental conditions that must or may be included in a development permit. This would improve certainty and consistency for industry. The codes should be developed through consultation with councils, industry and relevant community and environmental groups to ensure that the conditions address the concerns of all stakeholders.

Timeframes for Level 2 referrals

The timeframe for the Board to determine whether to assess a proposal as a Level 2 activity should not interfere with the time available to Councils to determine the application under LUPAA in the event that the Board does not assess the proposal. If the activity is to be assessed as a Level 1 activity, the maximum period for assessing and determining the application must be available to the Council.

We support an amendment to provide that the period referred to in section 57(6)(b) or 58(2) of LUPAA does not run while the Board makes its decision.

Enforcement

Effective enforcement is vital to maintaining public confidence in the environmental management system in Tasmania. We believe that EMPCA generally provides an appropriate suite of enforcement tools to secure effective environmental management. However, there appears to be neither sufficient resources available for enforcement activities nor an active enforcement culture amongst councils and DPIWE. Our specific comments regarding enforcement are made in this context.

The Use of EPNs to Vary Conditions

As discussed above, we support a legislative change that would allow the Director and local governments to change conditions of a development permit directly (not through the issue of an EPN).

For example, variations to permit conditions could be made because:

- the operator has committed an offence against EMPCA or LUPAA;
- the development permit was based on incorrect or misleading information or a material miscalculation of the quantity / quality of pollutants to be emitted or the effect of the pollution;
- the manner or location of the release of pollutants from the activity changes;
- new legislative requirements have been approved (e.g. a new Environment Protection Policy); or

- the results of an environmental audit demonstrate that the conditions need to be varied.

However, in the event that EPNs continue to be used to vary development conditions, we wish to address the issue of appeal rights.

Third party appeals

Pursuant to section 44(8) of EMPCA, when an EPN varies the conditions of a development permit, any person who made a representation in respect of a development must be notified. However, these parties currently have no right of appeal against the variation, other than through the *Judicial Review Act 2000*. In contrast, the developer is able to appeal to the Resource Management and Planning Appeal Tribunal (ss.44(6) and (6A)).

The regulation of environmental harm through development conditions is an important safeguard for the community. Often, the conditions are the result of hard fought negotiations between affected community members and the Council, or have been imposed by the Tribunal to provide greater protection to nearby residents. Therefore, it is important that affected community members are able to appeal against any revocation or variation of these conditions.

To take a familiar example, a group of residents in Quoiba have been involved in long-running litigation to address concerns regarding the emission of odours from a nearby rendering plant. An EPN is now proposed to vary the development permit to extend the operating hours of the plant. Despite their continuing efforts to address the odour problems associated with the rendering plant, the residents will not be given an opportunity to challenge these amendments.

We do not support limiting the rights of objection and appeal to those who made a representation at the time of the original development application. This would prevent affected parties such as new residents and people who did not realise the extent of the impact of the development at the time the application was made from objecting. We recommend that:

- Notice of a draft EPN that varies the conditions of a development permit (other than minor amendments (see comments below)) must be given to the owner, all adjoining owners and any person who made a representation in respect of the original development;
- Any party who receives notice of the proposed EPN can make a submission to the Council or Director regarding the proposed changes within 14 days;
- Council or the Director must determine whether to issue the EPN, having regard to any comments received and give notice of their decision to all parties;
- Any person who made comments, or any other person with the leave of the Tribunal, can appeal against the decision to vary the conditions.

Minor changes

Concerns regarding the administrative burdens of inviting objections where the variations "do not involve substantive changes to the terms under which the activity is operated" could be avoided by allowing Councils and the Director to make minor amendments to permits under s.56 of LUPAA without the amendment being requested by the owner / developer.

In the event that EPNs continue to be used to vary development conditions, a similar provision could be introduced to EMPCA to allow minor amendments to an EPN. These changes should be supported by guidance from DPIWE as to what constitutes a "minor change".

Issuance of EPNs

We would support amendments to require the Director to:

- consult with the local council before issuing an EPN in relation to an activity other than a Level 2 or 3 activity, other than in emergency situations; and
- notify the relevant council when s/he issues an EPN.

As discussed above, we also support amendments to allow the owner, adjoining owners and any person who made a representation in respect of the original development to comment on a proposed EPN to vary development conditions.

Enforcing Environmental Infringement Notices

EINs are an important way of penalising environmental infringements expeditiously, and should be used effectively as deterrents. We consider that EINs are extremely under-utilised as an enforcement tool – only 11 were issued throughout Tasmania in 2004.

We acknowledge concerns raised by Councils regarding the lack deterrent value in issuing an EIN if there is little likelihood of the alleged offender being prosecuted. We would encourage the direction of additional resources to environmental enforcement at all levels of government.

In addition, we support an amendment to section 67 to provide that a person who is served with an EIN must, within 28 days after the date of the EIN:

- pay the fine in full to the Department or council; or
- notify the Department or council that they elect to have the matter of the offence decided by a court.

In the event that the EIN is not paid or challenged within the specified time, the Fines Enforcement Unit could enforce the infringement notice.

Prosecutions

We commend DPIWE for establishing recently a dedicated compliance unit within the Environment Division. The compliance unit should be provided with adequate resources to actively pursue compliance and to widely publicise enforcement activities undertaken by the Department.

Costs

The Issues and Options paper indicates that a key factor in Councils' reluctance to undertake prosecutions is the potential expense. Currently, Councils can apply to the court to recover the reasonable costs incurred in gathering evidence (taking samples etc). We would support an amendment to section 64 to also 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.

For civil enforcement action, the Tribunal can order the offender to pay reasonable costs and expenses incurred in preventing or mitigating the environmental harm. The Tribunal can also make an order that the offender pay all or part of the Council's costs if it is "fair and reasonable" to do so.

We acknowledge that, even with these amendments, prosecutions and civil enforcement action involve significant costs and expenses. We recommend that greater technical and financial assistance be given to local governments to pursue enforcement activities.

Standing

The civil enforcement provisions of EMPCA provide a useful option for third parties to take action to prevent or address environmental harm. We would therefore support amendments to broaden the parties who are able to bring an action under section 48, as discussed below.

However, primary responsibility for enforcement still lies with the Department and local governments and should not be delegated to the community. Private citizens and community groups generally have fewer resources and less technical expertise than government agencies. While third party access is important, particularly in situations where government has not taken any action, the Department cannot rely on third parties to act as watchdogs.

We support an amendment to allow **any** party to apply to the Tribunal for an enforcement order under section 48. We believe that allowing any party to bring an action for civil enforcement would provide an important safeguard in the event that the State or local government do not take action to address environmental harm.

This amendment would not "open the floodgates" for civil enforcement activity because:

- Pursuant to section 22A of the *Resource Management and Planning Appeal Tribunal Act 1993*, the Tribunal is able to dismiss an application if it is satisfied that the application is frivolous or vexatious; and
- The expense and technical complexity of a civil enforcement action will continue to deter the public from taking action without sufficient likelihood of success.

Environmental Nuisance Offences

Managing environmental nuisance is an important aspect of EMPCA. We agree that, while nuisance is "best addressed through interventionist action" the powers available under EMPCA do not currently facilitate this approach.

We support the introduction of a "nuisance suppression notice" to provide an instrument for addressing nuisance in a timely manner. The system of "nuisance abatement notices" under Part 2A of the *Environmental Protection Regulation 1998* (Qld) is a good example. Under this system:

- Any person may make a complaint to the Department or council regarding a nuisance;
- Complaints must be investigated as soon as possible, unless the complaint is considered to be frivolous or vexatious;

- The officer must determine if an unlawful environmental nuisance is being caused, having regard to *noise emission criteria* including:
  - Time of the emission (noise, dust, ash etc);
  - Duration;
  - Frequency;
  - The characteristics and qualities of the receiving environment;
  - The impact of the emission on the receiving environment;
  - The views of each complainant for the emission; and
  - The order of occupancy between the responsible person and each complainant.
- If the officer is satisfied that an unlawful environmental nuisance is being caused, s/he can issue an abatement notice to the responsible person. In some cases, the notice will require the person to cease the activity that is causing the nuisance (e.g. putting out a fire that is causing a smoke nuisance). In other cases, people will be given a timeframe in which they must reduce or abate the emission to an acceptable level (e.g 24 hours).
- The responsible person can apply to the Department or council for a review of the decision to issue an abatement notice;
- If the person does not comply with the notice, the officer can issue an infringement notice, or take other action such as confiscating equipment.

In our view, the adoption of a similar system under EMPCA would address enforcement difficulties currently experienced in respect of nuisance offences.

The EDO receives many enquiries relating to nuisance caused by barking dogs. At present, this problem is dealt with under the *Dog Control Act 2000*. In our view, there is no justification for dealing with this nuisance differently from other nuisances.

In the event that the approach discussed above is adopted for environmental nuisance offences under EMPCA, we recommend that Part 3, Division 6 of the *Dog Control Act 2000* be repealed and nuisance offences relating to barking dog be brought within the ambit of EMPCA.

Notification

Section 32 currently requires "a person responsible for an activity" to notify the relevant authority if a pollutant is released "as a result of any incident in relation to that activity" and the release may cause environmental harm.

We recommend that this obligation be broadened to require <u>any</u> person carrying out an activity to notify the relevant authority if they become aware that environmental harm is being caused or threatened by the activity. Where the person is not the person responsible for the activity, they should be required to notify their employer (including any person who has engaged them as a contractor, consultant etc) of the risk of environmental harm. The employer must be obliged to report the matter to the relevant authority (see, for example, s.320 of the *Environmental Protection Act 1994* (Qld)).

Section 32(7) provides that notification given under the section is not admissible against the person in relation to any enforcement activity. An additional subsection should be included to clarify that evidence obtained as a result of the notice <u>can</u> be admitted as evidence in legal proceedings relating to the environmental harm.

Other comments regarding enforcement

In the interests of preventing or mitigating environmental harm in urgent situations, authorised and council officers must be able to give an order to cease an activity causing environmental harm. Section 92(l) currently allows an officer to "*give any directions reasonably required… in connection with the administration or enforcement of [EMPCA]*".

However, it would be preferable for authorised and council officers to have a clear power to give directions to prevent environmental harm or to take action themselves if the direction is not followed (see, for example, section 467 of the *Environmental Protection Act 1994* (Qld)). Failure to comply with a direction should be an offence.

We would also support moves to require Councils to publish details of their enforcement activities.

Miscellaneous

Public Participation

Public involvement in resource management and planning is a key objective of the Resource Management and Planning System in Tasmania. Public participation is particularly important in reviewing and assessing environmental impacts, as the broader community is affected by these impacts.

We acknowledge the standard practice of advertising DPEMPs for both LUPAA and non-LUPAA activities and having regard to comments received in relation to the DPEMP, on that basis of s.74(6). However, given the importance of public involvement, it is preferable to formalise this practice in legislation. We would therefore support amendments to:

- Clarify the process for preparation and notification of a DPEMP;
- Specify minimum time periods for advertising of DPEMPs. Given the complexity of issues raised in these documents, this period should be at least 28 days.
- Explicitly require the Board to have regard to all comments received in deciding whether to approve an activity.

Diffuse Land Uses

The difficulty in managing diffuse sources of pollution is an ongoing concern. We would support improvements in the use of environmental improvement programmes, audits and environmental agreements to address diffuse sources of pollution from various land uses.

A further concern is the limited nature of the "environmental harm" offences. While *environmental harm* is broadly defined, it is only an offence to cause serious environmental harm (s.50) or material environmental harm (s.51) "*by polluting the environment*". *Pollute* is defined in section 3 to include discharge, emit, deposit or disturb *pollutants*.

As a result of this qualification, much environmental harm resulting from activities such as forestry or farming is not a contravention of EMPCA. For example, vegetation loss, habitat disturbance and disruption to hydrological cycles have the potential to cause significant environmental harm but often do not involve *pollution* in the sense defined in EMPCA.

We recommend that section 50 and 51 be amended to remove the qualifying statement "*by polluting the environment*". That is, the offences should simply be unlawfully causing serious environmental harm or material environmental harm. This is consistent with the approach taken in other jurisdictions.

Environment Protection Policies

We do not consider that any legislative change to the Environment Protection Policy provisions is warranted. However, we are very disappointed by the apparent lack of commitment at all levels of government to the development and implementation of these "potentially powerful tools".

We hope that draft Environment Protection Policy (Air Quality) and draft Environment Protection Policy (Noise) are finalised in the near future and that new EPPs are developed to address important environmental issues such as water and waste management.

Strategic Environmental Assessment

In our view, the adoption of strategic environmental assessment approaches would help to further the objectives of the Resource Management and Planning System, particularly in promoting a broad view of sustainable development.

Strategic environmental assessment (***SEA***) involves the examination of policies, plans and programs at their inception. This allows for early consideration and management of cumulative, large-scale environmental effects, rather than the ad-hoc and compartmentalised assessment of project-based EIA. By considering regional environmental consequences when developing policies, SEA can help to identify alternatives, avoid inappropriate projects and to promote sustainable development.

One of the major concerns regarding the lack of strategic assessment is that alternatives are not considered in a timely manner. Public input is frequently overlooked at this stage, thereby limiting the public to reacting to a proposal rather than being able to influence decisions regarding alternatives.

If SEA is not introduced immediately, it would be a useful interim measure to adopt a staged EIA process whereby alternatives to the proposed project are considered upfront. This could be achieved by requiring a proponent to prepare and publish an Assessment of Alternatives for a Level 2 activity. The Board would consider the document (and any government or public comments) and determine which alternative/s (if any) are considered appropriate. A detailed DPEMP could then be prepared for the nominated option/s.

Environmental Bonds

We support amendments to broaden the situations in which developers can be required to provide an environmental bond in respect of activities with the potential to cause environmental harm.

We would also support amendments to allow the Board to impose a condition requiring the operator to maintain an insurance policy covering remediation costs and claims for damages resulting from pollution associated with a Schedule 2 or 3 activity (see, for example, s.72 of the *Protection of the Environment Operations Act 1997* (NSW)). We acknowledge the difficulty that may arise in the event of insolvency, but do not consider that this would significantly detract from the benefits of a requirement to maintain insurance coverage.

Other comments

Access to information

To ensure effective public involvement in environmental management, it is necessary to allow easy and equitable access to information within the RMPS. At present, the process for obtaining copies of development permits, EPNs and other management documents is unclear and varies between councils and government agencies. In some cases, it has been necessary to rely on the time-consuming and expensive Freedom of Information regime to obtain this information.

In our view, it would be preferable to explicitly provide for a right of access to this information. Section 22 currently requires the Board and councils to maintain a register of environmental management and enforcement documents, which can be searched by any person on payment of a fee.

We recommend that this section be amended to:

- Require environmental management plans to be maintained on the register;
- Clarify that documents on the register are available for public inspection (subject to the usual exemption for commercial-in-confidence material); and
- Provide that copies of these documents can be obtained on payment of a reasonable fee. The fee should be able to be waived if the Department or council considers it appropriate to do so.

False and misleading information

It is currently an offence under Schedule 5A of EMPCA to provide false or misleading evidence or information to the EPP Review Panel.

The provision of accurate information regarding proposed actions is integral to effective environmental management. We therefore submit that it should also be an offence to make a false or misleading statement in any information provided or record kept under EMPCA (see, for example, s.119 of the *Environment Protection Act 1993* (SA)).

Appeal Tribunal

We note that Appeal Tribunal is not currently defined in EMPCA. To clarify this situation, we recommend that section 3 be amended to include the following definition:

> **"Appeal Tribunal"** means the Resource Management and Planning Appeal Tribunal established under the *Resource Management and Planning Appeal Tribunal Act 1993*

The Environmental Defenders Office appreciates the opportunity to make these comments. Please do not hesitate to contact us if you wish to discuss anything raised in this submission.

Kind regards,
Environmental Defenders Office (Tas) Inc
Per:

Jessica Feehely
Principal Lawyer